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Abortion "Shield" Laws Undermine Interstate Comity and Medical Practice and Raise Constitutional Questions

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KEY TAKEAWAYS

Abortion shield laws are intended to prevent states from enforcing pro-life laws and could irrevocably damage the long American tradition of interstate comity.

By shifting the location of care from the patient's to the doctor's location, abortion shield laws could fundamentally undermine the practice of medicine.

Normalizing interstate conflict and retaliation not only raises constitutional questions but may have a negative impact far beyond the abortion context.

The Constitution requires each state to give "Full Faith and Credit" to the "judicial proceedings of every other State"[1] and to return fleeing fugitives to the state where they had been charged with a crime.[2] This is what it means for states to be their own sovereigns and, at the same time, part of a union. Cooperation between states, in fact, has been the norm for more than two centuries.

Abortion, however, seems to change everything. California, for example, has enacted a law refusing to apply another state's pro-life law[3] or "[e]nforce or satisfy a civil judgment"[4] based on it.

Some commentators say that such abortion "shield" laws represent the "new abortion battleground"[5] and even a "new war between the states."[6] These laws, so far at least, are preemptive; no pro-life state has yet attempted to implement laws that would extend its legislative or enforcement authority over abortion

across state lines. This *Legal Memorandum* examines abortion shield laws and their impact on both the American tradition of interstate comity and medical practice, as well as their potential constitutional flaws.

Abortion Regulation Before *Roe v. Wade*

In *Dobbs v. Jackson Women's Health Organization*,[7] the Supreme Court described an "unbroken tradition of prohibiting abortion on pain of criminal punishment"[8] that began under the English common law in the 13th century.[9] Here, legislative bodies started regulating abortion long before the United States was born. New York City, for example, enacted an ordinance in 1716 prohibiting midwives from performing abortions.[10]

States began regulating and restricting abortion under the powers granted by the Constitution. The Tenth Amendment provides that powers "not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[11] These state powers include what is often referred to as a general "police power" to provide for "[p]ublic safety, public health, morality, peace and quiet, [and] law and order."[12] The states' reserved powers also include regulating the medical profession by proscribing certain procedures or setting standards for performing them[13] and regulating, restricting, or prohibiting abortion.

States began enacting pro-life statutes in 1821 and, within a few decades, the American Medical Association launched a nationwide campaign to combat the "unwarrantable destruction of human life."[14] As a result, the "vast majority of States enacted statutes criminalizing abortion at all stages of pregnancy."[15] By the 1960s, every state prohibited abortion—all but a few allowing it only to save the mother's life.[16] Between 1965 and 1972, nearly every state considered legislation to repeal or modify these abortion bans, but most chose to retain them. A total of 18 states marginally liberalized those laws, 14 of them allowing abortion in a few narrow circumstances and four others allowing abortion generally but only during early pregnancy.[17]

The Supreme Court brought this tradition to a sudden halt in 1973, holding in *Roe v. Wade*[18] that the word "liberty" in the Fourteenth Amendment includes a "right of privacy...broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[19] *Roe* challenged a Texas statute, enacted in 1857, that prohibited all abortions except those necessary to save the mother's life.[20] On the same day, in *Doe v. Bolton*,[21] the Court also struck down a more permissive 1968 Georgia law, based on the Model Penal Code,[22] that allowed abortions in several specific circumstances.[23]

The Court later reaffirmed *Roe* in 1983,[24] its "general principles" in 1986,[25] and, in *Planned Parenthood v. Casey* in 1992, reaffirmed *Roe*'s "essence."[26]

In *Dobbs*, the Supreme Court overruled both *Roe* and *Casey*,[27] holding that the Constitution "does not confer a right to abortion" and that the "authority to regulate abortion must be returned to the people and their elected representatives."[28] Combined with significant cultural changes, however, 50 years of the fiction that abortion is a constitutional "right" had taken a serious toll and, as a result, the pre-*Roe* and post-*Dobbs* legal landscape regarding abortion look very different.

Roe v. Wade's Distorting Effects

Abortion had become a volatile social, cultural, and political issue by 1973, when the Supreme Court held in *Roe* that the Constitution protects a right to abortion.[29] Finding an unenumerated right in a written Constitution is unusual in any case, but especially so when the created right runs counter to such long-standing legal, political, and social history. The Court's basis for doing so in *Roe* was just as radical as the conclusion itself.

The Court, for example, held that the Fourteenth Amendment protects an unwritten right to abortion without making any attempt to interpret that provision. Instead of the necessary legal analysis, the Court offered its own version of the "history of abortion,"[30] a narrative since thoroughly exposed as "radically revisionist,"[31] implying that this narrative in some way supported its constitutional conclusion. As its opinion plainly states, however, the Court's real reason for creating a right to abortion had nothing to do with either the Constitution or history. The Court simply believed that this right should exist to prevent the "[d]etriments"[32] for women that, in the Court's opinion, banning abortion would cause.

But the Court's innovations did not end there. The Court imposed rules for evaluating abortion restrictions during different "pregnancy stage[s],"[33] or trimesters.[34] Detached from the Constitution's text, and at odds with the long legal arc of increasing protection for human life in the womb, implementing the right to abortion produced erratic results that made whatever support it might first have enjoyed, even within the Supreme Court, begin to crumble. Chief Justice Warren Burger, for example, voted with the *Roe* majority but joined an opinion just three years later, in *Planned Parenthood v. Danforth*,[35] asserting that the way the Court was applying *Roe* could not be justified by the Constitution—or even by *Roe* itself. "These are matters which a State should be able to decide," he wrote, "free from the suffocating power of the federal judge, purporting to act in the name of the Constitution."[36]

The trimester framework proved "completely unworkable"[37] and, by 1992, the Court could reaffirm only *Roe*'s "central"[38] holding. In *Planned Parenthood v. Casey*, the Court abandoned the trimester framework in favor of what appeared to be a simpler inquiry, whether an abortion restriction places an "undue burden" on the right to abortion. "A finding of an undue burden," the Court explained, "is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[39]

Neither the conclusion that the Constitution protects a right to abortion nor any of the Court's attempts to implement this invented right had any basis in the Constitution's text or history. But its distorting effect was not limited to those discreet decisions. Maintaining this constitutional fiction required twisting and undermining long-standing legal principles that, by themselves, had nothing to do with abortion. "*Roe* and *Casey*," the Supreme Court explained in *Dobbs*, "have led to the distortion of many important but unrelated legal doctrines."[40] These include the "standard for facial constitutional challenges[,]...the Court's third-party standing doctrine[,]... standard *res judicata* principles[,]...the ordinary rules on the severability of unconstitutional provisions, as well as the rule that statutes should be read where possible to avoid unconstitutionality. And they have distorted First Amendment doctrines."[41]

More recently, when the Supreme Court struck down a Texas law requiring that abortionists have hospital admitting privileges,[42] Justice Clarence Thomas described in dissent "the Court's troubling tendency 'to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue.'"[43]

The Legal Landscape Since *Dobbs*

The legal landscape regarding abortion prior to *Roe* and since *Dobbs* share one important feature: The Constitution does not dictate how states may exercise their power to regulate abortion. The similarity, however, ends there and two significant differences are relevant to this analysis of abortion shield laws. The first is that, in contrast to America before *Roe*, most abortions today are legal in most states.

A Mirror Image. Overruling *Roe v. Wade* eliminated a precedent that had been "egregiously wrong from the start"[44] but could not erase its "damaging consequences."[45] Fifty years of the fiction that the Constitution itself protects a right to kill human beings in the womb dramatically restructured abortion's place in American politics and culture. Consider these examples:

- Forty-six states prohibited abortion from conception in 1973; 13 states do so today.

- Four states in 1973 allowed abortions up to 12 weeks; 23 states today allow abortion up to 12 weeks or longer.

- No state allowed abortion during the entire pregnancy in 1973; nine states today have no gestational limit.

- No state in 1973 explicitly protected abortion in its constitution; since *Dobbs*, voters in 11 states have amended their charters to protect either a right to abortion during all or most of pregnancy or an even broader right to "reproductive freedom."[46]

The pre-*Roe* and post-*Dobbs* abortion landscapes can also be compared by the application of existing abortion laws during each period. This estimate uses data from the Centers for Disease Control and Prevention (CDC) on the percentage of abortions that occurred before specific gestational points in 2021, the last full pre-*Dobbs* year when abortion was largely unrestricted.[47] Applied to these data, the laws that *Roe* rendered unconstitutional in 1973 prohibited approximately 90 percent of abortions nationally—while the laws in effect since *Dobbs* prohibit less than 20 percent.

In other words, the abortion landscape since *Dobbs* is nearly the mirror image of what it was before *Roe*. Abortion laws today allow nearly as many abortions as pre-*Roe* laws prohibited. This puts in stark relief claims by abortion advocates of a "crisis in abortion access"[48] and even "an unprecedented human rights crisis."[49] The Center for Reproductive Rights, for example, labels as "hostile" toward abortion any state that has *any* gestational limit on abortion. Twenty-eight states do so, with limits ranging from six weeks in four states, to viability (generally placed at 24 weeks) in 11 others.

Of all these abortion "bans," however, only the most restrictive—at six weeks—prohibits even a slim majority of abortions. The CDC data noted above show that laws prohibiting abortion at points during the second trimester cover, on average, fewer than 3 percent of abortions. Even Mississippi's 15-week ban challenged in *Dobbs*, a line drawn more than two months earlier than the Supreme Court previously said was permissible, covered only 4 percent of abortions. Labeling such permissive policies "hostile" to abortion is absurd under any meaning of that term.

Innovative Abortion Methods. The second significant difference in the abortion landscape is the emergence of "innovations in the delivery of abortion, which can now occur entirely online and transcend state boundaries."[50] The U.S. Food & Drug Administration (FDA) approved the use of the drug mifepristone in September 2000 to cause abortion during the first seven weeks of pregnancy,[51] albeit under close physician supervision. For the next two decades, mifepristone had to be dispensed "directly in a physician's office, and...administered in the presence of a health professional."[52]

In March 2016, the FDA extended mifepristone's use to 10 weeks but retained the requirement that that it "be dispensed in person to patients" and "only in certain clinical settings."[53] The American College of Obstetricians and Gynecologists sued the FDA in May 2020, obtaining an injunction against the in-person dispensing requirement during the COVID-19 pandemic.[54] But in December 2021, without reference to the pandemic, the FDA announced that it would no longer enforce that requirement.

Finally, in January 2023, the FDA formally changed the safety rules for mifepristone, "allow[ing] patients to obtain the drug without an in-person visit to a clinician, including through the mail from certified prescribers or pharmacies."[55] As a result of these changes, the annual number of abortions in the United States is on the rise after a 35-year decline.[56] The percentage of abortions caused by drugs increased from 6 percent in 2001, the year after the FDA approved the sale of mifepristone, to 54 percent in 2020[57] and 63 percent in 2023.[58] As noted above, abortion drugs today can be obtained "entirely online" and their delivery and use can "transcend state boundaries."[59]

Legislative Responses to the New Legal Landscape

Legalization of most abortions in most states means that women living in pro-life states have options for obtaining an abortion elsewhere. Even if this means traveling to another state, only three states in the continental U.S. do not border a state in which most abortions are legal. In addition, the growing interstate availability of abortion drugs means that women need not leave a pro-life state at all to have an abortion. These developments are leading pro-life legislators to consider whether, and how, they may extend legislative or enforcement authority across state lines. Legislators in pro-abortion states, meanwhile, are strategizing about how to counter or frustrate such efforts.

Legislative Authority. A state's extra-territorial reach may be divided between legislative and enforcement jurisdiction. Legislative jurisdiction,

or "the authority of a state to make law applicable to persons, property, or conduct,"[60] is "traditionally limited to the territory of the sovereign."[61] A state may not, for example, make criminal conduct that occurs in a state where it is legal. Nor can a state prohibit its residents from crossing state lines for the purpose of engaging in such legal conduct.[62]

Nonetheless, a state may assert jurisdiction over "wholly out-of-state conduct that causes detrimental effects within the state."[63] In *Strassheim v. Daily*,[64] for example, the Supreme Court held that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."[65]

Enforcement Authority. This "if" refers to the second category of extra-territorial jurisdiction, namely, enforcement authority. While legislative authority refers to the "scope of a statute's applicability," enforcement authority refers to "the scope of authority for a state's law enforcement agencies"[66] and is "much more tightly confined to state territory,"[67] necessarily relying upon the cooperation of another state.[68]

The Constitution requires such cooperation in some cases. Article IV, section 2, often referred to as the Extradition Clause, provides that when a person charged with a crime in one state flees to, and is found in, another, that person "shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."[69]

The principle of extradition, explains Professor Richard Peltz-Stelle, "dates from antiquity. The Framers' purpose was to foster comity between the states and to prevent criminals from evading law enforcement."[70] Similarly, Professor Leslie Abramson writes that "the object of the Extradition Clause is to avoid states becoming asylums for persons accused of crimes elsewhere, and the Clause effectively eliminates state boundaries in order to bring offenders to speedy trial."[71]

At the state level, 48 states have enacted the Uniform Criminal Extradition Act,[72] which provides for a similar process in which the governor of one state requests extradition from the governor of the asylum state. "The courts in the asylum state determine only whether the extradition documents are proper. The courts do not consider the merits of the underlying charge."[73]

Extending Pro-Life Laws. Pro-life state legislators have suggested several interstate steps to protect the unborn. In 2022, for example, Missouri State Representative Mary Elizabeth Coleman introduced, as an amendment to several pro-life bills, a measure allowing "private citizens to sue

anyone who helps a Missouri resident obtain an abortion out of state." She reportedly relied on "the novel legal strategy behind the restrictive law in Texas that...ban[s] abortions in that state after six weeks of pregnancy."[74]

The Texas law, however, allows private citizens to, in effect, enforce Texas' abortion ban—a criminal statute—within Texas via a civil lawsuit. Coleman's measure, in contrast, would target anyone even tangentially involved in an abortion performed on a Missouri resident in another state. These would include, for example, hotline staffers who make abortion appointments, marketing representatives who advertise out-of-state clinics, and out-of-state doctors who perform the procedure itself. No legislation of this kind has been given serious attention, and Coleman's bill neither had co-sponsors nor received any hearings.

The Idaho legislature in 2023 enacted a law prohibiting what it calls "abortion trafficking."[75] While media reports mischaracterize this law as generally "restricting travel for abortions,"[76] it requires "the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor." Consent by a parent or guardian, in fact, is an affirmative defense under this law. The Idaho law is the first to expressly criminalize assisting with an out-of-state abortion, albeit in a specific limited context.[77]

Federal legislation with a similar focus has been introduced during each Congress since 2009. The latest version, S. 78 introduced by Senator Marco Rubio (R–FL), prohibits knowingly transporting a minor across a state line "with the intent that the minor obtain an abortion, and thereby in fact abridges the right of a parent of the minor under a law requiring parental involvement in a minor's abortion decision, in force in the State in which the minor resides."[78]

Prior to the November 2024 election, 20 states prohibited using telemedicine for either prescribing or obtaining abortion drugs.[79] Voters in two of those states, Arizona and Missouri, amended their state constitutions to allow abortion restrictions only after viability. Whether that constitutional change will affect their ban on abortion drugs, which may only be used during the first 10 weeks of pregnancy, is unclear. Four other states require at least one in-person interaction with a medical professional.

Abortion Shield Laws

Three law professors are often credited with developing the theory underlying abortion shield laws. "[A]t their core," they write, abortion shield laws "seek to protect abortion providers, helpers, and seekers in states where abortion remains legal from legal attacks taken by antiabortion [sic] state actors."[80] The Center on Reproductive Health, Law, and Policy[81] identifies 23 states that have enacted at least one of three main types of abortion shield laws.

- **Investigations and prosecutions.** Twenty-two of these states have laws that prohibit state agencies from cooperating in abortion-related investigations originating outside the state. This includes refusal to honor requests not only for extradition but also for issuance of subpoenas, search warrants, or witness summonses.

- **Professional discipline.** Eighteen states have laws prohibiting adverse actions related to abortion providers' licenses, board discipline, or denial or restriction of medical facility privileges.[82]

- **Civil liability.** Seventeen states have laws refusing to apply pro-life states' laws or to enforce any civil judgment issued under those laws. In some states, this includes so-called "clawback" provisions aimed at recovering damages from litigation in a pro-life state for providing, receiving, or assisting in abortion.[83]

Abortion shield laws in these categories are preemptive because "targeting cross-border abortion provision has been almost nonexistent until this point."[84] While some states have laws prohibiting obtaining abortion drugs virtually, for example, it remains to be seen whether, or to what extent, these laws can be enforced in practice. A pro-life state, for example, might attempt to use civil or criminal law against out-of-state providers of abortion drugs, arguing that those actions have negative consequences within the pro-life state.[85] This would be especially true when women using those drugs have medical complications. In addition, the states that now refuse cooperation with investigations involving pro-life laws previously enacted the Uniform Criminal Extradition Act, referenced above, and courts will have to determine whether this creates a conflict requiring legislative resolution.

Impact of Shield Laws

It warrants repeating that, at least when not mandated by the Supreme Court, abortion is more widely and easily available today than virtually any time in American history. Most abortions are legal in most states, the most common method of abortion is available entirely online, and a growing number of states are explicitly protecting abortion access in statutes and constitutions. Abortion shield laws, therefore, are not for the purpose of expanding abortion access within a particular state but to frustrate or undermine other states' ability to enforce their pro-life laws.

Interstate Comity. As noted above, the principle of interstate comity has very long and deep roots and is essential for maintaining basic unity among sovereign states. This is reflected not only in the Constitution itself, but in both federal and state laws and other commitments to strengthen interstate comity. Congress, for example, enacted the first statute to implement the Constitution's Extradition Clause in 1793.[86] In addition, nearly every state has adopted multiple laws to cooperate with each other in criminal and civil matters. For instance:

- Fifty states have adopted the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings.[87]
- Forty-eight states have joined the Interstate Agreement on Detainers.[88]
- Forty-six states have adopted some form of the Interstate Depositions and Discovery Act.[89]

Abortion shield laws not only conflict with existing state laws like these, but their advocates concede that undermining interstate comity is, in fact, their purpose. Professors David Cohen, Greer Donley, and Rachel Rebouche write that "there is no denying that each of these [abortion shield] proposals would threaten basic concepts of comity between states, possibly resulting in the breakdown of state-to-state relations and ultimately retaliation."[90] These measures "would also intensify interstate conflict in a way that could have unintended consequences for other areas of law as well as for the general fabric of the country's federalist form of government."[91]

These professors also claim that the "breakdown in state-to-state relations and ultimately retaliation...are the inevitable effects of overturning *Roe*."[92] In this they are wrong. There is no necessary connection between a state's freedom to change its own laws or policies with regard to an issue and attempting to frustrate other states' efforts to enforce a different policy on that issue. Interstate comity of the kind described here is, by itself, a critical feature of the kind of polity, a union of sovereign states, that America's Founders established.

If anything was inevitable, or at least likely, it is that, after 50 years under *Roe v. Wade*, many state legislatures would legalize most abortions. Doing so does not require sacrificing, or even questioning, a state's previous commitment to interstate comity, but carving out an exception to that commitment for this issue opens the door to others. Far from inevitable, sacrificing comity and moving toward normalizing interstate conflict and retaliation is a choice, and one that will likely have long-term negative consequences far beyond the abortion context.

The Practice of Medicine. In April 2022, the Federation of State Medical Boards (FSMB), which represents the 70 state medical and osteopathic boards across the United States and its territories, adopted a report on the appropriate use of telemedicine technologies. The model guidelines outlined in this report include the following:

> A physician must be licensed, or appropriately authorized, by the medical board of the state where the patient is located. The practice of medicine occurs where the patient is located at the time that telemedicine technologies are used. Physicians who diagnose, treat, or prescribe using online service sites are engaging in the practice [of] medicine and must possess appropriate licensure in all jurisdictions where their patients receive care.[93]

This is not simply a recommended, or even a preferred, practice. The FSMB House of Delegates approved a policy statement in April 2003 that identified "*essentials* of a modern medical practice."[94] These include treating the practice of medicine within a state "by electronic or other means without a license…[as] a felonious offense" and that grounds for disciplinary action should include "practicing medicine in another state or jurisdiction without appropriate licensure."

Advocates behind abortion shield laws do not dispute that this is the uniform standard for medicine, in general, and telehealth medicine, in particular. "Standard telehealth practice," they write, "considers medical care to have occurred where the patient is located. Accordingly, the provider must be licensed to practice in the state where the patient is located and follow that state's laws."[95] They even concede that "there are important reasons for defining care as occurring where the patient is located—the state where the patient resides typically has the strongest interest and best means of protecting the safety of the resident patient."[96]

As they do regarding interstate comity, these advocates acknowledge that "shifting the location of care is a significant departure from the standard of care, the provisions of state medical practice acts, and the guidance of professional organizations."[97] Nonetheless, they claim that further expanding abortion access justifies undermining this essential foundational principle of medical practice. Several states have enacted laws purporting to "shift the locale of care for a woman who received abortion-inducing drugs from the woman's home state to the abortionist's home state by shielding abortionists 'regardless of the patient's location.'"[98]

This, of course, is simply a legal fiction. It cannot change the fact that a doctor can prescribe and provide abortion drugs to a patient he will never

see in person, and with whom he will not be involved when treating any resulting complications. Pretending that a patient is in a state she may never visit in her lifetime may benefit the doctor, but it certainly does not neutralize the "important reasons for defining care as occurring where the patient is located."

Constitutional Questions. The Constitution requires that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[99] It also requires that states comply with requests to extradite individuals who have been charged with a crime in another state and fled across state lines.[100] Like interstate comity, generally, this requirement is necessary to maintain a union of sovereign states and must apply even to judgments from other states that "offend the public policy of the enforcing state."[101]

A growing number of states, however, are enacting laws refusing to, as California's abortion shield law puts it, apply another state's law[102] or "[e]nforce or satisfy a civil judgment"[103] based on another state's law that restricts abortion. Depending on the type of judgment, this may conflict with the Full Faith and Credit Clause.

Conclusion

Professors Cohen, Donley, and Rebouche write that abortion shield laws can "serve as a counteracting force to those states that might otherwise seek to extend their jurisdiction beyond their borders."[104] Especially when abortion access itself is still expanding, undermining interstate comity and the practice of medicine—as well as creating constitutional problems—is a steep price to pay for what amounts to little more than a potential deterrent.

Dissenting in *Thornburgh v. ACOG*, Justice Sandra Day O'Connor lamented that "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion."[105] Abortion's distorting effects, however, did not abate with overruling *Roe v. Wade*. Despite abortion access rapidly expanding, abortion advocates want abortion treated differently[106] in almost every respect.

Just as implementing *Roe v. Wade* distorted many legal principles unrelated to abortion, abortion shield laws will not simply distort, but perhaps irrevocably damage, interstate comity and medical practice in unforeseen ways.

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Endnotes

1. U.S. Const., art. IV, § 1.
2. U.S. Const., art. IV, § 2, cl. 2.
3. Cal. Health & Safety Code, § 123467.5(b)(1).
4. *Id*. § 123467.5(b)(2).
5. David S. Cohen et al., *The New Abortion Battleground*, 123 Colum. L. Rev. 1, 1 (2023).
6. Pam Belluck, *Abortion Shield Laws: A New War Between the States*, N.Y. Times (Feb. 22, 2024), https://www.nytimes.com/2024/02/22/health/abortion-shield-laws-telemedicine.html.
7. 597 U.S. 215 (2022).
8. *Id*. at 250.
9. *See* Thomas Jipping, *The Attack on Legal Protection for the Unborn Moves to State Courts*, Heritage Found. Legal Memorandum No. 322 (Jan. 5, 2023), at 2, https://www.heritage.org/life/report/the-attack-legal-protection-the-unborn-moves-state-courts.
10. *Id*.
11. *See* Charles Cooper, *Reserved Powers of the States*, in Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/amendments/10/essays/163/reserved-powers-of-the-states.
12. Berman v. Parker, 348 U.S. 26, 32 (1954).
13. *See* Gonzales v. Oregon, 546 U.S. 243, 270 (2006). Even in *Roe*, the Supreme Court acknowledged that "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." Roe v. Wade, 410 U.S. 113, 154 (1973).
14. *See* Frederick N. Dyer, *American Medical Association Documents That Led to Law Overturned by* Roe v. Wade, 26 J. of Amn. Physicians and Surgeons 83 (2021). At its 1859 national convention, the AMA endorsed a report rejecting the "mistaken and exploded dogma" that the unborn child has no "independent and actual existence…as a living being." *Report on Criminal Abortion*, 12 Transactions of the Am. Med. Ass'n 75–78 (1859). The convention unanimously adopted a resolution urging state medical societies to lobby for state laws to prohibit abortion throughout pregnancy.
15. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 248 (2022). See also *id*. at 250 ("by 1868 the vast majority of States criminalized abortion at all stages of pregnancy").
16. *See* Heather D. Boonstra et al., *Abortion in Women's Lives* 11, Guttmacher Inst. (2006), https://www.guttmacher.org/sites/default/files/pdfs/pubs/2006/05/04/AiWL.pdf. See also *Dobbs*, 597 U.S. at 248, quoting *Roe*, 410 U.S. at 139 ("By the end of the 1950s, according to the *Roe* Court's own count, statutes in all but four States…prohibited abortion 'however and whenever performed, unless done to save or preserve the life of the mother.'").
17. *Roe*, 410 U.S. at 140 n.37. See also Karen J. Lewis et al., Cong. Rsrch. Serv., IB74019, Abortion: Judicial and Legislative Control 3 (1981), https://digital.library.unt.edu/ark:/67531/metacrs8401/m2/1/high_res_d/IB74019_1981Oct13.pdf; Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?* 6 Guttmacher Pol'y Rev. 8, 9 (March 2003).
18. 410 U.S. 113 (1973).
19. *Id*. at 153.
20. *Id*. at 119.
21. 410 U.S. 179 (1973).
22. The American Law Institute first published the Model Penal Code in 1962, as a set of standardized proposals for states to consider. Most states have adopted one or more of its provisions. *See* model Penal Code (Am. L. Inst., 1962) [https://archive.org/details/ModelPenalCode_ALI/page/n1/mode/2up].
23. 410 U.S. at 181.
24. Akron v. Akron Center for Reproductive Health, 462, U.S. 416, 420 (1983).
25. Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 759 (1986).
26. Planned Parenthood v. Casey, 505 U.S. 833, 870 (1992). See also *id*. at 846 (reaffirming *Roe*'s "central holding").
27. *Id.* at 833.
28. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 292 (2022).
29. See Jipping, *supra* note 9, at 2–5.
30. Roe v. Wade, 410 U.S. 113, 129 (1973).
31. Stephen G. Gilles, *Roe's Life-or-Health Exception: Seld-Defense or Relative-Safety*, 825 Notre Dame L. Rev. 525, 541 (2010).
32. *Roe*, 410 U.S. at 153.

33. *Id*. at 164.
34. During the first trimester, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id*. During the second trimester, states may "regulate the abortion procedure in ways that are reasonably related to maternal health." *Id*. After "viability," states may "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id*. at 165. The Court defined viability as the "point at which the fetus…is potentially able to live outside the mother's womb, albeit with artificial aid." *Id*. at 160. At the time *Roe* was decided, the Court explained, viability was "usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Id*.
35. 428 U.S. 52 (1976).
36. *Id*. at 93 (White, J., concurring in part and dissenting in part). Chief Justice Burger dissented from a 1986 decision that struck down several long-standing abortion restrictions. Thornburgh v. American College of Obstetricians & Gynecologists, 462 U.S. 747, 785 (1986) (Burger, C.J., dissenting). He wrote:

    > In discovering constitutional infirmities in state regulations of abortion that are in accord with our history and tradition, we may have lured judges into "roaming at large in the constitutional field." The soundness of our holdings must be tested by the decisions that purport to follow them. If *Danforth* and today's holding really mean what they seem to say, I agree we should reexamine *Roe*.

37. Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 452 (1983) (O'Connor, J. dissenting). Justice Sandra Day O'Connor explained why: "The *Roe* framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception." *Id*. at 458.
38. Planned Parenthood v. Casey, 505 U.S. 833, 845 (1992).
39. *Id*. at 877.
40. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 286 (2022).
41. *Id*. at 286–87. *See also Thornburgh*, 476 U.S. at 814 (1986) (O'Connor, J., dissenting) ("[N]o legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.").
42. Whole Women's Health v. Hellerstedt, 579 U.S. 582 (2016).
43. *Id*. at 628 (Thomas, J., dissenting), quoting Stenberg v. Carhart, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting).
44. *Dobbs*, 579 U.S. at 231.
45. *Id*.
46. Voters in California, Michigan, and Vermont amended their constitution in 2020 to protect a right to "reproductive freedom" and Ohio voters did the same in 2023. In 2024, voters in Arizona, Colorado, Maryland, Missouri, Montana, and Nevada amended their constitutions to allow abortions prior to viability (24 weeks), and New York voters added a provision prohibiting unequal treatment based on "reproductive healthcare and autonomy." Nebraska voters rejected a proposal to allow abortion before viability but adopted one limited to the first trimester.
47. Katherine Korsmit et al., *Abortion Surveillance—United States, 2021*, 72 Surveillance summaries 1 (Nov. 24, 2023), Table 10, available at https://www.cdc.gov/mmwr/volumes/72/ss/ss7209a1.htm. Data for the 10 states that do not report their data to the CDC are available from KFF, formerly the Kaiser Family Foundation. *See Number of Reported Legal Abortions by State of Occurrence*, KFF (2021), https://www.kff.org/womens-health-policy/state-indicator/number-of-abortions/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D. The gestational limits imposed by states today are from the Guttmacher Institute (GI). See *State Bans on Abortion Throughout Pregnancy*, Guttmacher Inst. (Oct. 7, 2024), https://www.guttmacher.org/state-policy/explore/state-policies-abortion-bans.
48. Beatrice Lynch et al., *Addressing a Crisis in Abortion Access*, 140 Obstet. & Gynecol. 110 (2022).
49. *Human Rights Crisis: Abortion in the United States After* Dobbs, Hum. Rts. Watch (April 2023), https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs#_ftn1. Other advocates make blatantly false claims about the legality of abortion. Amnesty international, for example, claimed in August 2024 that abortion was "totally or nearly totally banned in 21 states." *Abortion in the USA: The Human Rights Crisis in the Aftermath of Dobbs*, Amnesty Int'l (Aug. 5, 2024), https://www.amnestyusa.org/reports/abortion-in-the-usa-the-human-rights-crisis-in-the-aftermath-of-dobbs/.
50. Cohen et al., *The New Abortion Battleground*.
51. *See* Judith A. Johnson, Cong. Rsch. Serv., Abortion: Termination of Early Pregnancy with RU–486 (Mifepristone) 2 (2001).
52. U.S. Gov't Accountability Off., GAO–08–751, Approval and Oversight of the Drug Mifeprex 45 (2008).
53. Julie Dohm and Mingham Ji, *An Introduction to Risk Evaluation and Mitigation Strategies*, 104 Contraception 6 (2021), https://www.contraceptionjournal.org/action/showPdf?pii=S0010-7824%2821%2900134-7; Melanie Israel, *Chemical Abortion: A Review*, Heritage Found. Backgrounder No. 3603 (Mar. 26, 2021), at 9, https://www.heritage.org/life/report/chemical-abortion-review.
54. *See* Food & Drug Admin., v. Am. Coll. Obstetricians and Gynecologists, 141 S.Ct. 578 (2021).

55. Jennifer A. Staman, Cong. Rsch. Serv., LSB10919, Abortion Medication: New Litigation May Affect Access 3 (2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10919.
56. Both the Centers for Disease Control and Prevention and the Guttmacher Institute (GI), the two primary sources of abortion data, have documented this pattern. The CDC data come from reports by state health departments, *CDC's Abortion Surveillance System FAQs*, Ctrs. Disease Control (Nov. 27, 2024), https://www.cdc.gov/reproductive-health/data-statistics/abortion-surveillance-system.html; the GI data come from surveys of abortion providers. Because of this difference in data collection methods, GI totals have averaged 30 percent higher than CDC totals since 1973.
57. *See* Rachel K. Jones et al., *Medication Abortion Now Accounts for More Than Half of All U.S. Abortions*, Guttmacher Inst. (Feb. 2022), https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions.
58. *See Monthly Abortion Provision Study*, Guttmacher Inst. (July 2024), https://www.guttmacher.org/monthly-abortion-provision-study.
59. Cohen et al., *The New Abortion Battleground*, at 1.
60. Darryl K. Brown, *Extraterritorial State Criminal Law, Post-Dobbs*, 113 J. Crim. L. & Criminology 853, 860–61 (2024), quoting Restatement (Fourth) of the L. of Foreign Rel. § 401 (Am L. Inst. 2018).
61. *Id*. at 861.
62. Although acknowledging that "[t]he word 'travel' is not found in the text of the Constitution" (Saenz v. Roe, 526 U.S. 489, 498 (1999)), the Supreme Court has held that the "the constitutional right to travel from one State to another" (United States v. Guest, 383 U.S. 757, 757 (1966)), is "a virtually unconditional personal right, guaranteed by the Constitution to us all" (Shapiro v. Thompson, 394 U.S. 618, 643 (1969) (Stewart, J., concurring)).
63. *Id*. A state may also "criminalize extraterritorial conduct if any constituent element…of the offense occurred within the state." Brown, *supra* note 60, at 861–62.
64. 221 U.S. 280 (1911).
65. *Id*. at 285.
66. Brown, *supra* note 60, at 864.
67. *Id*. at 872.
68. *See* Huntington v. Attrill, 146 U.S. 657, 669 (1892) ("Crimes and offenses against the laws of any State can only be defined, prosecuted and pardoned by the sovereign authority of that State; and the authorities, legislative, executive or judicial, of other States take no action with regard to them, except by way of extradition to surrender offenders to the State whose laws they have violated."). The same is true regarding the United States' assertion of extra-territorial jurisdiction over conduct that occurs in other countries. See Charles Doyle, Cong. Rsrch. Serv. RS42297, Extraterritorial Application of American Law: An Abbreviated Sketch 4 (2023).
69. U.S. Const., art. IV, § 2. This language is virtually unchanged from Article IV, Paragraph 2, of the Articles of Confederation and was unanimously approved at the convention that drafted the Constitution. It is codified at 18 U.S.C. § 3182. The Supreme Court has held that extradition is mandatory if the constitutional or statutory terms are met. See Puerto Rico v. Branstad, 483 U.S. 219 (1987).
70. Richard Peltz-Stelle, *The Interstate Rendition Clause*, in Heritage Guide to the Constitution, https://www.heritage.org/constitution/#!/articles/4/essays/123/interstate-rendition-clause.
71. Leslie W. Abramson, *Extradition in America: Of Uniform Acts and Governmental Discretion*, 33 Baylor L. Rev. 793, 794 (1981).
72. South Carolina and Missouri have not adopted the Uniform Criminal Extradition Act but have their own extradition laws.
73. Lance A. Cooper, *Extradition and Rendition*, Ctr. for the Study of Federalism (2018), https://federalism.org/encyclopedia/no-topic/extradition-and-rendition/. See also New Mexico *ex rel*. Ortiz v. Reed, 524 U.S. 151, 153 (1997) ("In case after case we have held that claims relating to what actually happened in the demanding State, the law of the demanding State, and what may be expected to happen in the demanding State when the fugitive returns are issues that must be tried in the courts of that State, and not in those of the asylum State.").
74. Caroline Kitchener, *Missouri Lawmaker Seeks to Stop Residents From Obtaining Abortions Out of State*, Wash. Post (March 8, 2022), https://www.washingtonpost.com/politics/2022/03/08/missouri-abortion-ban-texas-supreme-court/. *See also* Alice Miranda Ollstein and Megan Messerly, *Missouri Wants to Stop Out-of-State Abortions. Other States Could Follow*, Politico (March 19, 2022, 7:00 AM), https://www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539.
75. H.R. 242, 67th Leg., 1st Sess. (Idaho, 2023), https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2023/legislation/H0242.pdf.
76. *See* Aria Bendix, *Idaho Becomes One of the Most Extreme Anti-Abortion States With Law Restricting Travel for Abortion*, NBC News (Apr. 6, 2023, 8:24 AM), https://www.nbcnews.com/health/womens-health/idaho-most-extreme-anti-abortion-state-law-restricts-travel-rcna78225/.
77. *Id.*
78. Since the 111th Congress (2009–2010), this bill has been titled the Child Interstate Abortion Notification Act. From the 105th (1997–1998) and 110th (2007–2008) Congresses, it was titled the Child Custody Protection Act. See S. 78 and H.R. 792 in the 118th Congress; S. 109 and H.R. 2223 in the 117th Congress; S. 119 and H.R. 611 in the 116th Congress; S. 224 and H.R. 692 in the 115th Congress; S. 404 and H.R. 803 in the 114th Congress; S. 369 and H.R. 732 in the 113th congress; S. 1241 and H.R. 2299 in the 112th Congress; S. 2543 and H.R. 634 in the 111th Congress; H.R. 1063 in the 110th Congress; S. 403 and H.R. 748 in the 109th Congress; S. 851 and H.R. 1755 in the 108th Congress; H.R. 476 in the 107th Congress; S. 661 and H.R. 1218 in the 16th Congress; S. 1645 and H.R. 3682 in the 105th Congress.

79. *See Reproductive Health Initiative for Telehealth Equity & Solutions, Map of State Policies Impacting the Provision of TMAB*, RHITES (Oct. 4, 2024), https://www.rhites.org/tmab-map.
80. David S. Cohen et al., *Abortion Shield Laws*, 2 NEJM EVIDENCE (March 28, 2023), https://evidence.nejm.org/doi/full/10.1056/EVIDra2200280.
81. *Shield Laws for Reproductive and Gender-Affirming Health Care: A States Law Guide*, UCLA LAW, https://law.ucla.edu/academics/centers/center-reproductive-health-law-and-policy/shield-laws-reproductive-and-gender-affirming-health-care-state-law-guide.
82. *See* David S. Cohen et al., *Understanding Shield Laws*, 51 J. L. MED. & ETHICS 584, 586–87 (2023).
83. *Id*. at 587–88.
84. Cohen et al., *The New Abortion Battleground*, at 22.
85. Cohen et al., *Abortion Shield Laws*.
86. See Peltz-Stelle, *supra* note 70.
87. *See Subpoenaing Out-of-State Witnesses in Criminal Proceedings: A Step-by-Step Guide*, NAT'L ASSN. OF ATTYS. GEN. (May 18, 2021), https://www.naag.org/attorney-general-journal/subpoenaing-out-of-state-witnesses/.
88. Pub. L. 91–538, 84 Stat. 1397.
89. *See Interstate Depositions and Discovery Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=181202a2-172d-46a1-8dcc-cdb495621d35.
90. Cohen et al., *The New Abortion Battleground*, at 52.
91. *Id*.
92. *Id*. at 52.
93. *The Appropriate Use of Telemedicine Technologies in the Practice of Medicine*, FED'N STATE MED. BDS., https://www.fsmb.org/siteassets/advocacy/policies/fsmb-workgroup-on-telemedicineapril-2022-final.pdf.
94. *A Guide to the Essentials of a Modern Medical Practice Act*, FED'N STATE MED. BDS. (emphasis added), https://www.medicallicensedirect.com/files/A_Guide_to_the_Essentials_of_a_Modern_Medical_Practice_Act.pdf.
95. David S. Cohen et al., *Abortion Pills*, 76 STANFORD L. REV. 317, 356 (2024).
96. Scholar Mary Harned also points out that more than three-fourths of the states have joined the Interstate Medical Licensure Compact, which provides that "physicians subject to discipline in one state will be subject to discipline in another." See Mary Harned, *Abortion "Shield Laws": Pro-Abortion States Seek to Force Abortion on Life-Affirming States*, 96 ONPOINT 9 (Aug. 2023). *See also Introduction*, INTERSTATE MED. LICENSURE COMPACT, https://imlcc.com/a-faster-pathway-to-physician-licensure/.
97. Cohen et al., *Abortion Pills*, at 358. See also *id*. at 359.
98. *Id*. at 356. See also *id*. at 357 ("states could explicitly define…the location of abortion care as the provider's physical location rather than the patient's.").
99. U.S. CONST. art. IV, § 1. *See* Erin O'Connor, *Full Faith and Credit Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION, https://www.heritage.org/constitution/#!/articles/4/essays/121/full-faith-and-credit-clause.
100. U.S. CONST. art IV, § 2. *See* Richard Peltz-Stelle, *Interstate Rendition Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION, https://www.heritage.org/constitution/#!/articles/4/essays/123/interstate-rendition-clause.
101. O'Connor, *supra* note 99.
102. CAL. HEALTH & SAFETY CODE, § 123467.5(b)(1).
103. *Id*. at § 123467.5(b)(2).
104. Cohen et al., *Understanding Shield Laws*, at 590.
105. 476 U.S. at 814.
106. *See* Cohen et al., *Abortion Pills*, at 360.