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Travel Rights in a Culture War

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> *[T]he majority's ruling today invites a host of questions about interstate conflicts[, including:] . . . Can a State bar women from traveling to another State to obtain an abortion? . . . The Constitution protects travel and speech and interstate commerce, so today's ruling will give rise to a host of new constitutional questions.*[1]
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> *[A]s I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.*[2]

Introduction

Emboldened by *Dobbs v. Jackson Women's Health Organization*,[3] right-wing states are rushing to ban or limit abortion, including via restrictions on abortion-related travel. Targeting travel in this context makes a certain political sense. Abortion is a highly polarizing procedure giving rise to a range of strong moral views, none of which turn on a person's state of residence. The perceived moral necessity of ensuring abortion access or banning abortion carries equal force in Texas as it does in New York. For those who are pro-choice, facilitating abortion-related travel is key to broadening abortion access; for those who are pro-life, prohibiting such

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1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2337 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (citations omitted).

2. *Id.* at 2309 (Kavanaugh, J., concurring) (citing no authority).

3. 142 S. Ct. 2228 (2022).

travel is crucial to limiting abortions. A large component of post-*Dobbs* abortion policymaking thus appears likely to center around travel.

But this is not just an abortion issue. Similar restrictions on travel for gender-affirming care, conversion therapy, or physician-assisted suicide have been proposed or appear likely to be.[4] And indeed, if the Supreme Court rolls back other privacy rights in the wake of *Dobbs*, it is conceivable that travel restrictions targeting marriage equality, sexual autonomy, contraception, and a range of other activities may soon follow.[5] Suffice it to say, travel is primed to play a key part in the culture wars in the years to come.

The aggressive ways in which states are increasingly legislating to maximize the reach of their contested moral agendas have sparked a developing body of scholarship focusing primarily on comity, extraterritoriality, and enforcement mechanisms designed to evade judicial review.[6] The interaction of these laws with the constitutional right to travel, though increasingly recognized, has been given less attention—in part, because the right to travel has been largely relegated to the dusty back shelves of constitutional law. Indeed, what is commonly described as a "right" is better understood as several independent travel-related rights guarded by different provisions of the U.S. Constitution. Though long established by the Supreme Court, the Constitution's various protections of travel and movement are rarely litigated and, as a result, are often overlooked.

This piece proceeds by describing current and proposed efforts to extend the reach of legislation via limitations on travel as well as the primary existing critiques of such efforts. Building from my previous work on this subject, it then catalogues and applies a taxonomy of travel rights, explaining how these rights can provide an additional meaningful layer of protection in this context. The questions raised by such restrictions are difficult, and the answers are not always clear.

By setting out a right-to-travel conceptual framework applicable to this growing category of policymaking, this piece lays the groundwork for considering the variety of antitravel legislation that has been passed or is being considered. The Constitution's travel rights should serve as a meaningful bulwark against this emerging class of restrictions. Because these constitutional travel protections are robust and are distinct from other limitations discussed in the scholarship on aggressive moral legislation, they add an important dimension to discussions of travel restrictions imposed under the guise of moral necessity.

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4. *See infra* Part I.

5. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (calling for these matters to be reconsidered).

6. *See infra* Part I.

I. Legislation and the Scholarly Response

State and local efforts to use travel restrictions as a tool in the culture wars have taken a range of forms.

First, an emerging category of legislation explicitly targets travel. An Idaho bill, for example, would make it a felony for any parent or guardian to "travel with their child to another state for the purpose of obtaining gender-affirming health care."[7] A proposed Missouri amendment to an anti-abortion bill similarly included a restriction designed to "thwart efforts by Missourians to cross state lines for abortions."[8] And in Texas, a legislator has announced his intention to penalize any company that subsidizes its employees' travel to other states for purposes of seeking an abortion.[9] Though these provisions explicitly target interstate travel, they foreshadow similarly direct *intra*state restrictions; it is easy to imagine how Idaho, for example, could also seek to penalize travel within Idaho for purposes of obtaining gender-affirming care.[10]

Second, a number of states have passed or are considering legislation that imposes liability on anyone who "cause[s]," "aids[,] or abets" abortion, gender-affirming treatment, or some other identified disfavored activity.[11] These sorts of aiding or abetting laws do not explicitly impose liability related

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7. Tyler Kingkade, *Idaho Lawmakers Seek to Punish Parents*, NBC NEWS (Mar. 10, 2022, 2:44 AM), https://www.nbcnews.com/news/us-news/idaho-trans-health-care-youth-bill-rcna19287 [https://perma.cc/8FXV-T83S].

8. Caroline Kitchener, *Missouri Lawmaker Seeks to Stop Residents from Obtaining Abortions Out of State*, WASH. POST (Mar. 8, 2022, 2:21 PM), https://www.washingtonpost.com/politics/2022/03/08/missouri-abortion-ban-texas-supreme-court/ [https://perma.cc/FWA6-5FHT]; Amendment 4488H03.01H to H.B. 2012, 101st Gen. Assemb., 2d Reg. Sess. § 188.805, 815 (Mo. 2022) (died in committee) https://house.mo.gov/billtracking/bills221/amendpdf/4488H03.01H.pdf [https://perma.cc/F4SC-BRES]; Tessa Weinburg, *Missouri House Blocks Effort to Limit Access to Out-of-State Abortions*, MO. INDEP. (Mar. 29, 2022, 8:58 PM), https://missouriindependent.com/2022/03/29/missouri-house-blocks-effort-to-limit-access-to-out-of-state-abortions/ [perma.cc/CVK2-H6AQ].

9. Coral Murphy Marcos, *Texas Lawmaker Warns Citigroup Against Paying for Out-of-State Abortions*, N.Y. TIMES (Mar. 18, 2022), https://www.nytimes.com/2022/03/18/business/citigroup-abortion-texas-warning.html [https://perma.cc/65MU-UQ4Y].

10. For a detailed exploration of the sort of anti-abortion legislation likely to follow *Dobbs*, see David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. (forthcoming 2023).

11. *See, e.g.,* Deena Winter, *Abortion Bill Similar to Texas Ban Introduced in Minnesota*, MINN. REFORMER (Feb. 1, 2022, 2:29 PM), https://minnesotareformer.com/2022/02/01/texas-style-abortion-ban-introduced-in-minnesota/ [https://perma.cc/7LHZ-N7P8]; *see also, e.g.*, H.F. 2898, 92d Leg., 92d Sess. § 145.5516 (Mn. 2022) (died in committee) (calling for civil actions against those who "engage[] in conduct that aids or abets the performance or inducement of an abortion"); S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022) (enacted) (making it a felony for a person to "engage in or cause" gender-affirming care to be performed upon a minor); Lindsey Dawson, Jennifer Kates & MaryBeth Musumeci, *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape,* KAISER FAM. FOUND. (June 1, 2022), https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape/# [perma.cc/ZZT8-LX8J].

to travel, but their reach plainly extends to travel—often near-exclusively so. A friend or family member, or taxi or bus driver, who knowingly transports a state resident to a nearby jurisdiction to obtain an abortion or gender-affirming care has *aided or abetted* in that activity. Indeed, particularly in the case of minors who cannot yet drive themselves, such transportation might be essential to the activity: the conduct in question may sometimes be prohibitively difficult without it.

Some of these aid-or-abet laws only apply to travel within the state. Texas, for example, imposes liability on anyone who "aids or abets" a patient accessing abortion care in Texas, which will typically be limited to in-Texas travel.[12] Other laws, however, are directed to travel out of the state to engage in conduct that is explicitly legal where it occurs—i.e., to obtain an abortion in a state in which abortion is legal. Missouri's aid-or-abet law explicitly extends to actions that comply with all laws in the state in which the care is provided.[13] This latter category of liability is primarily a regulation on travel; where the conduct for which the travel is completed is perfectly legal, the travel cannot be said to merge with or aggravate some other properly sanctioned action.[14]

These efforts have garnered significant attention from the academic community—and widespread condemnation. A burgeoning literature has criticized these kinds of measures from the standpoints of comity,[15] extraterritorial overreach,[16] and avoidance of judicial review[17] (all crucial, and all falling outside the scope of this piece). The intersection of these laws with the constitutional protections of travel, although regularly recognized, has garnered comparatively less attention.[18]

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12. S.B. 8, 87th Leg., Reg. Sess. § 171.208 (Tex. 2021) (enacted); Tex. Health & Safety Code Ann. § 171.208. It is conceivable that travel from out of the state to Texas for purpose of obtaining an abortion in Texas could generate "aid or abet[ting]" liability under § 171.208.

13. MO. ANN. STAT. § 188.250 (West).

14. *Cf.* Jones v. Helms, 452 U.S. 412, 422–23 (1981) (holding that a law prohibiting a parent from abandoning his or her child and thereafter leaving the state did not violate the right to travel, because the "departure aggravates the consequences of conduct that is otherwise punishable").

15. *See generally* Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873 (1993).

16. *See, e.g.*, Cohen et al., *supra* note 10; *see also* Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133 (2010).

17. Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 107 CORNELL L. REV. (forthcoming 2023) (arguing that these regimes are bolstering a culturally conservative agenda by empowering motivated partisans to police others' life choices).

18. *See, e.g.*, Cohen et al., *supra* note 10 (manuscript at 24) (recognizing travel as a likely emerging source of tension following *Dobbs* and previewing some of the legal issues primed to arise); Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 638–40 (2007) (considering, in four paragraphs, whether "state laws barring their citizens from procuring out-of-state abortions would violate the long recognized

Indeed, the most cited discussion of any right to travel in this context comes from two Seth Kreimer articles relating to anti-abortion legislation published in 1992 and 1993.[19] Professor Kreimer provides a thoughtful examination of the questions arising at that time, but both the regulatory and legal landscapes have changed significantly over the past thirty years.[20] Moreover, Professor Kreimer's analyses focus on the travel right protected by the Privileges and Immunities Clause[21]—which, as Part II discusses, provides the least protection in this context. David Cohen, Greer Donley, and Rachel Rebouché provide a more updated analysis in their far-reaching exploration of the legal landscape of abortion regulation following *Dobbs*, but their relevant discussion focuses on extraterritoriality, a related but distinct thread of the Privileges and Immunities Clause, Dormant Commerce Clause, and fundamental right's protections.[22] As such, the question of how this broader category of legislation interacts with the constitution's travel rights remains underdeveloped.

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constitutional right of interstate travel"); B. Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L.J. 1081, 1129 (2021) (recognizing that a "right-to-travel framework may provide a powerful doctrinal and political argument in a possible future world without *Roe*"); Anthony Michael Kreis, *Prison Gates at the State Line*, HARV. L. REV. BLOG (Mar. 28, 2022), https://blog.harvardlawreview.org/prison-gates-at-the-state-line/ [https://perma.cc/2BTR-KTDV].

19. *See* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extra Terroritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992); *see also* Seth F. Kreimer, *"But Whoever Treasures Freedom . . .": The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907 (1993). In another 1993 article on the subject, C. Steven Bradford argues that "an extraterritorial abortion standard would probably not be an unconstitutional restriction on the right to travel." C. Steven Bradford, *What Happens if Roe Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 158 (1993). But Professor Bradford's analysis is based on an attempted unified *right*-to-travel analysis that incorrectly centers all of the rights in question on the Privileges and Immunities Clause's focus on discrimination against citizens from other states. *Compare id.* at 158–65 (centering discussion of a right to travel on the Privileges and Immunities Clause's protection from discrimination as a noncitizen of a state) *with* discussion *infra* Part II (disassociating these rights—and their tests).

20. To see changes in the legal landscape since Professor Kreimer's articles, compare, e.g., the regulations discussed in Part I with those discussed by Professor Kreimer. *See infra* notes 23–36 (citing important right-to-travel cases and scholarship, much of which postdates Professor Kreimer's articles).

21. *See supra* notes 16–17. Kreimer's focus on Privileges and Immunities is understandable; several important right-to-travel decisions on the other travel-related rights postdate his scholarship.

22. Cohen et al., *supra* note 10 (manuscript at 27–30) (centering Kreimer, Brilmayer, Rosen, Fallon, and other scholars of extraterritoriality); *id.* at 30 (highlighting then-Judge Gorsuch calling "the extraterritorial principle 'the least understood of the Court's three strands of dormant commerce clause jurisprudence'") (quoting Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015)); *id.* at 31 (discussing "the due process extraterritorial doctrine the Court has developed, which exists in the context of punitive damages for a defendant's out-of-state actions"); *cf.* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2337 (2022) (Breyer, Sotomayor, and Kagan, JJ, dissenting) (recognizing this as a likely emerging set of issues, citing Cohen et al., *supra* note 10).

II. Taxonomizing the Constitution's Travel Rights

The Constitution's multiple independent protections of travel can serve as a meaningful limit on antitravel legislation in service of a contested moral agenda. Indeed, the emerging strategy of targeting travel in this context is either clearly or colorably unconstitutional in most of its forms.

I begin this discussion by briefly sketching a taxonomy of the Constitution's protections of travel to clarify the ways in which travel is protected in its various forms.[23] What is commonly described as a *right* to travel[24] is better characterized as a series of travel-related rights protected by different provisions of the Constitution: "the Constitution guarantees, at the very least, a right to free movement, to travel between the states, and to relocate from one state to another."[25] Because this last right—the right to relocate—does not appear likely to be implicated by these measures, I will not discuss it in greater detail.

First, the right to free movement both interstate and intrastate is a fundamental right. Indeed, it is one of the few fundamental rights to be consistently recognized by the Supreme Court post-*Lochner*.[26] "Freedom of movement," the Supreme Court has written, "is basic in our scheme of values."[27] "Travel . . . may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads."[28] The key question in evaluating whether the fundamental right to movement is implicated is whether a burden sufficiently impedes "activities [that] are historically part of the amenities of life as we have known them,"[29] like "walk[ing] and stroll[ing] and wander[ing],"[30] "[traveling] for job and business opportunities[, and traveling] for cultural, political, and social activities."[31] Indeed, even the "decision to remain in a public place of [a person's] choice" is likely protected by the right to free movement.[32] Notably, few of these aspects of the protected right turn on the interstate nature of the movement in question; that is to say, the right to free movement protects both

23. This taxonomy builds from my previous work on the right to travel. *See* Noah Smith-Drelich, *The Constitutional Right to Travel Under Quarantine*, 94 S. CAL. L. REV. 1367, 1381 (2021).

24. *See supra* notes 16–17.

25. *See* Smith-Drelich, *supra* note 23, at 1381.

26. *See, e.g.*, *id.*; *cf. infra* note 63.

27. Kent v. Dulles, 357 U.S. 116, 126 (1958).

28. *Id.*; *see also* Aptheker v. Sec'y of State, 378 U.S. 500, 505–06 (1964); Crandall v. Nevada, 73 U.S. 35, 46 (1867).

29. Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972).

30. *Id.*

31. *Aptheker*, 378 U.S. at 519–20 (Douglas, J., concurring).

32. City of Chicago v. Morales, 527 U.S. 41, 54 (1999); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *134.

interstate and intrastate movement.[33] Restrictions that implicate this fundamental right are subject to strict scrutiny, meaning that they must be "narrowly tailored to serve a compelling state interest."[34]

The right to travel is also protected by the Dormant Commerce Clause, which primarily protects interstate travel from state restrictions. The Supreme Court has recognized that travel plays such a central role in commerce that burdens on interstate travel also burden interstate commerce.[35] The Court has taken an expansive view toward such burdens, recognizing that even "purely local" regulations can violate the Clause: "[I]f 'it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.'"[36] Whether a travel-related law violates the Dormant Commerce Clause turns largely on whether the law discriminates against interstate commerce. Within this analysis, facially discriminatory regulations are "virtually *per se* invalid" and are almost always struck down.[37] Nondiscriminatory laws that only incidentally affect interstate commerce, on the other hand, are subject to a far more deferential balancing test that weighs the costs and benefits of the regulation.[38]

Finally, the right to travel is protected by the Privileges and Immunities Clause of Article IV, which also primarily protects interstate travel from state regulation. This is the dominant lens through which the right to travel has been discussed in the academic literature in this context.[39] Unfortunately, the Privileges and Immunities Clause provides few protections against a state's efforts to regulate the travel of its own citizens.[40] That is because the crux of a Privileges and Immunities right-to-travel analysis is whether a regulation "appl[ies] discriminatorily against [*out-of-state* travelers]."[41] "[T]he purpose

33. *See* Smith-Drelich, *supra* note 23, at 1383–85 (discussing the breadth of this right).

34. *Id.* at 1384–85 (quoting Washington v. Glucksberg, 521 U.S. 702, 772 n.12 (1997) (Souter, J., concurring)) (discussing the consensus—albeit with some confusion—of lower courts evaluating the scrutiny applicable to regulations that implicate the right to free movement).

35. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 573 (1997) (recognizing "the transportation of persons across state lines" itself to be "a form of 'commerce'" protected by the Commerce Clause).

36. *Id.* (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964)).

37. *Id.* at 575 (quoting Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996)).

38. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Such laws are typically upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.*; *cf.* Nat'l Pork Producers Council v. Ross, No. 21-468 (cert. granted Mar. 28, 2022) (involving a range of Dormant Commerce Clause jurisprudence, including potentially the *Pike* balancing test).

39. *See supra* Part I and notes 16–17.

40. *See, e.g.*, United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 217 (1984) ("[T]he disadvantaged New Jersey residents have no claim under the Privileges and Immunities Clause [against New Jersey].").

41. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 (1993) (emphasis added).

of [the Privileges and Immunities Clause]," after all, "is to outlaw classifications based on the fact of non-citizenship."[42]

III. Applying the Right to Travel

Together, the fundamental right to free movement and the Dormant Commerce Clause provide a robust set of protections against the kinds of travel limitations described in Part I.[43] These protections extend to explicit and non-explicit limitations on travel as well as to both interstate and intrastate restrictions.[44]

A. Explicit Restrictions on Interstate Travel

Regulations that explicitly target interstate travel are particularly suspect and are vulnerable to both Dormant Commerce Clause and fundamental rights challenges.[45] First, by facially limiting interstate travel and therefore commerce, these regulations almost certainly violate the Dormant Commerce Clause.[46] Indeed, most such regulations appear primed to directly regulate interstate commerce via restrictions on travel for specified commercial activities (like abortion, gender-affirming care, conversion therapy, and physician-assisted suicide). But the disfavored conduct needn't be commercial for these laws to violate the Dormant Commerce Clause: given the Supreme Court's linkage of travel and commerce, that these laws seek to suppress interstate travel is likely enough to render them unconstitutional.[47]

Second, by substantially restricting interstate travel, such laws likely also implicate the fundamental right to free movement. That is particularly true when the disfavored activity is medical in nature: travel to obtain medical treatment falls within the range of "activities [that] are historically part of the amenities of life as we have known them."[48]

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42. Toomer v. Witsell, 334 U.S. 385, 398 (1948).

43. The Privileges and Immunities Clause does not do so: these laws discriminate against *in-state* residents, whereas the Clause only protects discrimination against *out-of-state* residents. *See supra* note 41 and accompanying text.

44. Moreover, although this piece focuses on *state* restrictions, the fundamental right to free movement also applies to *federal* restrictions. *See, e.g.*, Aptheker v. Sec'y of State, 378 U.S. 500, 519 (1964) (Douglas, J., concurring).

45. The likely invalidity of such regulations is recognized by Justice Kavanaugh in his *Dobbs* concurrence, albeit without any supporting citation. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

46. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 573 (1997).

47. *Id.* at 582 (quoting *Edwards v. California*, 314 U.S. 160, 172 (1941) for the proposition that "the transportation of persons is 'commerce'"); Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996).

48. Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972); Bigelow v. Virginia, 421 U.S. 809, 824 (1975) ("Neither could Virginia prevent its residents from traveling to New York to obtain [abortion] services."); *cf.* Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 259 (1974)

The question then turns to whether such regulations can survive strict scrutiny. Most likely cannot.[49] Indeed, even for judges who are personally sympathetic to the underlying goals furthered by a restriction, strict scrutiny should present a meaningful obstacle. There are a number of reasons for this. As a threshold matter, there is robust disagreement about whether states can legislate extraterritorially.[50] If states cannot, then these sorts of interstate travel restrictions should fail: rather than furthering a compelling state interest, these laws promote an impermissible one.

Even accepting that states may so legislate leads only to another gauntlet: the application of strict scrutiny in the context of extraterritoriality.[51] Extraterritoriality's implication of multiple state and national interests raises challenging questions for strict scrutiny without clear answers. For one, whose interests count? The answer to this for most legislation is the regulating state: there will be no conflict when only one state's interests are at play. But it is not so clear that this should be the rule for laws with extraterritorial reach. When a Missouri resident travels to Illinois, for example, both states' interests are implicated: Missouri has an interest in the safety of its residents; Illinois has an interest in its territorial sovereignty as well as in the safety of its visitors. Given the importance the Court has attached to comity and national citizenship in its right-to-movement jurisprudence, there is some appeal to the more inclusive inquiry—but this is an open question.

Finally, it is far from certain that such laws can survive the narrow tailoring prong of strict scrutiny. If it is permissible for a state to directly restrict an activity extraterritorially—for Idaho to ban its residents from obtaining gender-affirming treatment in Oregon, for example—then such a direct ban will represent the "least restrictive means"[52] of accomplishing the

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(holding, in the context of the right to interstate migration, that states cannot burden travel for even *non*emergency medical care via a residency requirement because such care is "a basic necessity of life") (quoting DEP'T OF HEALTH, EDUC. & WELFARE, 86TH CONG., MEDICAL RESOURCES AVAILABLE TO MEET THE NEEDS OF PUBLIC ASSISTANCE RECIPIENTS 74 (Comm. Print 1961)); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (discussing the fundamental right to make choices about healthcare).

49. *See, e.g.*, Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (characterizing strict scrutiny as "'strict' in theory and fatal in fact").

50. *See, e.g.*, *Bigelow*, 421 U.S. at 824 ("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."); Planned Parenthood of Kansas v. Nixon, 220 S.W.3d 732, 742 (Mo. 2007) (en banc) ("Missouri simply does not have the authority to make lawful out-of-state conduct actionable here."); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 871 (2002).

51. Rosen, *supra* note 50, at 871 (discussing the constitutionalizing of this inquiry by *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818–19 (1985)).

52. *See* Johnson v. City of Cincinnati, 310 F.3d 484, 503 (6th Cir. 2002).

state's interest in regulating abortions. Interstate travel restrictions, which necessarily cast a broader shadow, will not.[53]

B. Non-Explicit Restrictions on Interstate Travel

The second major category of travel regulation, aid-or-abet laws, will also be vulnerable to a right-to-travel challenge, even though they may not explicitly single out travel. When a state targets anyone aiding or abetting its residents in leaving the state in order to participate in a locally disfavored activity, the only activity giving rise to liability may well be the interstate travel itself—the taxi or bus ride *aid*. The fact that sanctions targeting such aid and abetting might never explicitly mention travel is of little importance. For both the Dormant Commerce Clause and the fundamental right to free movement, it is the purpose and effect of the law that matters most—and here, both the purpose and effect of such regulations largely track explicit restrictions on travel.

C. Restrictions on Intrastate Travel

These constitutional questions are the closest for restrictions cabined to *intra*state travel, whether explicit or non-explicit.[54] Such laws likely trigger, at the very least, the protections of the right to free movement, particularly when they attach to intrastate travel for medical treatment or some other activity that has historically been "part of the amenities of life as we have known them."[55] The question then becomes whether the restriction can survive strict scrutiny. Where such laws are paired with legally infirm legislation designed to evade judicial review, like Texas's S.B. 8 pre-*Dobbs*,[56] the answer to this should be no: the underlying purpose of such laws is an impermissible one (to burden activities that current precedent holds cannot be so burdened).[57] Where, however, intrastate travel restrictions are tailored to amplify the effect of a legally permissible but controversial piece of moral legislation, the question will likely turn on the exact nature of the regulation and underlying interests—as well as the ideology of the reviewing judge. Strict scrutiny is a sufficiently difficult test to overcome that a judge

53. This, too, is a question deserving more attention.

54. For a discussion of statutes that are implicitly intrastate and explicitly interstate, see *supra* notes 11–12 and accompanying text.

55. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972); *see also supra* notes 28–30 and accompanying text. *Dobbs*, of course, explicitly excludes abortion from such protections—and the Court's approach to abortion implies that other discrete categories of medical care could likewise be separately considered and labeled as not historically rooted. 142 S. Ct. 2228, 2242 (2022).

56. *See* S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (enacted); Tex. Health & Safety Code Ann. § 171.201–212.

57. *See, e.g.*, Michaels & Noll, *supra* note 17 (manuscript at 3).

with personal convictions starkly at odds with the legislative goals will have some leeway to strike these measures down, particularly as there are few objective principles that can constrain review into such morally contested topics.[58]

Intrastate restrictions may also implicate the Dormant Commerce Clause. That is because even purely local travel restrictions will generally apply to *forms* of transportation with an interstate reach—such as Uber, Greyhound, or Southwest Airlines—and are therefore likely to have impacts on transportation practices extending beyond the state.[59] Greyhound, for example, may add interstate travel-restrictive terms and conditions designed to limit its corporate liability in response to an intrastate travel regulation. Indeed, even when transportation companies officially hold themselves open to interstate travel, individual employees and contractors—like Uber drivers—may refuse to complete any trips for the targeted purpose, intrastate or interstate, for fear of liability. Even locally cabined restrictions on travel may thus have a hefty interstate pinch.

As such, purely intrastate travel restrictions may be regularly subject to the Dormant Commerce Clause's *Pike v. Bruce Church*[60] balancing test.[61] Though *Pike* is generally viewed as deferential,[62] intrastate restrictions intended to amplify the effect of legislation furthering a contested moral agenda may yet be vulnerable under this test. That is because states that locally sanction certain activities (like gender-affirming care) may see few to no local benefits of also sanctioning intrastate travel for purposes of engaging in such activities: without in-state providers offering the services, there will be nowhere within the state to travel for such services.[63] On the other hand, there will often be numerous clinics in neighboring jurisdictions offering these services that could see their businesses greatly impacted by the

58. *Cf.* Smith-Drelich, *supra* note 23, at 1389 (discussing how public health expertise provides a strong set of principles helpful to evaluating quarantine measures under strict scrutiny).

59. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) ("[I]f 'it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.'").

60. 397 U.S. 137 (1970).

61. *Id.* at 142.

62. *See e.g.* Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 422 (2008).

63. Whether there are other benefits that can conceivably be described as "local" will turn on the nature of the sanctioned conduct as well as the ideological leanings of the reviewing court. *See Pike*, 397 U.S. at 142 (weighing "putative *local* benefits" against "the burden imposed on [interstate] commerce") (emphasis added). When the out-of-state chilling effect of a restriction leads to decreases in the locally disfavored activity (say: fewer Missouri residents get abortions in Illinois), is that a "local" benefit? Recasting such burdens on interstate commerce as a "local benefit" cuts against the spirit of the Dormant Commerce Clause, but this is largely untilled legal ground. *Cf.* Lilienthal v. Kaufman, 239 Or. 1, 16 (1964) (considering, as part of a conflict-of-laws analysis, third-party benefits within Oregon that would spring from the extraterritorial application of Oregon law).

interstate shadow cast by even purely intrastate restrictions.[64] In such a circumstance, there would thus be a large "burden imposed on [interstate commerce]" yet close-to-no "putative local benefits" of these measures,[65] in which case *Pike* would demand that the restrictions be struck down.

Conclusion

Given the increasing moral disagreement from state to state on prominent issues like abortion, gender-affirming care, conversion therapy, and physician-assisted suicide, states appear primed to test the limits of their extraterritorial legislation, including via restrictions on travel. They should be cautious in doing so. Even if such laws are permissible from the standpoint of comity or extraterritoriality, it is likely that they will be vulnerable to constitutional challenges under one of the rights to travel.

Indeed, although no previously recognized right may truly be inviolable, these constitutional protections remain particularly well-entrenched. The fundamental right to free movement, for example, is regularly contrasted with other fundamental rights as an example of one that *is* firmly rooted in history and tradition.[66] And the Dormant Commerce Clause retains a strong champion in Justice Alito, with six or seven justices in support of its vigorous application.[67] As such, even in an era of constitutional retrenchment, these rights should be relatively resistant to reconsideration.

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64. *Cf., e.g.*, *see* Josh Merchant, *Nearly Half of Abortions in Kansas Are for Missouri Residents, But Voters Could End That*, NPR (Nov. 20, 2021, 4:00 AM), https://www.kcur.org/news/2021-11-20/nearly-half-of-abortions-in-kansas-are-for-missouri-residents-but-voters-could-end-that [https://perma.cc/C9AY-WY4Q] (noting that over 3,000 Missouri patients traveled out of the state for purposes of obtaining an abortion in 2020).

65. *See Pike*, 397 U.S. at 142; *cf.* Nat'l Pork Producers Council v. Ross, No. 21-468 (cert. granted Mar. 28, 2022) (considering, among other things, whether a state's purely moral local interests are properly part of the *Pike* balancing test).

66. *Cf., e.g.*, *Kent v. Dulles*, 357 U.S. 116, 125–26 (1958) (noting that the right of freedom of movement "was emerging at least as early as the Magna Carta," and was "deeply engrained in our history" by the time of the drafting of the U.S. Constitution) (citing favorably ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 171–81, 187 (1956), which describes "freedom of movement" as one of the "three human rights in the original Constitution").

67. *See, e.g.*, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2460 (2019) (striking down, on 7–2 vote with Justice Ginsburg in the majority, residency requirement under the Dormant Commerce Clause).