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Abortion, Citizenship, and the Right to Travel

By Rebecca E. Zietlow*

Abstract

This article considers the changed landscape for abortion rights since the United States Supreme Court's opinion in Dobbs v. Jackson Women's Health. Before Dobbs, the right to choose an abortion was a fundamental right under federal law, enforceable against all state governments. After Dobbs, the scope of one's right to choose an abortion depends on the state in which one lives, and if abortion is illegal in their home state, their right to travel to another state where abortion is legal. The right to travel is particularly important for workers who must live in an anti-abortion state because their jobs are located there. Yet some states and localities have enacted laws effectively banning the right to travel out of state to obtain abortions—and other states are considering such laws. This article considers the origins and scope of that right to travel, based in the efforts of fugitives from slavery and the activism of free Black people in the anti-slavery and civil rights movements. The article argues that the right to travel to obtain an abortion is essential to equal citizenship, protected by Article IV and the Privileges or Immunities Clause of the Fourteenth Amendment. States banning travel to obtain abortions also arguably impose involuntary servitudes on those travelers, violating the Thirteenth Amendment.

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I. INTRODUCTION

The United States Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*¹ altered the constitutional landscape relating to the right to choose an abortion.² Prior to the Court's ruling in *Dobbs*, the right to choose an abortion was a fundamental right protected by the Fourteenth Amendment against state interference.³ The scope of the right to choose an abortion was a matter of federal law, governed by the principles of federalism. Since the Court's ruling in *Dobbs*, however, the right to choose an abortion is no longer a federal right. Many states recognize that right under their laws and constitutions.⁴ Since *Dobbs*, however, other states have enacted outright bans or severe restrictions on the right to choose.⁵ Since the Court's decision in *Dobbs*, thirty legislatures in thirty states have introduced legislation banning abortion after twelve weeks.⁶ State legislators in anti-abortion states have enacted laws that impose barriers on out-of-state travel to obtain abortions, and many more states are considering adopting similar laws.⁷ The scope of a person's right to obtain an abortion is now governed, not by federal state relations, but by principles of interstate comity and interstate

¹ 597 U.S. 215 (2022).

² See generally David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023).

³ See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (identifying the right to choose an abortion as a fundamental right).

⁴ See generally CTR. FOR REPROD. RTS., STATE CONSTITUTIONS AND ABORTION RIGHTS (2022), <https://reproductiverights.org/wp-content/uploads/2022/07/State-Constitutions-Report-July-2022.pdf>. E.g., *Hodes & Nauser v. Schmidt*, 440 P.3d 461 (Kan. 2019) (finding right to abortion protected by state constitution); H.B. 4664, 103d Gen. Assemb., Reg. Sess. (Ill. 2023) (protecting the right to abortion and expanding access and protections for those in other states seeking care in Illinois).

⁵ By November, 2022, twenty-one states had banned or tried to ban abortions no matter what the circumstances. See Cohen et al., *supra* note 2, at 3. The landscape is changing rapidly. For updated information, the Guttmacher Institute's interactive map is a good source. *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST. (Mar. 25, 2024), <https://states.guttmacher.org/policies>.

⁶ *An Overview of Abortion Laws*, GUTTMACHER INST. (Aug. 31, 2023), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>.

⁷ See Noah Smith-Drelich, *Travel Rights in a Culture War*, 101 TEX. L. REV. ONLINE 21, 23–24 (2022), <https://texaslawreview.org/wp-content/uploads/2022/11/Smith-Drelich.Publication.pdf>; *infra* notes 110–14 and accompanying text.

relations.⁸ People who live in states that ban abortions must travel to other states in order to obtain the procedure. This article discusses the historical origins of the constitutional right to travel—disputes over the rights of free Black people and fugitives from slavery in the antebellum era—and explores the extent to which people travelling across state borders to obtain abortions have a constitutional right to do so. Depriving people seeking abortions of the right to travel treats them as second class citizens with fewer rights than people travelling across state borders for other reasons.⁹ Such a deprivation also undermines principles of interstate comity that are essential to the structure of our national government.

The right to travel is particularly important to workers because they often need to travel to engage in their economic lives and exercise other fundamental rights.¹⁰ Many workers can't choose the state in which they live based on state policies and protections for rights. They must go to where they find employment, and their mobility is limited to where they can find a job. Thus, the right to an abortion is integrally linked to women's equal participation in the labor market.

Chattel slavery in the United States imposed a unique and total violation of human rights.¹¹ The system of slavery in this country was race based and hereditary.¹² Enslaved people were treated not as human beings, but as property.¹³ Enslaved people were entirely deprived of bodily autonomy for their entire lives.¹⁴ They not only lacked freedom of movement, but also lacked any control over their reproductive lives.¹⁵ People seeking abortions today do not suffer from the same total lack of bodily autonomy as enslaved people did in the antebellum era. All people seeking abortions do suffer from a lack of autonomy over their reproductive lives. They seek the right to freedom of movement in order to remedy that lack of autonomy.

⁸ Cohen et al., *supra* note 2, at 4 (“[O]verturing *Roe* and *Casey* will create a complicated world of novel interjurisdictional legal conflicts over abortion.”).

⁹ See Seth Kreimer, *The Law of Choice and the Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 NYU L. REV. 451 (1992).

¹⁰ See generally KATHRYN ANNE EDWARDS, ECON. POL'Y INST., WORKER MOBILITY IN PRACTICE (2022), <https://files.epi.org/uploads/215905.pdf>.

¹¹ See generally STANLEY M. ELKINS, SLAVERY (1959).

¹² See generally *id.*

¹³ See generally *id.*

¹⁴ See DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY 4 (1997).

¹⁵ *Id.* at 6.

Moreover, women of color have always struggled to exercise control over their reproductive lives.¹⁶ Thanks in large part to the struggles of enslaved people and free Black civil rights activists in the antebellum era, people seeking abortions today have the right to travel to exercise their reproductive autonomy.¹⁷

Freedom of movement is a fundamental human right, recognized in international law.¹⁸ People crossing borders to assert rights is itself an exercise of rights, an assertion of one's humanity and belonging to our national polity. The right to travel is also a well-established constitutional right, protected by Article IV and the Fourteenth Amendment, inherent in the structure of our federal government and essential to interstate comity.¹⁹ Without the ability to travel to obtain an abortion, people seeking abortions are denied the rights of equal citizenship.²⁰ Laws that deny that right to people seeking an abortion treat them as second class citizens by imposing discriminatory burdens on the exercise of a fundamental right.²¹ The right to travel is also essential to the freedom from involuntary servitude established by the Thirteenth Amendment because the deprivation of freedom of movement is a badge or incident of slavery and freedom of movement is essential to freedom from involuntary servitude.²²

Perhaps most importantly, barriers on the right to travel violate principles of interstate comity and undermine our system of federalism. Our federalism is not a group of independent countries guarding their borders, but a union of federated states in which

¹⁶ *Id.*

¹⁷ See *infra* notes 59–62 and accompanying text.

¹⁸ The United Nations Universal Declaration of Human Rights states that “[e]veryone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including his own, and return to his country.” G.A. Res. 214 A (III), U.N. Doc. A/810, art. 13 (1948), <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

¹⁹ See *infra* Part IV.A.1.

²⁰ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885–86; *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 346 (Kavanaugh, J., concurring); *id.* at 394 (Breyer, Sotomayor & Kagan, JJ., dissenting).

²¹ See *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (finding that a law that imposed discriminatory burdens on the right to travel violated the Equal Protection Clause of the Fifth Amendment, noting that “[w]e have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision”).

²² U.S. CONST. amend. XIII (“[N]either slavery nor involuntary servitude . . . shall exist.”); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (recognizing Congress’ power to legislate to remedy the “badges and incidents of slavery”).

individuals can choose to live and travel based on the laws that govern them in any individual state.²³ Principles of interstate comity limit the extent to which states can regulate activity that occurs outside of that states' borders. Like the Court's Dormant Commerce Clause doctrine, the right to travel promotes national unity and our national economy.²⁴ It also furthers state autonomy to regulate people within state borders, even (or especially) when a state's regulations differ from those of another state. Although the United States Supreme Court does not currently recognize the right to obtain an abortion as a fundamental right, many states do. People crossing borders are doing so precisely to travel to those states.

II. THE RIGHT TO TRAVEL IN THE ANTEBELLUM ERA

The antebellum era was marked by hotly contested disputes over the scope of the right to travel and the question of who could exercise that right.²⁵ By crossing state borders and exercising the fundamental human right to freedom of movement, fugitives from slavery provoked conflict over interstate comity and destabilized the status quo in northern states, especially states that shared borders with states where slavery was legal.²⁶ States in which slavery was legal enacted laws restricting the movement of all Black people, whether free or enslaved.²⁷ Slaveholders understood that allowing enslaved persons freedom of movement could embolden them to try to escape their enslavement.²⁸ The right to travel was central to developing a national identity, but also one of the principle rights denied to enslaved people and often restricted for free Black people.²⁹ In the antebellum era, civil rights and antislavery activists responded to

²³ See REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS*, 136 (2006).

²⁴ See *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 532 (1949) (noting that the Constitution “was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union, and not division”) (citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935)); *United States v. Guest*, 383 U.S. 745, 758–59 (“[T]he federal commerce power surely encompasses the movement in interstate commerce of persons as well as commodities.”).

²⁵ ZIETLOW, *supra* note 23, at 28–29.

²⁶ See Rebecca E. Zietlow, *Freedom Seekers: The Transgressive Constitutionalism of Fugitives from Slavery*, 97 NOTRE DAME L. REV. 1375, 1404–08 (2022).

²⁷ *Id.* at 1396.

²⁸ *Id.*

²⁹ *Id.*

those restrictions by advocating the right to travel as a right of citizenship.³⁰

Article IV, Section 2 of the United States Constitution provides that “the Citizens of each State shall be entitled to all Privileges or Immunities of Citizens in the several States.”³¹ This clause is one of the principles of interstate comity in our original constitution, along with clauses requiring state officials to “deliver up” fugitives from justice and fleeing “persons held to service or labour” in other states.³² Persons who were citizens had a constitutional right to freedom of movement between states, freedom that enslaved people and those convicted of crimes lacked. The Article IV Privileges or Immunities Clause prohibited states from discriminating against out-of-state residents who were citizens of other states.³³ By contrast, the Article IV Fugitive Slave Clause³⁴ prohibited enslaved people from crossing state borders.³⁵ The tension between these clauses played an important role in political debates over slavery in the antebellum era.

A. Restrictions on the Right to Travel in the Antebellum Era

Interstate travel was fraught in the antebellum era because of conflicts between free states and those in which slavery was legal.³⁶ Along with all other fundamental human rights, most enslaved people lacked any freedom of movement. With exceptions, enslaved people were usually confined to the premises owned by their slaveholder and close surroundings.³⁷ Fugitives from slavery fled across state borders

³⁰ See *infra* notes 59–71 and accompanying text.

³¹ U.S. CONST. art. IV, § 2, cl. 1.

³² U.S. CONST. art. IV, § 2, cl. 2–3.

³³ See, e.g., Supreme Court of N.H. v. Piper, 470 U.S. 274, 288 (1985) (striking down New Hampshire law discriminating against out of state residents in licenses to practice law).

³⁴ U.S. CONST. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

³⁵ PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY 6 (1981).

³⁶ See MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 99 (2018).

³⁷ See Mekala Audain, “Design His Course to Mexico”: The Fugitive Slave Experience in the Texas-Mexico Borderlands, 1850-1853, in FUGITIVE SLAVES AND SPACES OF FREEDOM IN NORTH AMERICA 232, 235 (Damian Pargas ed., 2018).

in search of freedom.³⁸ This increased tensions between states and threatened interstate comity.³⁹ Supporters of slavery demanded that officials in free states cooperate with the kidnapping and returning of fugitives from slavery, insisting that the Fugitive Slave Clause required them to do so.⁴⁰ Many states also enacted laws that restricted the right of free Black people to travel.⁴¹ Free Black people also felt threatened by the colonization movement, whose proponents argued that free Black people should be sent to Africa.⁴²

Slaveholders always feared that the people whom they enslaved would either revolt against them or run away.⁴³ Their fears intensified after Denmark Vesey, a free Black man, travelled to South Carolina in 1822, hoping to incite enslaved people to revolt against their masters.⁴⁴ Many southern states enacted laws restricting the movement of enslaved and free Black people after Vesey's foiled plot.⁴⁵ For example, the legislature of the state of South Carolina enacted Seaman's Acts, which prohibited Black sailors in their ports who arrived on boats from northern states from leaving the ports and authorized their kidnapping and enslavement if they did.⁴⁶ After the passage of those laws, no free Black person was safe travelling in southern states. Northern and border states also enacted laws restricting the movement of free Black people. For example, an 1844 Maryland statute required free Black people who left the state to obtain a court's permission when they attempted to return to the states.⁴⁷ Other states enacted laws requiring free Black people to carry a permit when they were travelling.⁴⁸ Some northern states, including the states of Illinois and Indiana, enacted laws prohibiting free Black people from entering.⁴⁹

³⁸ See Zietlow, *supra* note 26, at 1377.

³⁹ See *id.* at 1393–97.

⁴⁰ *Id.* at 1395.

⁴¹ See JONES, *supra* note 36, at 98–99; KATE MASUR, *UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION* 88 (2021).

⁴² JONES, *supra* note 36, at 37.

⁴³ HERBERT APTHEKER, *AMERICAN NEGRO SLAVE REVOLTS*, 50–51 (50th ann. ed., 1993).

⁴⁴ *Id.* at 274.

⁴⁵ *Id.*

⁴⁶ See ZIETLOW, *supra* note 23, at 27–28.

⁴⁷ See JONES, *supra* note 36, at 91.

⁴⁸ *Id.* at 94.

⁴⁹ See ZIETLOW, *supra* note 23, at 36.

As tensions over fugitives from slavery intensified, the dangers of being kidnapped and sent into slavery increased for free Black people, not only in states where slavery was legal, but also in northern border states.⁵⁰ The passage of the 1850 Fugitive Slave Act effectively nationalized the law of slavery and endangered the safety of all Black people in the country, including free Black people who lived in northern states.⁵¹ The Act created the first national police force to aid slavecatchers who travelled into northern states in search of alleged fugitives from slavery.⁵² The Act did not include any procedural protections for people who were accused of being fugitives.⁵³ The danger of being kidnapped significantly limited the ability of free Black people to travel, including in northern states.⁵⁴

Free Black people also felt threatened by the movement to encourage free Black people to leave the United States and move to Africa.⁵⁵ Even some abolitionists supported the colonization movement, and President Abraham Lincoln spoke in favor of the movement as late as 1862.⁵⁶ Free black advocates saw colonization as a threat and feared that they would be forced to leave the country.⁵⁷ They denounced colonization as an attack on their right to belong in the national polity—and asserted that they had a right to belong because they were citizens of the state in which they lived.⁵⁸

B. The Right to Travel and Antebellum Rights Claims

Responding to these and other race-based restrictions, antislavery activists championed the right to travel as a fundamental human right and a right of free citizens. They viewed citizenship broadly, as the right to belong to the government and to the protection of the government. Antislavery activists asserted the “freedom

⁵⁰ See ERIC FONER, *GATEWAY TO FREEDOM: THE HIDDEN HISTORY OF THE UNDERGROUND RAILROAD* 125 (2015).

⁵¹ See FINKELMAN, *supra* note 35 at 37–84.

⁵² Zietlow, *supra* note 26, at 1398.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See JONES, *supra* note 36, at 11.

⁵⁶ CHRISTOPHER BONNER, *REMAKING THE REPUBLIC: BLACK POLITICS AND THE CREATION OF AMERICAN CITIZENSHIP* 156 (2020). Opponents of slavery who favored colonization argued that free Black people would be better off in Africa because they would never attain equal rights in the United States.

⁵⁷ JONES, *supra* note 36, at 38.

⁵⁸ *Id.* at 39.

principle,” that a person’s enslaved status would change when an enslaved person enters a free state.⁵⁹ Fugitives from slavery asserted that principle when they crossed state lines in search of freedom. They did not claim to be citizens, but they sought to travel to free spaces where they would be treated as human beings.⁶⁰ Free Black people and their allies argued that they were citizens of the states in which they lived, entitled to the rights of citizenship.⁶¹ As citizens, they claimed that they were entitled to fundamental human rights; rights that would extend to enslaved people when they escaped into freedom.⁶²

Antislavery activists developed an ideology of antislavery constitutionalism, arguing that enslaved people had constitutional rights that were violated by their enslavement.⁶³ Some of those activists also supported rights for free Black people and fought restrictions on their freedom of movement.⁶⁴ Many activists in the antislavery movement employed the language of citizenship to combat slavery and support the rights of free Black people. They argued that free Black people were (or could be) United States and/or state citizens, and some argued that enslaved people became citizens as soon as they escaped from slavery.⁶⁵ Black civil rights activists also employed the language of citizenship to argue against laws that restricted their rights on the basis of race.⁶⁶ For example, in 1852, Black civil rights activist Martin Delaney wrote a treatise arguing that “We are Americans, having a birthright citizenship”—citizens

⁵⁹ See Zietlow, *supra* note 23.

⁶⁰ In *Dred Scott v. Sandford*, the United States Supreme Court rejected the argument that an enslaved person, or anyone of African descent, could be either a United States or state citizen. 60 U.S. 393, 403–12 (1857). This highly exclusionary ruling was overturned by the Reconstruction Congress with the 1866 Civil Rights Act and the Fourteenth Amendment Citizenship and Privilege or Immunities Clause. See Rebecca E. Zietlow, *The Other Citizenship Clause, in THE GREATEST AND GRANDEST ACT: THE CIVIL RIGHTS ACT OF 1866 FROM RECONSTRUCTION TO TODAY* 37 (Christian G. Samito ed., 2018).

⁶¹ See BONNER, *supra* note 56, at 4. *But see* JONES, *supra* note 36, at 11 (not all antebellum Americans saw citizenship as a gateway to rights).

⁶² See BONNER, *supra* note 56, at 38.

⁶³ See REBECCA E. ZIETLOW, *THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION* 20 (2018).

⁶⁴ *Id.* at 77–78.

⁶⁵ *Id.* at 31.

⁶⁶ See BONNER, *supra* note 56, at 2–3.

with natural rights.⁶⁷ Frederick Douglass made the same arguments, citing the Declaration of Independence.⁶⁸ Some Black people sought passports to travel abroad, to prove that they were U.S. citizens.⁶⁹ According to historian Christopher Bonner, “[b]y claiming rights as citizens, black people . . . made citizenship more important.”⁷⁰ They argued that to be a citizen meant the right to travel safely and to be protected by the government against threats to their personal safety.⁷¹

Antislavery constitutionalists articulated a broad view of the rights of citizens. Many of them cited the influential case of *Corfield v. Coryell*, in which Justice Bulrod Washington, riding circuit, defined the privileges and immunities protected by Article IV as fundamental human rights.⁷² Justice Washington elaborated:

What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . [and particularly t]he right of a citizen of one state to pass through, or to reside in any other state.⁷³

Although not all antislavery and civil rights activists advanced the broad reading of citizenship from *Corfield v. Coryell*, all agreed that the right to travel between states was a right of citizenship.⁷⁴ On that basis, they opposed measures that restricted the rights of free Black people to travel.

As early as 1820, congressional debates over the admission of Missouri focused on a provision of the Missouri Constitution that

⁶⁷ See JONES, *supra* note 36, at 89 (citing MARTIN ROBISON DELANEY, THE CONDITION, ELEVATION, EMIGRATION, AND DESTINY OF THE COLORED PEOPLE OF THE UNITED STATES (1852)).

⁶⁸ *Id.* at 90.

⁶⁹ In 1849 the Secretary of State refused to issue passports for Black people, and they protested. BONNER, *supra* note 56, at 81.

⁷⁰ *Id.* at 4.

⁷¹ See *id.* at 95.

⁷² *Corfield v. Coryell*, 6 F. Cas. 546, 551 (E.D. Pa 1823).

⁷³ *Id.*

⁷⁴ See Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship*, 36 AKRON L. REV. 717, 741–42 (2003).

would have prohibited free Black people from entering the state.⁷⁵ That debate ended in ambiguous compromise that allowed Missouri to become a state as long as it did not violate the privileges or immunities of people entering the state. In the early 1840s, lawmakers from the state of Massachusetts protested the South Carolina Seaman's Acts which authorized the arrest of free Black sailors from Massachusetts who entered the southern state.⁷⁶ Massachusetts lawmakers claimed that the free Black sailors from their state were citizens of the state of Massachusetts, and the South Carolina laws violated their rights under the Article IV Privileges and Immunities Clause.⁷⁷

In the 1857 case of *Dred Scott v. Sandford*, Justice Robert Taney articulated a similarly broad view of the rights of citizenship, though he held that people of African descent could not be citizens and thus were not entitled to those rights. Even after the *Dred Scott* ruling, however, antislavery constitutionalists continued to argue that Black people were entitled to the rights of citizenship. Some of these activists, including Ohio Representatives John Bingham and James Ashley, played prominent roles in the Reconstruction Congress that enacted the Thirteenth and Fourteenth Amendments. For example, in 1860, congressional debates over the admission of Oregon focused on a provision of the Oregon Constitution that would have prohibited free Black people from entering the state.⁷⁸ Ohio Representative John Bingham and others argued that the provision violated the Article IV Privileges or Immunities Clause because it restricted the rights of free Black people.⁷⁹ Opponents in the debate did not dispute the existence of the right to travel. Instead, they argued that free Black people did not enjoy the right to travel because they could not be citizens—the approach that Justice Taney took in his majority opinion in *Dred Scott*.⁸⁰

It was clear to all who considered the subject that there was a link between the right to travel and the right to engage in economic activity. Like the Dormant Commerce Clause, Article IV principles of non-discrimination furthered the development of the national economy by promoting national unity and economic prosperity. Many antislavery activists linked citizenship to the right to free labor; to

⁷⁵ See ZIETLOW, *supra* note 23, at 26.

⁷⁶ *Id.* at 28.

⁷⁷ *Id.*

⁷⁸ See Zietlow, *supra* note 74, at 726.

⁷⁹ *Id.* at 726–27.

⁸⁰ *Id.*

work free of undue coercion and to enjoy the fruits of one's labor. Antislavery activists often argued that enslaved people were deprived of the fruits of their own labor, to which they were entitled as a fundamental human right.⁸¹ Enslaved people were denied freedom of movement for economic reasons—to enable slaveholders to exploit their labor. During the debate over the admission of Oregon, John Bingham explained that once people were recognized as citizens, they acquired “the equality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil.”⁸² The freedom of movement protected by the right to travel was necessary for workers to leave oppressive employers, just as travel over state lines was essential to avoid oppressive laws.

C. Reconstruction and the Right to Travel

After the Civil War, our nation adopted several constitutional amendments to abolish slavery and protect the rights of freed slaves and other people. The Thirteenth Amendment abolished slavery and involuntary servitude, established a positive right to free labor, and empowered Congress to legislate to remedy the badges or incidents of slavery.⁸³ The Fourteenth Amendment established birthright citizenship for freed slaves and all other people born in the United States and prohibits states from denying the privileges or immunities of citizenship, and equal protection and due process rights of all people.⁸⁴ In addition, the Fourteenth Amendment clearly established the federal constitution as a source of individual rights that were enforceable against state governments.⁸⁵ The framers of the Fourteenth Amendment believed that the privileges or immunities of citizenship would be the primary source of those rights, which would be uniformly enforced throughout the country, including the right to

⁸¹ The slogan of the Republican Party, “Free Soil, Free Labor, Free Men,” reflects this view. *See generally* ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1995).

⁸² CONG. GLOBE, 35th Cong., 1st Sess. 985 (1859). John Bingham's remarks are particularly significant because after the Civil War, he was the principal drafter of Section 1 of the Fourteenth Amendment, with its own citizenship and privilege or immunities clause. *See* Zietlow, *supra* note 74, at 729.

⁸³ *See generally* Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859 (2016).

⁸⁴ U.S. CONST. amend. XIV.

⁸⁵ *See id.* § 1 (“No state shall . . . deny to any person within its jurisdiction . . .”).

travel across state borders.⁸⁶ The Citizenship and Privileges or Immunities Clause recognized a national community and sought to promote the belonging, protection and equality of U.S. citizens in that national community.⁸⁷

The Thirteenth Amendment to the Constitution abolished slavery and involuntary servitude and established a positive right to free labor.⁸⁸ Above all, slavery was a system of exploitation of labor. During debates over Reconstruction measures, many invoked the right to the fruit of one's labor as one of the principal rights that they were enforcing. As we have seen from John Bingham's speech during the Oregon debates, Bingham and some other members of the Reconstruction Congress saw the right to free labor—the right to control one's economic life—as an essential right of citizenship. The right to free labor was central to the Reconstruction project. The ability to participate in the national economy is central to what it means to belong to the national community and the right to travel is essential to that participation.

In 1866, Congress used its power to enforce the Thirteenth Amendment to enact the 1866 Civil Rights Act, the first civil rights legislation Congress ever enacted.⁸⁹ The 1866 Civil Rights Act established birthright citizenship, recognizing people who had been newly freed from slavery as United States citizens and purporting to overturn the Court's decision in *Dred Scott* that people of African descent could not be citizens.⁹⁰ The Act proclaimed that all citizens had “the same right . . . as is enjoyed by white citizens” to purchase real and personal property.⁹¹ The 1866 Act also guaranteed “all persons” in the United States “the same right . . . to make and enforce contracts . . . and to the full and equal benefit of the laws . . . as is enjoyed by white citizens.”⁹² The 1866 Civil Rights Act thus recognized the ability to engage in the national economy as a right of

⁸⁶ See Kreimer, *supra* note 9, at 504 (“The fourteenth amendment was intended to provide explicit constitutional warrant for a right to travel that extended to both blacks and whites, overturning the regime under which southern states could exclude free blacks and abolitionists.”).

⁸⁷ See Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281, 313 (2000); Kreimer, *supra* note 9, at 500–08.

⁸⁸ Zietlow, *supra* note 83, at 877.

⁸⁹ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. §§ 1981, 1982).

⁹⁰ See generally Zietlow, *supra* note 60.

⁹¹ Civil Rights Act of 1866, ch. 31, §1, 14 Stat. 27.

⁹² 42 U.S.C. § 1981(a).

citizenship and protected the right to contract, a fundamental human right that enslaved people had lacked, as well as the right to travel.

In 1867, Congress enacted the Anti-Peonage Act, which prohibited “the holding of any person to service or labor under the system known as peonage.”⁹³ The Act prohibited employers from forcing employees to enter into long term contracts which prevented them from leaving their employment regardless of the pay or conditions of the job. The Act also prohibited arresting or returning return any person to the condition of servitude.⁹⁴ As Pennsylvania Senator Charles Buckalew, a supporter of the Act, explained, the terms of debt service were “always exceedingly unfavorable to [the laborer].”⁹⁵ Without the freedom to leave their job, workers were trapped in involuntary servitudes.⁹⁶

In 1868, the same Congress adopted the Fourteenth Amendment, which established rights enforceable against state governments, including the privileges or immunities of citizenship.⁹⁷ Like the 1866 Civil Rights Act, the Fourteenth Amendment adopted the antislavery constitutionalists’ theory of citizenship rights.⁹⁸ The Amendment clearly established free Black people as United States citizens with rights that adhere thereto. Scholars debate the scope of those rights,⁹⁹ but even under the narrowest interpretation, the right to travel is protected by the Fourteenth Amendment Privileges or Immunities Clause, as it had already been recognized under Article IV.¹⁰⁰

⁹³ Anti-Peonage Act, ch. 187, 14 Stat. 546, 546 (1867) (repealed but some provisions codified as amended at 18 U.S.C. § 1581 and 42 U.S.C. § 1994).

⁹⁴ *Id.*

⁹⁵ CONG. GLOBE, 39th Cong., 2d Sess., 1571, 1572 (statement of Sen. Buckalew).

⁹⁶ See *Bailey v. Alabama*, 219 U.S. 219, 240, 245 (1911) (striking down an Alabama law that criminalized the act of leaving a long-term employment contract as violating the Thirteenth Amendment and the Anti-Peonage Act).

⁹⁷ U.S. CONST. amend. XIV, § 1.

⁹⁸ Indeed, one of the reasons for the Fourteenth Amendment was the doubts held by John Bingham and a few other members of Congress that Congress lacked the power to enact the law under the Thirteenth Amendment. Zietlow, *supra* note 60, at 37. The Fourteenth Amendment is thus widely viewed as constitutionalizing the protections established by the 1866 Civil Rights Act. *Id.*

⁹⁹ See, e.g., Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) (arguing that the framers of the Fourteenth Amendment had a broad view of citizenship rights); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) (same); Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar’s Wishing Well*, 61 U. CINN. L. REV. 1 (1993) (advocating a narrower view).

¹⁰⁰ See *infra* Part IV.

III. ABORTION AND THE RIGHT TO TRAVEL

Today, pregnant people in many states must travel across state borders to exercise their right to reproductive autonomy, a right which they lack in their state of residence. For that reason, a number of international corporations have offered to pay for their employees who live in anti-abortion states to travel out of state to obtain abortions.¹⁰¹ Those employers located in some anti-abortion states are now facing potential criminal liability for aiding and abetting abortions. The availability of interstate travel, and interstate commerce, will be crucial to those seeking to assert their right to reproductive autonomy in this post-*Dobbs* world.

Even before the Court's ruling in *Dobbs*, access to abortion in his country varied widely from state to state, and many pregnant people travelled across state borders to obtain abortions. Since *Dobbs*, however, the right to travel has become an urgent necessity for people seeking abortion in the increasing number of states that have banned the procedure altogether.¹⁰² At the time of this article, that landscape is still developing, but recent studies anticipate the enormity of the need for travel. For example, a 2019 study predicted that the average person would experience a 249-mile increase in travel distance, causing the abortion rate to fall by 32.8 percent, if *Roe* were overturned.¹⁰³ "Abortion deserts" are developing, mostly in midwestern and southern states.¹⁰⁴ The availability of medication abortions will mitigate the need for people in early-stage pregnancies to travel.¹⁰⁵ However, they will still need access to out-of-state medical providers and pharmacists in order to obtain the necessary medication.¹⁰⁶ Some patients are travelling across borders to states that allow abortions by remote health care.¹⁰⁷ Some providers are

¹⁰¹ See Emma Goldberg, *These Companies Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/article/abortion-companies-travel-expenses.html>.

¹⁰² See Cohen et al., *supra* note 2, at 11 ("[A]bortion travel will become an essential part of the post-*Roe* reality.").

¹⁰³ See *id.* at 11, n.46 (citing Caitlyn Myers, Rachel Jones & Ushma Upadhyay, *Predicted Changes in Abortion Access and Incidence in a Post-Roe World*, 100 CONTRACEPTION 367, 369 (2019)).

¹⁰⁴ See *id.* at 11, n.49 (citing Lisa Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER L. & JUST. 76, 79–80 (2015)).

¹⁰⁵ See *id.* at 9.

¹⁰⁶ See *id.*

¹⁰⁷ *Id.* at 13–15.

considering placing mobile clinics near borders.¹⁰⁸ Some people have their medication mailed to someone in a state where it is legal, then have that person forward it to them.¹⁰⁹

After *Dobbs*, it is clear that states can enact laws that restrict the right of their residents while those people are within the state's borders. However, the *Dobbs* ruling leaves wide open the extent to which states can regulate their residents who cross state borders in search of abortions.¹¹⁰ Congress has not yet acted, in part because Republican lawmakers rejected a bill which would affirm the right of people seeking abortions to travel.¹¹¹ However, states are starting to adopt laws which would limit the right of pregnant people to travel and impose criminal penalties on those who assist them. In April, 2023, the Idaho state legislature enacted a law amending the definition of illegal human trafficking to include obtaining or supporting access to out-of-state abortion care for people under the age of eighteen without parental knowledge.¹¹² In addition, the National Right to Life Committee model law would impose criminal and civil penalties on anyone who obtains an abortion outside of the state, as well as anyone who "conspires to cause an illegal abortion" or "aids or abets" them.¹¹³ A number of state legislatures are considering adopting this law or a similar measure.¹¹⁴

In addition, laws authorizing bounty lawsuits against people obtaining abortions and those who help them, such as Texas's SB8, would also apply to out-of-state abortions and thus effectively restrict the right of Texas residents to travel to obtain abortions.¹¹⁵ These laws

¹⁰⁸ *Id.* at 17.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 5.

¹¹¹ See Jamelle Bouie, Opinion, *Republicans Are Already Threatening the Right to Travel*, N.Y. TIMES (July 15, 2022), <https://www.nytimes.com/2022/07/15/opinion/abortion-rights-travel.html>.

¹¹² See *Interactive Map: US Abortion Policies and Access After Roe*, *supra* note 5.

¹¹³ Memorandum from the Nat'l Right to Life Comm. Gen. Couns. James Bopp, Jr., to the Nat'l Right to Life Comm. (June 15, 2022), <https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf>.

¹¹⁴ Alice Miranda Ollstein & Megan Messerly, *Missouri Wants to Stop Out-of-State Abortions. Other States Could Follow*, POLITICO (Mar. 19, 2022, 7:00 AM EDT), <https://www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539>.

¹¹⁵ See Michael Hiltzik, *Column: Threats to Criminalize Out-of-State Abortions Are a Scary Reminder of 1850s America*, L.A. TIMES (July 12, 2022, 1:58 PM PT), <https://www.latimes.com/business/story/2022-07-12/threats-to-criminalize-out-of-state-abortion>.

directly infringe on the right to travel.¹¹⁶ As New York Times columnist Jamelle Bouie has argued:

When a state claims the right to limit your travel on account of your body—when it claims one of the most fundamental aspects of your personal liberty in order to take control of your reproductive health—then that state has rendered you little more than another form of property.¹¹⁷

A. The Right to Travel to Obtain an Abortion

Like all other people who cross state borders, those who cross borders to obtain abortions enjoy a constitutional right to travel for several reasons. First, Article IV and the Fourteenth Amendment protect the right of people seeking abortions, like all other citizens, to travel across state borders. The right to participate in the national economy is central to the concept of citizenship. As the Supreme Court recognized in *Planned Parenthood v. Casey*, control over one's reproductive life is necessary to fully engage in the labor market, a right of social citizenship.¹¹⁸ As the dissenters in *Dobbs* acknowledged, denying women the right to an abortion curtails “their status as free and equal citizens.”¹¹⁹ The right to travel is also essential to equal citizenship. Denying the right to travel to people seeking abortions compounds the injury and treats them as second class citizens.¹²⁰ Moreover, when states bar their residents from crossing state borders based on the reason why they are travelling, they discriminate against them when denying a fundamental right, violating the Equal Protection Clause of the Fourteenth Amendment.¹²¹ Moreover, state laws that restrict such travel discriminate against travelers seeking abortions, unconstitutionally treating them as second class citizens. Second, many people who must cross state borders to obtain abortions

¹¹⁶ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 346 (2022) (Kavanaugh, J., concurring).

¹¹⁷ Bouie, *supra* note 111.

¹¹⁸ See *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992), *overruled in part by Dobbs*, 597 U.S. 215 (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”).

¹¹⁹ *Dobbs*, 597 U.S. at 362 (Breyer, Kagan and Sotomayor, dissenting).

¹²⁰ See Jamelle Bouie, Opinion, *The Limit Does Not Exist for Republicans*, N.Y. TIMES (Aug. 15, 2023), <https://www.nytimes.com/2023/08/15/opinion/abortion-republicans-ohio-idaho.html>.

¹²¹ See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 621 (1969).

are doing so for economic reasons, and restricting their ability to do so violates their right to freedom from involuntary servitude under the Thirteenth Amendment and their right to social citizenship.

1. *Citizenship*

The United States Supreme Court has repeatedly ruled that there is a constitutional right to travel. The Court has identified various sources of the right, including the Article IV Privileges and Immunities Clause, the Equal Protection Clause, and the Privileges or Immunities Clause of the Fourteenth Amendment. All of those cases involved people who were travelling into states for economic reasons. Some of the Court's cases recognizing the right to travel involve people travelling to relocate permanently in another state.¹²² However, the Court has also found that the right to travel prohibits states from barring entry to individuals regardless of how long they plan to remain in the state,¹²³ and has recognized the right to travel through a state regardless of how long the traveler plans to remain there.¹²⁴ These cases recognize a robust right to travel that encompasses the right to travel to another state for any reason.

The Court first recognized the right to travel as a right of citizenship in 1867, before the ratification of the Fourteenth Amendment. In *Crandall v. Nevada*, the Court struck down a Nevada law that imposed taxes on railroad and stage companies that passed through the state.¹²⁵ The Court held that the law violated the right of citizens to travel around the country. The Court pointed out that “[t]he people of these United States constitute one nation. They have

¹²² See, e.g., *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (striking down a state law that paid lower welfare benefits to newly arrived citizens as violating the Privileges or Immunities Clause of the Fourteenth Amendment); *Shapiro*, 394 U.S. at 629–31 & n.8 (striking down laws in Connecticut, Pennsylvania, and the District of Columbia imposing state durational residency requirements on welfare recipients as violating the right to travel, declining to “ascribe” the source of the right “to a particular constitutional provision”).

¹²³ See *Edwards v. California*, 314 U.S. 160, 176 (1941) (holding that a California statute that criminalized knowingly bringing or assisting in bringing into the state a nonresident “indigent person” was an unconstitutional burden on Congress’s interstate commerce power).

¹²⁴ See *United States v. Guest*, 383 U.S. 745, 759 (1966) (upholding a federal indictment against a defendant who murdered a person travelling through his state on the grounds that it violated the traveler’s right to travel).

¹²⁵ *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 40 (1867).

a government in which all of them are deeply interested.”¹²⁶ In this case, decided immediately after the Civil War, the Court emphasized the importance of the right to travel to promote national unity.

In 1873, still during the Reconstruction Era, the Court interpreted the scope of the Fourteenth Amendment for the first time in *The Slaughterhouse Cases*.¹²⁷ In that case the Court narrowly interpreted the Privileges or Immunities Clause of the Fourteenth Amendment, but acknowledged that the clause protected a federal right to travel. In *Slaughterhouse*, a group of butchers challenged New Orleans city regulations which limited their ability to engage in their trade.¹²⁸ The butchers argued, inter alia, that the right to engage in their profession was a privilege or immunity of citizenship, and that the city regulation had deprived them of that right.¹²⁹ The butchers’ argument relied on the broadest interpretation of the rights of citizenship, that articulated by Justice Washington in *Corfield v. Coryell*. Writing for the Supreme Court, Justice Miller rejected the butchers’ claims. In his opinion, Miller distinguished between national and state citizenship, and held that the *Corfield* list of rights referred to the rights of state, not national, citizenship.¹³⁰ According to Miller, transferring the protection of that broad category of rights from the states to the federal government would amount to an overhaul of our system of federalism that was not intended by the Framers of the amendment.¹³¹ The rights of federal citizenship, said the Court, were limited to those “which owe their existence to the Federal government, its National character, its Constitution or its laws.”¹³²

The Court’s ruling in *Slaughterhouse* has been heavily criticized by scholars.¹³³ In fact, the Framers of the Reconstruction Amendments intended exactly what Miller rejected—to transfer the protection of individual rights from state governments to the federal government.¹³⁴ After all, slavery had been a matter of state law, and the differences in state laws that regulated slavery and the rights of free Black people had erupted into the Civil War. The Thirteenth and

¹²⁶ *Id.* at 43.

¹²⁷ *Slaughterhouse Cases*, 83 U.S. 36, 71 (1872).

¹²⁸ *Id.* at 59.

¹²⁹ *Id.* at 66.

¹³⁰ *Id.* at 72–73.

¹³¹ *Id.* at 78.

¹³² *Id.* at 79.

¹³³ See, e.g., Aynes, *supra* note 99, at 64.

¹³⁴ *Id.*

Fourteenth Amendments created federal rights, and the Fourteenth Amendment made those rights enforceable against state governments.¹³⁵ The *Slaughterhouse* ruling is also in tension with the 1866 Civil Rights Act, which linked fundamental rights (including economic rights such as the right to contract and to buy and sell property) to United States citizenship. Nonetheless, even the narrow *Slaughterhouse* definition of the rights of federal citizenship included the right to travel.¹³⁶ The right to travel is linked to the structure of the federal government because it enforces national unity.

In the 1941 case of *Edwards v. California*, the Court again confirmed the right to travel when it struck down a California law prohibiting bringing a non-resident “indigent person” into the state.¹³⁷ California enacted the statute during the Great Depression to prevent indigent people from Oklahoma and other states from entering the state in search of employment. The defendant was convicted of bringing his brother-in-law into the state as he searched for economic opportunity.¹³⁸ The Court overturned the conviction, holding that it violated the brother-in-law’s right to travel under the Dormant Commerce Clause.¹³⁹ In *Shapiro v. Thompson*, the Court invalidated a Maryland law that imposed a waiting period on newly arrived residents who applied for welfare benefits.¹⁴⁰ The Court held that the law violated the Equal Protection Clause of the Fourteenth Amendment because the state had discriminated against newly arrived residents, violating their right to travel.¹⁴¹ The Court applied the highest level of scrutiny to the law because it infringed “the fundamental right of interstate movement,” and found that the law was not justified by a sufficiently compelling state interest.¹⁴² Most recently, in *Saenz v. Roe*, the Court struck down a California law that limited the welfare benefits for newly arrived residents to the level that they would have received in the state from which they came.¹⁴³

¹³⁵ At the time that *Slaughterhouse* was decided, the Fifteenth Amendment, which prohibits the denial of the franchise on the basis of race, had not yet been enacted.

¹³⁶ See *Slaughter-House*, 83 U.S. at 79 (citing *Crandall v. Nevada*, 73 U.S. 35, 48 (1867) (recognizing a federal right to travel)).

¹³⁷ *Edwards v. California*, 314 U.S. 160, 177 (1941).

¹³⁸ *Id.* at 170.

¹³⁹ *Id.* at 177.

¹⁴⁰ *Shapiro v. Thompson*, 394 U.S. 618, 641–42 (1969).

¹⁴¹ *Id.* at 634.

¹⁴² *Id.* at 638.

¹⁴³ *Saenz v. Roe*, 526 U.S. 489, 495 (1999).

The Court held that the law violated the Privileges or Immunities Clause of the Fourteenth Amendment.¹⁴⁴ In all three cases, the Court held that the state could not discriminate against out of state residents who exercised their right to travel into that state.

In *Shapiro* and *Saenz*, the travelling plaintiffs intended to stay in the states to which they had travelled. By contrast, in *Edwards*, the state had imposed a criminal penalty on a person aiding a traveler for merely helping him to enter the state, regardless of how long the traveler intended to stay.¹⁴⁵ In *United States v. Guest*, the Court further clarified that travelers who were merely passing through a state had a federal right to do so, protected by federal civil rights law.¹⁴⁶ In *Guest*, the Supreme Court upheld an indictment of six individuals who conspired to deny the right to travel to Lemuel Penn by shooting and killing him while he was travelling through the state of Georgia.¹⁴⁷ Penn was an African American Army reserve officer who was returning to his home in the District of Columbia from active duty in the state of Georgia when defendants ambushed and murdered him. The Court upheld the indictment, finding that the defendants had violated Penn's right to Equal Protection, Due Process, and his right to travel under the Fourteenth Amendment.¹⁴⁸ The Court's ruling in *Edwards* and *Guest* affirm that the right to travel is implicated whenever someone is engaged in interstate travel, especially if, like people seeking abortions, they are travelling for economic reasons or to exercise other rights.

Moreover, when states bar people seeking abortions from travelling across states borders because of the reason why they are travelling, that is a discriminatory denial of a fundamental right.¹⁴⁹ In *Shapiro v. Thompson*, the Court held that a state that denied welfare benefits to newly arrived residents "created a classification which was an invidious discrimination denying them equal protection of the laws."¹⁵⁰ Any such discrimination could only be justified by a

¹⁴⁴ *Id.* at 506.

¹⁴⁵ The California statute under which *Edwards* was convicted made it a misdemeanor to "bring or assist in bringing into the state any indigent person who is not a resident of the state, knowing him to be an indigent person." See *Edwards*, 314 U.S. at 166.

¹⁴⁶ *United States v. Guest*, 383 US 745, 757 (1966).

¹⁴⁷ *Id.* at 758.

¹⁴⁸ *Id.* at 760.

¹⁴⁹ See *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969).

¹⁵⁰ *Id.*

compelling state interest.¹⁵¹ A state denying the right to travel to people seeking abortions would likely argue that they have a compelling interest in protecting the fetus carried by the traveler.¹⁵² Scholars debate whether states have the power to impose extraterritorial regulations on citizens.¹⁵³ This uncertainty further calls into question laws that discriminate against the interstate travel of people seeking abortions.

2. Thirteenth Amendment

In addition to violating the Fourteenth Amendment, state laws prohibiting people from travelling to obtain abortions arguably violate the Thirteenth Amendment by unconstitutionally imposing an involuntary servitude on those travelers. As discussed above, restrictions on the freedom of movement of enslaved people were an essential badge or incident of slavery. Preventing workers from travelling is also an aspect of involuntary servitude. During Reconstruction, Congress recognized this reality when enacting the 1867 Anti-Peonage Act.¹⁵⁴ Enforcing that Act in *Bailey v. Alabama*, the Supreme Court struck down an Alabama state law that made it a crime for workers to leave their employer in violation of a long-term employment contract.¹⁵⁵ The Court held that the law imposed an involuntary servitude on workers because it prevented them from

¹⁵¹ *Id.*

¹⁵² See Kreimer, *supra* note 9, at 474; Cohen et al., *supra* note 2, at 25 (arguing that if Roe was overturned, “a central issue for the Supreme Court would likely be whether the states’ interest in preserving fetal life is weighty enough to justify them in regulating abortions that occur outside their borders”); Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 634 (2007) (courts would need to weigh one state’s interest in “in protecting fetal life against another state’s interest in making abortion within its territory a matter of individual conscience”).

¹⁵³ See, e.g., Mark Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 919–30 (2002); Mark Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133, 1135–36, 1150–51 (2010) (arguing that nothing in the constitution prohibits states from enforcing laws that target travel or out of state abortion.); Kreimer, *supra* note 9, at 479 (“In a nation which guarantees the right to travel among states and proclaims a national citizenship ‘entitling’ visitors to take advantage of the ‘privileges or immunities’ enjoyed by local residents, such efforts to export moral jurisdiction are dubious in the extreme.”).

¹⁵⁴ See *supra* notes 93–96 and accompanying text.

¹⁵⁵ *Bailey v. Alabama*, 219 U.S. 219, 245 (1910).

leaving their place of work to find a better job.¹⁵⁶ Similarly, In *Pollock v. Williams*, the Court struck down a Florida statute that made it a crime for workers to leave their job while they owed money to their employers.¹⁵⁷

In both *Bailey* and *Pollock*, the Court recognized freedom of movement as part of the freedom from involuntary servitude. People who are travelling to seek abortions are not bound to their employers as involuntary servants, but they suffer the same deprivation of bodily autonomy. Moreover, many of them are forced to travel because they work in states where they are denied the right to obtain an abortion. Thus, there is a colorable argument that laws banning them from travelling violate the Thirteenth Amendment because they impose an involuntary servitude.

B. Federalism, Comity and the Right to Travel

Perhaps most importantly, the right to travel is not only an individual right, it is also an essential aspect of our constitutional system of federalism and interstate comity. Although the right to choose an abortion is no longer a fundamental right under federal law, it is considered a fundamental right in a number of states in which abortions are still legal and accessible—precisely the states in which the pregnant person seeks to exercise their right to travel. Our system of federalism is premised on the view that states are independent sovereigns that can enact their own laws on issues that are important to their citizens, laws that would also apply to out-of-state residents while they are within a state’s borders. As Kreimer explains, our system of federalism “should not be a system in which citizens carry home-state law with them as they travel, like escaped prisoners dragging a ball and chain.”¹⁵⁸ Our system of federalism would not function properly without the ability of people to travel to states that enact policies that they prefer, including (especially) policies that are more protective of their rights.

¹⁵⁶ *Id.*

¹⁵⁷ *Pollock v. Williams*, 322 U.S. 4, 22 (1944) (“No indebtedness warrants a suspension of the right to be free from compulsory service, and no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor.”).

¹⁵⁸ Kreimer, *supra* note 9, at 462.

The right to travel enables states to serve as laboratories of experimentation.¹⁵⁹ Under the Fourteenth Amendment, states cannot enact laws that infringe on federal rights. However, states are free to enact laws that are *more* rights-protective than existing federal law.¹⁶⁰ In the wake of *Dobbs*, many states have done just that, enacting statutes and constitutional amendments that protect reproductive autonomy, including the right to obtain an abortion. The right to travel is thus a structural right that is essential to our system of federalism.¹⁶¹ The right to travel is particularly important when people are seeking to travel to exercise a fundamental right. As Kreimer explains, “[t]he whole point of national citizenship is that citizens of one state who enter another are not aliens, but fellow citizens of the nation, entitled to function on a basis of equality with native residents.”¹⁶²

The right to travel is not only an individual right, it is also an essential aspect of our constitutional system of federalism and interstate comity. The Article IV Privileges or Immunities Clause binds our country together as one nation, not a confederation of nations with separate borders. In the antebellum era, disputes over interstate travel led to the disintegration of our nation and a brutal civil war.¹⁶³ Today, interstate conflicts over the right to travel to obtain an abortion are stressing interstate relations and contributing to the political polarization which threatens our democracy.¹⁶⁴ People who live in the United States are accustomed to traveling across state borders free of barriers and to complying with the laws of the states in which they are located when they engage in behavior that is regulated by the states. Not only do they have a right to do so under Article IV, but their right is protected by the constitutional structures that bind our nation.

¹⁵⁹ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments.”).

¹⁶⁰ See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

¹⁶¹ Perhaps that’s why Justice Kavanaugh concurrence argued that laws prohibiting out of state travel to obtain abortions would be unconstitutional.

¹⁶² Kreimer, *supra* note 9, at 509.

¹⁶³ See FINKELMAN, *supra* note 35, at 283.

¹⁶⁴ See Cohen et al., *supra* note 2, at 12.

IV. CONCLUSION

Like the deprivation of the right to choose an abortion, restrictions on the right to travel infringe on a person's bodily autonomy. Restricting the right to travel adds insult to injury, creating a group of second class citizens that enjoy fewer rights than other citizens merely because of the reason why they seek to travel. Like fugitives from slavery in the nineteenth century, people crossing borders to obtain abortions today are catalysts for conflict, not over the meaning and scope of individual rights, but over our constitutional structure and national identity. The history and meaning of Article IV and the Thirteenth and Fourteenth Amendments support a broad reading of the constitutional right to travel to obtain abortions. Pregnant people have lost a federal right to choose an abortion after *Dobbs*. They should not also be forced to lose their rights of citizenship due to their pregnant status.