Abortion Regulation in a Post-Dobbs World

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"The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite."
James Madison

I. INTRODUCTION

For well over a century, the social issue of abortion has sharply divided America.[1] Some Americans hold the view that life begins at conception; others believe that life begins after birth; and many others feel ambivalent regarding this issue. Whether one's views are shaped by

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[1] Annalies Winny, *A Brief History of Abortion in the U.S.*, HOPKINS BLOOMBERG PUB. HEALTH (updated Nov. 22, 2022), https://magazine.jhsph.edu/2022/brief-history-abortion-us, (stating that in 1957, the American Medical Association proclaimed that life begins at conception).

philosophical, political, or religious beliefs, one thing is certain: the sharp divide continues today.[2]

In the former landmark case, *Roe v. Wade*, the United States Supreme Court held that women had a constitutional right to abortion.[3] With that then-recognized constitutional right, abortion access existed in every state.[4] After nearly 50 years and a myriad of cases challenging

[2] *See Public Opinion on Abortion*, PEW RSCH. CTR (May 13, 2024), https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/.Though philosophical and political beliefs inform one's abortion views, even the casual observer knows that religious views are often the driving factor in establishing one's abortion views. *See Views About Abortion*, PEW RSCH CTR, https://www.pewresearch.org/religion/religious-landscape-study/views-about-abortion/, (last visited Oct. 22, 2024) (finding approximately 80% of Americans say their religious views are "very important" or "somewhat important" in shaping their abortion views). In response to the fact that religious views shape abortion views, abortion advocates argue that religious views have no place in the abortion debate. *See* Kelly Percival, *Religion Must Not Substitute Science in the Abortion Debate*, BRENNAN CTR. FOR JUST. (Nov. 5, 2021), https://www.brennancenter.org/our-work/analysis-opinion/religion-must-not-substitute-science-abortion-debate.

[3] *See generally* Roe v. Wade, 410 U.S. 113 (1973).

[4] *Id.*

abortion laws,[5] the Court granted certiorari in *Dobbs v. Jackson Women's Health Organization* to address whether "all pre-viability prohibitions on elective abortions are unconstitutional."[6] In *Dobbs*, the Court held that the federal constitution does not recognize a protected right to abortion and overruled *Roe* and its progeny.[7] With *Roe* now overruled, the right to abortion is no longer constitutionally guaranteed, leaving the issue of abortion regulation to the states.[8]

Post-*Dobbs*, many states have since moved to restrict abortion severely.[9] Some states now outlaw abortion unless the pregnancy threatens the life or health of the mother.[10] This sea change has triggered several responses and concerns—a chief concern being whether all

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[5] *E.g.*, Bigelow v. Virginia, 421 U.S. 809 (1975) (holding that prohibitions on abortion clinic advertisement violated freedom of speech and freedom of the press); Bellotti v. Baird, 443 U.S. 622 (1979) (holding that minors have a right to seek judicial authorization for abortion without first seeking parental consent); Harris v. McRae, 448 U.S. 297 (1980) (holding that Medicaid was not required to cover abortion cost when the abortion was not necessary to save the life of the mother); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (holding that 24-hour waiting periods, dissemination of abortion information to patients seeking an abortion, and parental consent requirements for minors were unconstitutional); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (striking down a law requiring physicians to use abortion techniques that maximized the chance of fetal survival, even when such technics increased health risks to the mother); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (overruling *Thornburgh* and *Akron* and replacing *Roe's* trimester system with the more lenient and less clear undue burdens test); Gonzales v. Carhart, 550 U.S. 124 (2007) (holding that Congress may ban specific types of partial-birth abortions).

[6] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 234 (2022).

[7] *Id.* at 234.

[8] *See generally id.* (overruling both *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*).

[9] GUTTMACHER INST., *Interactive Map: US Abortion Policies and Access After Roe,* (Policies current as of Oct. 7, 2024) https://states.guttmacher.org/policies/?gclid=CjwKCAjwp9qZBhBkEiwAsYFsb4TcshxOAE5oAkaN6QJtwjkb0xhzqOK19SSXPgNCIHCQOpsGPPa2OxoChQQQAvD_BwE.

[10] *E.g.*, S.D. CODIFIED LAWS § 22-17-5.1 (2024).

women will have any legal access to abortion services. This article advances three conclusions about post-*Dobbs* regulations rolling forward. First, state abortion bans that provide no exceptions are unlikely to survive rational basis review. Second, those seeking out-of-state abortion services will be protected by the right to travel. Third, it is unclear whether Congress possesses the power to regulate abortion and whether federal regulation is wise.

II. STATE ABORTION REGULATION AND RATIONAL BASIS REVIEW

Under *Dobbs*, states can now regulate abortion without major oversight from the federal judiciary.[11] Some states have codified abortion rights, and others have outlawed abortion in nearly all circumstances.[12] For instance, in Oregon, abortion is not restricted at any gestational age, and state Medicaid covers abortion costs.[13] In stark contrast, Alabama prohibits abortion in virtually every case, Alabama forbid abortion coverage for both state Medicaid and private health insurance (with "very limited" exceptions), and only permit licensed physicians to perform abortions.[14] Other states, such as Wyoming, have taken a middle approach, banning abortion only after viability.[15]

In *Dobbs*, the Court declared that future abortion cases will be subject to rational basis review.[16] Such scrutiny merely requires state laws to be "rationally related to a legitimate state interest."[17] Under rational

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[11] With *Roe* and *Casey* overruled, federal courts will no longer review abortion restrictions under the "undue burden" standard.
[12] GUTTMACHER INST., *supra* note 10 (selecting the state of Oregon).
[13] *Id.*
[14] *Id.* (selecting the state of Alabama).
[15] *Id.* (indicating that Wyoming also limits Medicaid coverage for abortion care, requires parental consent for minors seeking abortion services, and requires that all abortions be performed by a physician.).
[16] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 300 (2022).
[17] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

basis review, challengers seldom succeed.[18] Reiterating this point, the *Dobbs* Court affirmed that "[a] law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'"[19]

Although deferential, "'rational-basis scrutiny' is still scrutiny."[20] So, what abortion laws would fail rational basis review? On one end of the spectrum, the Court could foreseeably strike down abortion laws that "deprive" mothers of "life."[21] On the other end of the spectrum, the Court, at least as currently comprised, could hold that full-term babies are entitled to constitutional protections.

While not yet recognized by the Court, women may have a fundamental right or a liberty interest to abortion in some circumstances.[22] The *Dobbs* Court explained that fundamental rights protected by the constitution must be "deeply rooted in our Nation's history" and essential to our Nation's "scheme of ordered liberty."[23] Similarly, a liberty interest protected by the Fourteenth Amendment's substantive due process clause requires an "historical inquir[y]." Looking at history, the Court noted that in 1868, three-quarters of the states outlawed abortion at every stage of pregnancy.[24] Accordingly, the Court concluded that "abortion is not deeply rooted in our Nation's history," nor

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[18] *See, e.g.*, Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1319 (2018) ("rational basis review is 'essentially insurmountable,' and successful challenges 'rare.'").

[19] *Dobbs*, 597 U.S. at 301.

[20] Nordlinger v. Hahn, 505 U.S. 1, 31 (1992) (Steven J., dissenting); *see also* Obergefell v. Hodges, 576 U.S. 644, 675-76 (2015) (striking down laws prohibiting same-sex marriage under rational basis scrutiny).

[21] U.S. Const. amend. XIV, § 1 ("nor shall any state *deprive* any person of *life*, liberty, or property, without due process of law") (emphasis added).

[22] Additionally, the Court will almost certainly grapple with the conflict between laws that severely limit abortion and free exercise rights. *See* Lisa Fishbayn Joffe, *Do Abortion Bans Violate Jews' Religious Rights?*, BRANDEIS UNIV. (June 16, 2022), https://www.brandeis.edu/jewish-experience/social-justice/2022/june/abortion-judaism-joffe.html.

[23] *Dobbs*, 597 U.S. at 237–38 (quoting Timbs v. Indiana, 586 U.S. 146, 149 (2019)).

[24] *Id.* at 248 (citing Lord Ellenborough's Act, 43 Geo. 3, c. 58 (1803)).

is it essential to our Nation's scheme of ordered liberty.[25] While the *Dobbs* Court observed that a super-majority of the states outlawed abortion in 1868, historical evidence suggests that every state at that time also recognized a carveout in cases where the pregnancy threatened the mother's life.[26] Given this history, abortion access, in this circumstance, appears to be "deeply rooted in our Nation's history." Consequently, laws that do not provide an exception to save the mother's life are unlikely to pass constitutional muster.

Although there is not a fundamental right to abortion, laws prohibiting abortion when the mother's life is threatened would likely not pass rational basis review. In his dissenting opinion from *Roe*, then-Associate Justice Rehnquist observed:

> [t]he Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit . . . on legislative power to enact [abortion] laws . . . if [a] statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective.[27]

Simply put, a state cannot, under the pretext of protecting life, force a woman to proceed with a pregnancy

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[25] *Id.* at 250 ("The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973.").

[26] Jonathan H. Adler, *Sherif Girgis on the Draft Dobbs Opinion and Its Critics*, THE VOLOKH CONSPIRACY (May 26, 2022), https://reason.com/volokh/2022/05/26/sherif-girgis-on-the-draft-dobbs-opinion-and-its-critics/; *see also* LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, & THE L. IN THE U.S. 1867–1973, 14 (Univ. of Cal. Press 1997).

[27] Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting).

that, to a reasonable degree of medical certainty, would "deprive" her of "life."[28]

Just as the Court will likely find that a mother has a right to an abortion when the pregnancy threatens her life, the Court at some future point may conclude that full-term babies, whether in or out of the womb, possess a right to life. "Full-term" is not a legal term, but a medical one. According to most medical institutions, babies reach full-term between thirty-seven and thirty-nine weeks of gestation.[29] As the *Dobbs* Court noted, the question of when a baby becomes a person is heavily debated.[30] However, that does not mean the Court can abdicate its constitutionally-appointed role to review laws and proclaim when persons are entitled to the equal protections of the law.

All agree that personhood is endowed to babies at some point—whether at birth or an earlier point in time. Though largely a philosophical or theological question as to when life begins, most individuals would not suggest that

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[28] U.S. CONST. amend. XIV, § 1 ("nor shall any state *deprive* any person of *life*, liberty, or property, without due process of law") (emphases added).

[29] *Neonatal Care for the Late Preterm Infant*, BETH ISRAEL DEACONESS MED. CTR. (Sept. 2013), https://www.bidmc.org/-/media/files/beth-israel-org/centers-and-departments/neonatology/nicuadmission.pdf; *Know Your Terms*, NAT'L CHILD & MATERNAL HEALTH EDUC. PROGRAM (June 2, 2022), https://www.nichd.nih.gov/ncmhep/initiatives/know-your-terms/moms#:~:text=%22Full%20Term%22%20Starts%20at%2039%20Weeks&text=In%20the%20past%2C%20a%20baby,full%20term%22%20at%2039%20weeks.; *but see* Mayo Clinic Staff, *Pregnancy and COVID-19: What are the risks?*, MAYO CLINIC (Nov. 3, 2023), https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/pregnancy-and-covid-19/art-20482639 (suggesting that full-term is now thirty-nine weeks of gestation). However, statistically, babies born at thirty-seven weeks do not require major medical assistance.

[30] *Dobbs*, 597 U.S. at 223 ("Abortion presents a profound moral issue on which Americans hold sharply conflicting views.").

passing through the birth canal endows personhood.[31] In fact, many state laws, including laws from pro-choice states, have recognized that personhood exists before birth.[32] While some may argue that thirty-seven or thirty-nine weeks is arbitrary, one defining line between a baby and a potential life is certainly the capability of living outside the womb *without major medical assistance*.[33]

This standard is much different from mere viability. Viability begins when a baby becomes capable of living outside the womb; however, full-term is more than mere viability. Full-term babies are fully developed and do not normally require extensive medical care.[34] Thus, full-term babies, capable of living outside the womb in a fashion similar to naturally born babies, may be persons entitled to constitutional protections.

Cases involving terminal fetuses likely present one of the most challenging questions for federal courts. Historically, states have successfully argued that they have the power to regulate abortion because they possess a

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[31] *See, e.g.*, People v. Davis, 7 Cal. 4th 797, 810 (1994) (discussing that in the 1990s, California recognized a fetus as a person "seven or eight weeks after fertilization."). *But see* Rachel Mikva, *When Does Life Begin? There's More Than One Religious View*, THE CONVERSATION (Sept. 7, 2021), https://theconversation.com/when-does-life-begin-theres-more-than-one-religious-view-167241 (explaining that some religions hold the view that a baby does not obtain personhood until birth).

[32] *Davis*, 7 Cal. 4th at 810.

[33] *See id.* (indicating that babies born at 37 weeks are not automatically admitted to the neonatal intensive care unit to receive *major medical assistance* and that even older late preterm babies are admitted to postpartum floors as are full-term babies); *see also* Minn. Dep't of Health Child & Fam. Health Div., *If You Are Pregnant: Information on Fetal Development, Abortion and Alternatives*, MINN. DEP'T OF HEALTH (Aug. 2019), health.state.mn.us/people/wrtk/handbook.html.

[34] *Neonatal Care for the Late Preterm Infant*, BETH ISRAEL DEACONESS MED. CTR. (Sept. 2013), https://www.bidmc.org/-/media/files/beth-israel-org/centers-and-departments/neonatology/nicuadmission.pdf; *Pregnancy at week 37*, PREGNANCY BIRTH & BABY (Aug. 2020), https://www.pregnancybirthbaby.org.au/pregnancy-at-week-37#:~:text=By%20the%20end%20of%20week,grip%20firmly%20with%20their%20hand.

legitimate interest in protecting potential life.[35] However, when the potential life has a zero or negligible chance of living, is the legitimate interest rationally related to an abortion ban?[36] While no fundamental right or liberty interest exists in this circumstance, this is still likely to be one of the more difficult challenges that federal courts will face as they examine abortion laws under rational basis review.

The *Dobbs* Court made clear that *Roe* was egregiously wrong because it "usurped the power" of the People by "address[ing abortion,] a question of profound moral and social importance that the Constitution unequivocally leaves for the [P]eople."[37] Although cases involving the life of the mother involve a constitutional question, the majority of cases will not.[38] Thus, the People, through their elected state representatives, will largely decide when abortions are permissible.

IV. INTERSTATE TRAVEL

Some fear that pro-life states will bar citizens from traveling to pro-choice states to obtain abortion services, but these fears are likely ill-founded.[39] "The right of interstate travel has repeatedly been recognized as a basic constitutional freedom."[40] Therefore, laws explicitly

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[35] *Dobbs*, 597 U.S. at 298.

[36] *But see Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1203 (Idaho 2023) (suggesting that the government has an interest in protecting the unborn life where there "is *some* chance of survival outside the womb") (emphasis in original).

[37] *Dobbs*, 597 U.S. at 269.

[38] Many cases of moral difficulty fall between the two ends of the spectrum. Among these cases are those involving rape, incest, and pregnant minors. While these cases will surely come before federal courts, these cases do not involve a literal deprivation of a mother's life. Therefore, federal courts will likely uphold state laws permitting or banning abortions in these instances.

[39] Thor Benson, *Interstate Travel Post-Roe Isn't as Secure as You May Think*, WIRED (Jul. 25, 2022), https://www.wired.com/story/insterstate-travel-abortion-post-roe/.

[40] Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 254 (1974); *see generally* Saenz v. Roe, 526 U.S. 489 (1999).

restricting this right will face strict scrutiny.[41] This non-deferential standard requires a law to be "narrowly tailored" to advance a "compelling government interest."[42] Thus, no state may prohibit travel to prevent its citizens from securing abortion services, nor may a state retroactively punish a citizen for services obtained in another state unless the prohibition can pass the highest form of constitutional scrutiny. After all, "[t]he right of Americans to travel interstate in the United States has never been substantially [] limited."[43]

Former Associate Justice William Brennan famously told law clerks, "Five votes. Five votes can do anything around here."[44] This frequent lesson has become known as the Rule of Five, the only rule that matters on the Court.[45] Applying Justice Brennan's Rule of Five, the Court will almost undoubtedly rule that interstate travel bans are unconstitutional. Although the *Dobbs* majority does not address interstate travel bans, both Justice Kavanaugh and the dissenters did. In concurrence, Justice Kavanaugh suggested that laws prohibiting or penalizing interstate travel to receive abortion services would not pass constitutional muster as they violate the "Due Process

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[41] *See Mem'l Hosp.*, 415 U.S. at 262, n.21 ("Strict scrutiny is required here because the challenged classification impinges on the right of interstate travel.").

[42] Williams-Yulee v. Fla. Bar, 575 U.S. 433, 442 (2015) (holding that limitations on speech are constitutional only if they are narrowly tailored to serve a compelling interest).

[43] Meryl Chertoff, *The Right to Travel and National Quarantines: Coronavirus Tests the Limits*, GEO. L. SALPAL (last visited Oct. 10, 2022), https://www.law.georgetown.edu/salpal/the-right-to-travel-and-national-quarantines-coronavirus-tests-the-limits/.

[44] Nat Henoff, *The Constitutionalist*, THE NEW YORKER (Mar. 12, 1990), https://www.newyorker.com/magazine/1990/03/12/the-constitutionalist.

[45] Jay Willis, *The Conservative Justices Know the Only Supreme Court Rule That Matters*, BALLS & STRIKES (June 24, 2022), https://ballsandstrikes.org/scotus/dobbs-supreme-court-only-rule-that-matters/#:~:text=The%20Conservative%20Justices%20Know%20the,can%20do%20anything%20around%20here.%E2%80%9D&text=Whenever%20one%20of%20William%20Brennan's,remind%20them%20how%20arithmetic%20works.

Clause [and] the *Ex Post Facto* Clause."[46] The dissenters, Justices Breyer, Sotomayor, and Kagan, took a critical view of the majority opinion, writing, "[t]he Constitution protects travel and speech and interstate commerce, so today's ruling will give rise to a host of new constitutional questions."[47] Though it is questionable whether the majority opinion opens the door to such issues, it is clear that Justices Sotomayor, Kagan, and Kavanagh will oppose interstate travel bans and retroactive punishment on those who cross state lines to receive abortion services.[48]

All Justices will likely hold that interstate travel bans are unconstitutional. The real question to consider is whether five justices will hold that retroactive penalties are unconstitutional. Justices Thomas, Alito, and Gorsuch will likely hold that states cannot place travel bans on women seeking an out-of-state abortion. In Justice Thomas' view, "[t]he right to travel *clearly* embraces the right to go from one place to another, and *prohibits States* from impeding the free interstate passage of citizens."[49] Justices Alito and Gorsuch recently signaled that laws impeding one's ability to travel between states with firearms violate the right to travel.[50] However, these justices have not indicated whether the right to travel protects against retroactive penalties.

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[46] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 346 (2022) (Kavanaugh J., concurring).
[47] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 394 (Breyer, J., dissenting).
[48] Breyer, while in the dissent is not listed here as he retired from the Court effective June 30, 2022. *See* Letter from Justice Stephen Breyer, Assoc. Justice, Supreme Court of the U.S., to Joseph R. Biden, President of the U.S. (Jan. 27, 2022), https://www.supremecourt.gov/publicinfo/press/Letter_to_President_January-27-2022.pdf.
[49] Saenz v. Roe, 526 U.S. 489, 511–12 (1999) (Rehnquist C.J., dissenting) (Thomas joined the opinion) (emphasis added).
[50] N.Y. State Rifle & Pistol Ass'n, Inc. v. N.Y.C., 590 U.S. 336, 346 (2020) (Alito J., dissenting) (asserting that New York City's travel restrictions "violated [petitioners'] rights under the Second Amendment and other provisions of the Constitution" and suggesting that the right to travel was implicated when petitioners could not travel with their firearms from New York City to New Jersey).

Chief Justice Roberts will likely hold that both travel bans and retroactive penalties are unconstitutional. Chief Justice Roberts is well known for his commitment to precedent.[51] *In Attorney General of N.Y. v. Soto–Lopez*, the Court held that restrictions amounting to "deprivation of very important benefits and rights" that operate to indirectly penalize the right to travel are unconstitutional.[52] Therefore, precedent indicates that the right to travel not only protects interstate travel, but also protects against state action that *deprives* or discourages interstate travel by removing the *benefits* thereof. Thus, precedent suggests that the right to travel prohibits retroactive penalties.

Some constitutional experts may argue that members of the Court are more motivated by political and social movements than precedent.[53] Professor Neal Devins argues that the Court often rules in response to social and political pressures. For example, Devins suggests that *Glucksburg* and *Quill* did not extend a constitutional right to die with dignity because of prevailing views on suicide and death.[54] However, an examination of current cases suggests that Chief Justice Roberts acts in accordance with precedent more than social or political pressures. His concurrences in *Dobbs* and *June Medical* were certainly not reflective of social or political views, but respect for

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[51] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 348–49 (2022) (Roberts, C.J., concurring in judgment) (arguing that adherence to *Roe* and *Casey*, in the sense that abortion is constitutionally protected, was preferred to overruling *Roe* and *Casey*); S.D. v. Wayfair, Inc., 585 U.S. 162, 191 (2018) (Roberts C.J., dissenting) (arguing that the Court too lightly overruled *Quill Corp.* and *National Bellas Hess, Inc.*).

[52] Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 907 (1986).

[53] *See generally* Neal Devins, *The Last Word Debate: How Social and Political Forces Shape Constitutional Values*, 45 WM. & MARY SCHOLARSHIP REPOSITORY 46, 47 (Oct. 1997).

[54] *Id.* at 50.

precedent.[55] He similarly refused to overrule the unpopular precedent, *Employment Division v. Smith*.[56] Though Devins' theory may apply to some jurists, it is likely less applicable to Chief Justice Roberts.

It is less clear how Justices Barrett and Jackson will address the right to travel. The two newest members of the Court have not heard cases that directly implicate the right to travel, either as members of the Supreme Court or circuit courts. Any prediction as to how these justices will rule on this topic is therefore somewhat speculative. Nevertheless, as a Biden appointee, Justice Jackson is likely to be aligned with Justices Sotomayor and Kagan.[57]

Given these considerations, one can confidently predict that Chief Justice Roberts, and Justices Sotomayor, Kagan, and Kavanaugh will not support travel bans or retroactive penalties for women who seek out-of-state abortion services. Though it cannot be said with the same confidence, Justice Jackson will likely have the same view. Thus, pro-choice Americans can take comfort in knowing that, under the Rule of Five, the Court will likely hold that travel bans and retroactive penalties are unconstitutional.

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[55] *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 348-49 (2022) (Roberts, C.J., concurring); June Med. Servs. L.L.C. v. Russo, 591 U.S. 299, 346 (2020) (Roberts, C.J., concurring) (arguing that the Court's deviation from *Casey* was improper as "[r]espect for precedent promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process) (internal quotations omitted).

[56] Fulton v. City of Phila., Pa., 593 U.S. 522, 536 (2021) (holding that a law allowing discretionary exceptions renders the law not generally applicable).

[57] Justice Jackson's sympathy for individual rights also suggests that she would strike down laws imposing retroactive penalties. *See* Luke T. Green, Michael Goutsaliouk, and Gader Wren, *The Judicial Philosophy of Justice Ketanji Brown Jackson*, HOUS. L. REV. 14 (2025) (forthcoming) (suggesting that Justice Jackson is a constitutional pluralist with a particular concern for individual rights).

V. CONGRESSIONAL EFFORTS TO REGULATE ABORTION

Efforts to codify the core holding of *Roe* existed long before the *Dobbs* decision was issued.[58] In 1989, the House of Representatives introduced the Freedom of Choice Act. [59] This act aimed to protect abortion rights "before fetal viability" and in any case "necessary to protect the life or health of the [pregnant] woman."[60] From 1989 to 2007, Congress failed to pass the Freedom of Choice Act several times.[61] Consequently, the act was "deprioritized."[62]

When the Court granted *certiorari* on *Dobbs*, efforts in the House of Representatives to codify *Roe* were reborn.[63] On June 8, 2021, Representative Judy Chu (D-CA-27) introduced the Women's Health Protection Act of 2021.[64] This bill, proposing the codification of *Roe*, was quickly passed by the House and turned over to the Senate for consideration.[65] However, efforts to secure sixty votes in the Senate failed.[66]

When the Court issued *Dobbs*, congressional attention towards codifying *Roe* took on new life. On May

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[58] Sheryl Gay Stolberg, *On Abortion, Obama is Drawn into Debate He Hoped to Avoid*, N.Y. TIMES (May 14, 2019), https://www.nytimes.com/2009/05/15/us/politics/15abortion.html; FightFOCA, *Barack Obama Promises to Sign FOCA*, YOUTUBE, https://www.youtube.com/watch?v=pf0XIRZSTt8&t=97s.

[59] Freedom of Choice Act, H.R. 3700, 101 Cong. (1989); *see also* Freedom of Choice Act, S. 1912, 101 Cong. (1989) (a similar introduced bill in the Senate).

[60] Freedom of Choice Act, H.R. 3700, 101 (1989).

[61] *See* Freedom of Choice Act of 1993, H.R. 25, 103 Cong. (1993); Freedom of Choice Act, S. 2020, 108 Cong. (2004); Freedom of Choice Act, S. 1173, 110 Cong. (2007).

[62] *See* Sheryl Gay Stolberg, *On Abortion, Obama is Drawn into Debate He Hoped to Avoid*, N.Y. TIMES (May 14, 2019), https://www.nytimes.com/2009/05/15/us/politics/15abortion.html.

[63] *See, e.g.*, Women's Health Prot. Act of 2021, H.R. 3755, 117 Cong. (2021).

[64] *Id.*

[65] *Id.*

[66] Press Release, Lawyers' Committee for Civil Rights Under Law, *Senate Fails to Advance Women's Health Prot. Act (WHPA)*, (Feb. 28, 2022), https://www.lawyerscommittee.org/senate-fails-to-advance-womens-health-protection-act-whpa/.

3, 2022, the Senate introduced the Women's Health Protection Act of 2022, a reiteration of the Women's Health Protection Act of 2021,[67] and on July 7, 2022, the House introduced the Ensuring Access to Abortion Act of 2022.[68] The latter bill sought to protect women's ability to obtain out-of-state abortion services.[69]

Although Congress failed to pass either bill, Senators Tim Kaine (D-VA), Lisa Murkowski (R-AK), Kyrsten Sinema (I-AZ), and Susan Collins (R-ME) introduced the Reproductive Freedom For All Act.[70] The bill attempted to codify both *Casey* and *Griswold*.[71] Unlike the previous bills, this proposal was sponsored with bipartisan support.[72] Nevertheless, even with bipartisan support, the bill never gained measurable momentum in

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[67] Women's Health Prot. Act of 2022, S. 4132, 117 Cong. (2022).
[68] Ensuring Access to Abortion Act, H.R. 8297, 117 Cong. (2022).
[69] *Id.*
[70] Reprod. Freedom for All Act, S. 4688, 117th Cong. (2022) (explaining that the purpose of the Act is to protect the "essential holdings" of Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), Roe v. Wade, 410 U.S. 113 (1973), Carey v. Population Services International 431 U.S. 678 (1977), Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), and Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016)); *see also* Press Release, *Kaine, Murkowski, Sinema, & Collins Introduce Legislation to Codify Roe V. Wade,* Lisa Murkowski U.S Senator for Alaska (Aug. 1, 2022), https://www.murkowski.senate.gov/press/release/kaine-murkowski-sinema-and-collins-introduce-legislation-to-codify-roe-v-wade.
[71] *Id.*
[72] Press Release, *supra* note 70; *see also* CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, *Roll Call 362 Bill Number: H.R. 8297,* Office of the Clerk (July 15, 2022, 1:38 PM), https://clerk.house.gov/Votes/2022362?Page=2&RollCallNum=362 (noting that only three House republicans voted for the Ensuring Access to Abortion Act).

the Senate.[73] More recently, in the 2023-2024 Congressional session, House Democrat Judy Chu introduced the Women's Health Protection Act of 2023. With a Republican-controlled House, however, the bill has not been put to a vote.

A handful of Republicans have also attempted to pass national abortion standards.[74] These Republicans seek to ban all abortions after fifteen weeks of gestation.[75] This movement, however, has not gained traction.[76] In fact, the vast majority of Republicans "prefer [abortion issues to] be handled at the state level."[77] Despite congressional efforts to protect or restrict abortion services, it is dubious whether Congress has the power to regulate abortion at all. Both the Women's Health Protection Act, in all its variations, and the Reproductive Freedom For All Act assert that Congress has the power to do so under the Commerce Clause.[78] The latter bill claims that because "abortion services are economic transactions that frequently involve the shipment of goods, the provision of services, and the travel of persons across State lines,"

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[73] Abigail Adcox, *Warren Won't Back Bipartisan Abortion Right Bill*, WASH. EXAM'R (Aug. 3, 2022, 3:37 PM), https://www.washingtonexaminer.com/policy/healthcare/not-obvious-improvement-warren-wont-back-bipartisan-abortion-rights-bill (explaining that Democrat Senator Warren would not support the bill); *see also* Burgess Everett et al., *Graham's Abortion Ban Stuns Senate GOP*, POLITICO (Sept. 9, 2022, 3:30 PM), https://www.politico.com/ news/2022/09/13/grahams-abortion-ban-senate-gop-00056423.

[74] Kevin Breuninger, *Sen. Lindsey Graham Introduces Bill to Ban Most Abortions Nationwide After 15 Weeks*, CNBC POLITICS (Sept. 13, 2022, 2:54 PM), https://www.cnbc.com/2022/09/13/sen-lindsey-graham-introduces-bill-to-ban-most-abortions-nationwide-after-15-weeks.html.

[75] *Id.*

[76] Everett, *supra* note 73.

[77] *Id.*

[78] *E.g.*, Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. (2021); Reproductive Freedom for All Act, S. 4688, 117th Cong. (2022).

Congress has power to regulate abortion.[79] However, this rationale may not persuade a majority of the Court.

The Commerce Clause empowers Congress to regulate "commerce . . . among the several states."[80] Throughout the years, the Commerce Clause power has been narrowed, expanded, and again narrowed.[81] Most recently, the Court has narrowed its New Deal era interpretation of the Commerce Clause in *United States v. Lopez*,[82] *United States v. Morrison*,[83] and *National Federation of Independent Business v. Sebelius*.[84] These cases outline that Congress may regulate (1) the "channels" of interstate commerce, (2) the "instrumentalities" of interstate commerce, and (3) activities that have a "substantial relation" and "substantially affect" on interstate commerce.[85]

Some may point to the Partial-Birth Ban Act of 2003 as evidence of Congress' ability to regulate abortion; however, the act was passed in a pre-*Dobbs* world, when abortion was constitutionally protected.[86] Despite two Supreme Court cases addressing the act,[87] neither case

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[79] S. 4688. The Act also claims to have the power to regulate contraceptive care. With *Griswold*, Congress likely has the power to regulate under Section 5. *Id.*

[80] U.S. CONST. art. I, § 8, cl. 3. The parameters of the commerce clause are heavily debated. *Compare* JACK BALKIN, LIVING ORIGINALISM 138-82 (2011) (asserting that "commerce" originally meant "interaction"), *with* Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce,"* 2012 ILL. L. REV. 623 *passim* (2012) (arguing that "commerce" is narrower than "interaction").

[81] *See* Wilson Huhn, *A New Frontier: A Constitutional Perspective on "Socialized Medicine,"* 15 MICH. ST. UNIV. J. MED. & L. 299, 308 (2011) (citing the commerce clause eras as "the Founding Era, the Lochner Era, and the Modern Era"); *see also* Nareissa L. Smith, *Moving from Carolene to the Commerce Clause: A New Approach to Race for the New American Future*, 117 W. VA. L. REV. 1131, 1144 (2015) ("The Commerce Clause has undergone at least four eras of change.").

[82] United States v. Lopez, 514 U.S. 549, 551 (1995).

[83] United States v. Morrison, 529 U.S. 598, 607-19 (2000).

[84] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[85] *Morrison*, 529 U.S. at 609; *see also Lopez*, 514 U.S. at 637.

[86] 18 U.S.C. § 1531.

[87] *See* Gonzales v. Carhart, 550 U.S. 124 (2007).

challenged Congress' ability to regulate abortion. Justice Thomas, however, in one of those cases suggested that the Commerce Clause does not empower Congress to regulate abortion.[88] As the Court has never undertaken this inquiry, whether the Commerce Clause power extends to abortion regulation remains an open question.

Although Congress possesses great power under the Commerce Clause, Congress cannot, among other things: (1) regulate activities whose effects on "interstate commerce [are] attenuated,"[89] (2) regulate non- activity,[90] or (3) regulate in a fashion that "obliterate[s] the distinction between what is national and what is local and create a completely centralized government."[91] These limits on Congress' commerce power *may* prevent broad abortion regulation.[92]

Abortion regulation may be substantially related and may significantly affect interstate commerce, but it may also go beyond two Commerce Clause limitations.[93] Abortion services, unlike guns in school zones or gender-motivated violence,[94] are transactions that are economic in nature. However, in states where abortion is banned or limited, regulation requiring a state to provide or allow abortion services may be considered regulation of a non-activity.[95] A challenger of such a law may attempt to

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[88] *See* Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas J., concurring) (suggesting that Congress does not have commerce clause power to regulate abortion).

[89] *Morrison,* 529 U.S. at 612 ("[O]ur decision in Lopez rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated.").

[90] *See Sebelius,* 567 U.S. at 552.

[91] United States v. Lopez, 514 U.S. 549, 557 (1995).

[92] Meaning federal laws that would ban abortion or laws that would codify *Casey* or *Roe.* However, Congress *may* still provide some protections or limitations.

[93] *See* Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring). Applying the Rule of Five to the commerce clause question is difficult; however, predicting Justice Thomas' vote is not difficult. *See* Gonzales v.

[94] *See generally* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

[95] *See Sebelius,* 567 U.S. at 552. (holding that Congress does not have the power to regulate non-existent commerce activities).

analogize to *Nat'l Fed'n of Indep. Bus. v. Sebelius*.[96] There, the Court held that penalizing individuals for not purchasing health insurance did not fall within Congress' commerce power because such a requirement amounted to regulation of non-activity (i.e., not buying health insurance).[97] Similarly, in the abortion context, requiring a state to provide abortions that it does not currently provide could amount to penalizing a state for non-activity (i.e., not providing abortions).

Perhaps more importantly, congressional protection or bans on abortion may infringe on state police power. "Police powers" have long been recognized as powers inherently granted to state governments to regulate the order, safety, health, morals, and general welfare of its citizenry.[98] Even in *Roe v. Wade*, the majority declared that "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."[99] The states also have the power to regulate the medical profession to protect the health and welfare of its citizens.[100] Given that the states traditionally regulate issues of health and general wellbeing, a strong argument can be made that requiring states to provide abortion "obliterate[s]" "our Nation's dual government" structure and may lead to a "completely centralized government" on issues traditionally left to the states.[101] For these reasons, it is unclear whether Congress may regulate abortion under the Commerce Clause.

The proposed abortion bills also claim that Congress has the power to regulate abortion under Section 5 of the Fourteenth Amendment.[102] Section 5 empowers Congress to pass "appropriate" legislation to enforce the Fourteenth Amendment.[103] Thus, under Section 5, Congress may enact

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[96] 567 U.S. 519 (2012).
[97] *Id.* at 552.
[98] Barbier v. Connolly, 113 U.S. 27, 31 (1885); Chicago, B. & Q. Ry. Co. v. People of State of Illinois, 200 U.S. 561, 593 (1906).
[99] Roe v. Wade, 410 U.S. 113, 154 (1973).
[100] Barsky v. Bd. of Regent, 347 U.S. 442, 449-451 (1954).
[101] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).
[102] *See, e.g.*, *supra* notes 72 and 71.
[103] U.S. Const. amend. XIV, § 5.

congruent and proportional laws to protect constitutional rights and liberties and ensure equal protection for all.[104] However, as abortion is neither a constitutionally protected right nor a constitutional liberty interest, Section 5 has no application.[105]

In *City of Boerne v. Flores*, the Court held that while Congress is empowered to "enact legislation under §5 [to] enforce [] . . . constitutional right[s]" it does not have the power to create new constitutional rights or define the scope of the constitutional rights.[106] With *Roe* and *Casey* overturned, and the *Dobbs* Court declaring that there is no liberty interest in abortion, Congress likey does not have the Section 5 power to pass legislation to protect the once-recognized right to abortion.[107]

Federal abortion regulation does not implicate the Equal Protection Clause. In *Geduldig v. Aiello*, the Court held that discrimination based on pregnancy does not violate the Equal Protection Clause because such

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[104] *Id.*; *see also* Erwin Chemerinsky & Earl M. Maltz, *The Fourteenth Amendment Enforcement Clause*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/703#the-fourteenth-amendment-enforcement-clause-chemerinsky-maltz (last visited Feb. 9, 2024) (explaining that after *City of Boerne v. Flores*, Congress is limited under Section 5 to create laws which are "'proportionate' and 'congruent'—to the scope of constitutional violations.").

[105] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[106] City of Boerne v. Flores, 521 U.S. 507, 519 (1997); *see also* Chemerinsky & Maltz, *supra* note 104 ("Most importantly, in City of Boerne v. Flores (1997), the Court held that Section Five does not empower Congress to create new rights or expand the scope of rights, and that even laws designed to prevent or remedy violations of rights recognized by the Supreme Court must be narrowly tailored—"proportionate" and "congruent"—to the scope of constitutional violations.").

[107] Some suggest that Congress could have Section 5 power if factual findings indicated that state abortion regulations violated a recognized constitutional right; however, since abortion is not protected by the Constitution, this appears to be a difficult challenge. *See generally* KEVIN J. HICKEY & WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10787, CONG. AUTH. TO REGUL. ABORTION (last updated July 8, 2022).

discrimination is not based on sex.[108] Rather, this is discrimination between "pregnant women and nonpregnant persons."[109] Though state statutes have extended disability coverage to pregnant women, the Court, despite Justice Ginsburg's dissents, has not overruled this precedent.[110] In 2009, Justice Ginsburg argued that discrimination between pregnant women and nonpregnant persons is sex discrimination and thereby prohibited by the Fourteenth Amendment.[111] But this argument has not gained the support of five justices.[112]

In a recent congressional hearing, UC Berkeley professor of law Khiara M. Bridges stated, "many women, *cis women*, have the capacity for pregnancy. Many *cis women* do not have the capacity for pregnancy. There are also *transmen* who are capable of pregnancy as well as *non-*

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[108] Geduldig v. Aiello, 417 U.S. 484, 496, n. 20 (1974) (Holding that denial of benefits due to pregnancy status did not violate equal protection. "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.").

[109] *Id.*

[110] *See generally* AT&T Corp. v. Hulteen, 556 U.S. 701, 726 (2009) (Ginsburg, J., dissenting) ("*Gilbert* also advanced the strange notion that a benefits classification excluding some women ('pregnant women') is not sex based because other women are among the favored class ('nonpregnant persons').").

[111] *See* Coleman v. Maryland Court of Appeals, 566 U.S. 30, 55 (2012) (Ginsburg, J., dissenting) ("Rather, discriminating on the basis of pregnancy '[b]y definition ... discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male.'") (quoting General Elec. Co. v. Gilbert, 429 U.S. 125, 161–162 (1976) (Stevens, J., dissenting)).

[112] *See generally id.* While Congress passed the Pregnancy Discrimination Act, this does not impact suspect classes recognized under the Constitution. 42 U.S.C. § 2000e.

binary people who are capable of pregnancy."[113] She continued, "[w]e can recognize that [pregnancy] impacts women while also recognizing that it impacts other groups[;] those things are not *mutually exclusive*."[114] With leading legal scholars like Professor Bridges admitting that pregnancy is not exclusively a women's issue, it may be more difficult to argue that discrimination between pregnant and nonpregnant persons is synonymous with sex discrimination. [115] Whether Justice Ginsburg was or was not right in 2009 might be debatable. However, with society's "evolving standards,"[116] Justice Ginsburg's argument, from a living constitutionalist perspective, has

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[113] Jo Yurcaba, *Law Professor Khiara Bridges Calls Sen. Josh Hawley's Questions about Pregnancy 'Transphobic'*, NBC NEWS (July 13, 2022, 1:47 PM), nbcnews.com/nbc-out/out-politics-and-policy/law-professor-khiara-bridges-calls-sen-josh-hawleys-questions-pregnanc-rcna38015; *see also* Committee on the Judiciary, *A Post-Roe America: The Legal Consequences of the Dobbs Decision* (July 12, 2022), judiciary.senate.gov/meetings/a-post-roe-america-the-legal-consequences-of-the-dobbs-decision (emphases added).

[114] *Id.* (emphasis added).

[115] Ironically, many abortion advocates have criticized those who shape their abortion views in accordance with religious beliefs, suggesting that science alone ought to govern the abortion debate but have ignored basic biology when discussing gender. *See* PEW RSCH. CTR. ET AL, *supra* note 2.

[116] Atkins v. Virginia, 536 U.S. 304, 312 (2002) (holding that the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). Under a similar theory, the Court has invented new classes of minorities. *See Scalia: Don't Invent Minorities*, POLITICO (Aug. 19, 2013), politico.com/story/2013/08/antonin-scalia-dont-invent-minorities-095692#ixzz4079FBCbR. *But see* Gader Wren, *The Establishment Clause: No Longer a Lemon*, 100 U. DET. MERCY L. REV. ONLINE 1, 3-4 (2023) (suggesting that the evolving standards of decency approach is inconsistent with the original public understanding of the constitution).

lost much of its merit.[117] Thus, Congress likely lacks the power the Section 5 to pass abortion regulation.

A recent case before the Court has opened discussion as to whether Congress may indirectly regulate abortion through the Spending Clause. In the 2023-2024 term, the Court was asked to address the interplay between state laws restricting abortion and federal healthcare laws. In *Moyle v. United States*, the Court considered whether the Emergency Medical Treatment and Labor Act (EMTALA), a statute passed pursuant to the Spending Clause, obligates states to provide abortion services even when such services are restricted by state law.[118] EMTALA requires Medicare-funded hospitals to "scree[n]" and "stabilize" "any individual" who arrives at an emergency room with an "emergency medical condition" that seriously jeopardizes the patient's "health."[119] While the Court ultimately dismissed the writ of *certiorari* as improvidently granted,[120] concurring and dissenting opinions from the dismissal of *certiorari* may provide some insight to the Court's view as to states' outer limits when restricting abortion.

In a concurring opinion, Justice Kagan, joined by Justices Sotomayor and Jackson, suggested, perhaps unsurprisingly, that EMTALA preempts a state law that would otherwise prohibit abortion in circumstances where a mother's health is threatened.[121] Justice Barrett, joined

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[117] Though Justice Ginsberg *may* have been correct in 2009, recognizing that pregnancy discrimination is sex discrimination would require overruling precedent. The Court has made clear that "major legal or factual changes" will undermine a precedent; however, here the factual changes suggest that pregnancy discrimination is not inherently sex discrimination. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 294 (2022).

[118] 603 U. S. ___ (2024); *see also* 603 U. S. ___ (2024) (Barrett, J., concurring) ("We granted certiorari before judgment in these cases to decide whether the Emergency Medical Treatment and Labor Act (EMTALA) preempts a provision of Idaho law that prohibits abortions except when necessary to save the life of the mother.")

[119] 42 U.S.C. §§1395dd(a), (b)(1)(A), (e)(1)(A).

[120] 603 U. S. ___ (2024).

[121] 603 U. S. ___ (2024) (Kagan, J., concurring). Justice Jackson joined only Part II of the opinion.

by Chief Justice Roberts and Justice Kavanaugh, indicated that dismissal of *certiorari* was appropriate because of significant changes to the state law in question. Justice Barrett noted that the Federal Government conceded that EMTALA permits individual healthcare providers and hospitals to assert conscience objections and refuse the administration of abortion services.[122]

In a lengthy dissent, Justice Alito, joined by Justices Thomas and Gorsuch, argued that the instant issue was "easy" as EMTALA requires hospitals and medical providers to "protect both a pregnant woman and her 'unborn child.'"[123] In Part III of his opinion, Justice Alito signaled deference to a state's right to regulate issues of moral importance. Justice Alito wrote:

> Idaho has always permitted abortions that are necessary to preserve the life of a pregnant woman, but it has not allowed abortions for other non-life-threatening medical conditions. This balance reflects Idaho's judgment about a difficult and important moral question. By requiring Idaho hospitals to strike a different balance, the preliminary injunction thwarts the will of the people of Idaho as expressed in law by their elected representatives.[124]

In a lone opinion, concurring in part and dissenting in part, Justice Jackson argued that the Court should have resolved the case in the Federal Government's favor, holding that EMTALA preempts the Idaho abortion law.[125]

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[122] 603 U. S. ___ (2024) (Barrett, J., concurring) (citing Tr. Of Oral Arg. 87-89). In the event of forthcoming federal regulation, conscience and religious objections may prove as a means to limit abortion services in pro-life states.

[123] 603 U. S. ___ (2024) (Alito, J., dissenting) (quoting 42 U.S.C. §1395dd(e)(1)(A)(i)). Justice Gorsuch joined only Parts I and II of the opinion.

[124] 603 U. S. ___ (2024) (Alito, J., dissenting).

[125] 603 U. S. ___ (2024) (Jackson, J., concurring in part, dissenting in part).

Perhaps of greater note, Justice Jackson took aim at her judicial colleagues, writing, "today six Justices refuse to recognize the rights that EMTALA protects."[126] She argued that Justice Alito, Thomas, and Gorsuch would allow states to "have free rein to nullify" federal laws protecting abortion.[127] More critically, she indicated that Chief Justice Roberts and Justices Kavanaugh and Barrett lack the judicial fortitude to decide the instant case, "offer[ing] only murmurs that 'petitioners have raised a difficult and consequential argument' about Congress's authority under the Spending Clause" to regulate abortion protections.[128]

Collectively assessing the *Moyle* opinions, one may conclude that a state's ability to restrict abortion in light of federal laws passed pursuant to Congress' Spending Clause power is an open question.[129] Court observers might believe that three justices stand ready to allow states to regulate abortion free from federal interface, three justices may take a middle-ground approach to the evolving post-*Dobbs* abortion regulation world, and three justices will give deference to federal laws protecting access to abortion services. Of course, others may believe that *Moyle*, as a statutory interpretation case, involving a statute passed under the Spending Clause, provides an unreliable glimpse as to how the Court will address future challenges to federal abortion laws.

Should the Court hold that Congress has the constitutional power to regulate abortion, such a ruling would be a double-edged sword for both sides—but especially for pro-choice advocates. Suppose Congress

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[126] *Id.*

[127] *Id.*

[128] *Id.* Inasmuch as Justice Jackson seeks to find herself in the majority more frequently in cases involving social and political issues, she may wish to consider the relationship between Justices Hugo Black and Robert Jackson. *See generally* Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203 (suggesting that Justices Jackson and Hugo may have found themselves on different sides of legal issues due to personal conflicts with one another).

[129] Of course, precedent suggests that Congress cannot use its Spending Clause power to control state law or policy. *See generally* S. Dakota v. Dole, 483 U.S. 203, 205 (1987).

codifies the *Casey* viability standard. Pro-life states could simply recycle pre-*Dobbs* legislation to indirectly, but effectively, restrict abortion.[130] For instance, using their police powers, states may implement waiting periods,[131] parental consent requirements for minors,[132] admitting privileges,[133] and stringent facility requirements.[134] The effectiveness of these restrictions was most evident in Mississippi where pre-*Dobbs*, the state had only a single abortion clinic.[135] Conversely, if Congress passed an abortion ban, pro-choice states would not have countermeasures to provide abortion services. Under such an enactment, abortion services would not be available to any pregnant mother.

With no power to regulate abortion under the Fourteenth Amendment and with questionable commerce power, Congress lacks a clear constitutional basis to enact abortion protections or restrictions applicable to states. It is for this very reason that the *Dobbs* Court repeatedly iterated, "*States* may regulate abortion for legitimate reasons."[136]

VI. CONCLUSION

Post-*Dobbs*, most women seeking an abortion can secure abortion services in their home state or a

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[130] *See generally e.g.*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 US 833 (1992).
[131] City of Akron v. Akron Ctr. for Reprod. Health Inc., 462 U.S. 416 (1983).
[132] *See id.*; Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (overruling *Akron* and holding that parental consent did not place an undue burden on minors seeking abortion).
[133] Louisiana implemented admitting privilege requirements to restrict abortion, reducing the number of clinics from five to three. June Med. Servs. LLC v. Russo, 591 U.S. 299, 312 (2020).
[134] Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 591 (2016).
[135] Sarah McCammon, *This Mississippi Clinic is at the Center of the Case That Could End Roe v. Wade*, NPR (Dec. 1, 2021), npr.org/2021/12/01/1060023038/supreme-court-abortion-restrictions-mississippi.
[136] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 300 (2022) (emphasis added).

neighboring state.[137] State laws attempting to infringe on the right to travel will face strict scrutiny and will not likely pass constitutional muster. Similarly, the Court will likely strike down laws penalizing women who receive out-of-state abortion services. Congressional attempts to codify abortion rights are presumably futile as the Court is likely to hold that Congress lacks Section 5 power, commerce power, and spending power to regulate abortion. Pro-choice states and individuals should be the strongest advocates against congressional abortion regulation as pro-choice states would have no countermeasures against federal regulations restricting abortion. However, pro-life states may recycle pre-*Dobbs* tactics to limit abortion services notwithstanding federal laws or regulation protecting abortion access. In the end, as the *Dobbs* Court indicated, states will most likely have primary responsibility for regulating abortion.[138]

[137] *See supra* note 10.
[138] *See id.*