BOUND TO MISFORTUNE[1]: PROTECTING JUVENILE ABORTION THROUGH THE RIGHT TO TRAVEL

John H.C. Hughes†

TABLE OF CONTENTS

[1] *See* Edwards v. California, 314 U.S. 160, 185 (1941) (Jackson, J., concurring) ("Any measure which would divide our citizenry . . . into one class free to move from state to state and another class that is []bound to the place where it has suffered misfortune is . . . at war with the habit and custom by which our country has expanded . . . .").

† Senior Articles Editor, *Cardozo Law Review*, Volume 45; J.D. Candidate (June 2024), Benjamin N. Cardozo School of Law. I would like to thank Professor Deborah Pearlstein for her guidance and support, my colleagues on *Cardozo Law Review*, particularly Isabelle Faber, Timothy Gentles, Ryen Lim, and Frank Gallina, for their excellent edits, and my family for everything else.

INTRODUCTION

On July 1, 2022, the *Indianapolis Star* reported that a ten-year-old Ohio girl, who had been raped and was six weeks pregnant, had sought an abortion in Indiana.[2] Abortion had been outlawed in Ohio mere hours[3] after the Supreme Court overturned *Roe v. Wade*,[4] but it remained legal in neighboring Indiana.[5] The Ohio girl was able to cross the state border, get the abortion, and—presumably—return home safely.[6] But if lawmakers like those in Missouri, South Carolina, Texas, and a handful of other states have their way, pregnant children in abortion-restrictive states will be unable to avail themselves of neighboring states' abortion-permissive laws.[7]

While many post-*Dobbs*[8] restrictions have imposed variously severe bans on abortion itself,[9] some states have proposed—and at least one has implemented—a particularly pernicious type of regulation: the travel ban.[10] Some of these proposed statutes mirror the design of Texas Senate

---

2 Shari Rudavsky & Rachel Fradette, *Patients Head to Indiana for Abortion Services as Other States Restrict Care*, INDYSTAR (Jan. 24, 2023, 3:47 PM), https://www.indystar.com/story/news/health/2022/07/01/indiana-abortion-law-roe-v-wade-overturned-travel/7779936001 [https://perma.cc/SV6W-93SA].

3 OHIO REV. CODE ANN. § 2919.195 (West 2024) (banning most abortions); Preterm-Cleveland v. Yost, No. 19-cv-00360, 2022 WL 2290526 (S.D. Ohio June 24, 2022) (dissolving injunction barring enforcement of § 2919.195).

4 Roe v. Wade, 410 U.S. 113 (1973); Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

5 Rudavsky & Fradette, *supra* note 2; IND. CODE ANN. § 16-34-2-1 (2022) (allowing abortions during the first trimester), *amended by* Act of Aug. 5, 2022, Pub. L. No. 179-2022, § 21, 2022 Ind. Acts 2595, 2608–11.

6 Rudavsky & Fradette, *supra* note 2.

7 *See infra* notes 13–14, 25 and accompanying text.

8 *Dobbs*, 597 U.S. 215.

9 *See State Legislation Tracker: Major Developments in Sexual & Reproductive Health*, GUTTMACHER INST., https://www.guttmacher.org/state-policy [https://perma.cc/H8Y7-7W2Z]. In a related vein, states have begun to propose restrictions on gender-affirming care as well. *See* Lindsey Dawson, Jennifer Kates & MaryBeth Musumeci, *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape*, KFF (June 1, 2022), https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape [https://perma.cc/752Z-9MGJ].

10 *See, e.g.*, Proposed Amendment to H.B. 1677, H. 101-4311H02.14H, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022), https://www.house.mo.gov/billtracking/bills221/amendpdf/4311H02.14H.pdf [https://perma.cc/5X3K-USMT]; Letter from Rep. Mayes Middleton, Chairman, Texas Freedom Caucus, to Yvette Ostolaza, Chair of the Mgmt. Comm., Sidley Austin LLP (July 7, 2022), https://freedomfortexas.com/uploads/blog/3b118c262155759454e423f6600e2196709787a8.pdf [https://perma.cc/B8B9-4HNQ].

Bill 8,[11] imposing no direct restrictions on women seeking abortions.[12] Instead, they would bar third parties from aiding, either physically[13] or financially,[14] out-of-state abortion travel.[15] Such proposals have been met with skepticism in the legal community,[16] and there is extensive scholarship rejecting the notion that states may prohibit abortion travel.[17] Indeed, Justice Kavanaugh explicitly stated in his *Dobbs* concurrence that such restrictions would be unconstitutional.[18] Such reassurances may be cold comfort to those who cannot travel, but they are vital nonetheless.[19]

---

11 Texas Heartbeat Act, ch. 62, 2021 Tex. Gen. Laws 125 (codified as amended at TEX. HEALTH & SAFETY CODE ANN. ch. 171). Senate Bill 8 was enacted prior to *Dobbs*.

12 HEALTH & SAFETY § 171.208(a)–(c); *see* Lauren Moxley Beatty, *The Resurrection of State Nullification—and the Degradation of Constitutional Rights: SB8 and the Blueprint for State Copycat Laws*, 111 GEO. L.J. ONLINE 18, 19–20 (2022) (explaining the private enforcement framework that allows S.B. 8 "to evade traditional checks" by the judiciary or executive).

13 Proposed Amendment to H.B. 1677, H. 101-4311H02.14H.

14 Letter from Rep. Mayes Middleton to Yvette Ostolaza, *supra* note 10.

15 *See* Proposed Amendment to H.B. 1677, H. 101-4311H02.14H, at 2 (banning, among other things, "[o]ffering or knowingly providing transportation to or from an abortion provider" even if the abortion is performed in another state); Letter from Rep. Mayes Middleton to Yvette Ostolaza, *supra* note 10, at 1–2 (threatening to allow private citizens to sue those who pay for abortion-related expenses, including travel to abortion-friendly states).

16 *See* Anthony Michael Kreis, *Prison Gates at the State Line*, HARV. L. REV. BLOG (Mar. 28, 2022), https://blog.harvardlawreview.org/prison-gates-at-the-state-line [https://perma.cc/H588-NWAY]; Vanessa Romo, *Can States Limit Abortion and Gender-Affirming Treatments Outside Their Borders?*, GBH NEWS (Mar. 15, 2022), https://www.wgbh.org/news/national-news/2022/03/15/can-states-limit-abortion-and-gender-affirming-treatments-outside-their-borders [https://perma.cc/9AR4-RAN8].

17 *See generally* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992) (concluding that abortion travel is protected by the right to travel); Joseph W. Dellapenna, *Abortion Across State Lines*, 2008 BYU L. REV. 1651 (concluding that criminalization of extraterritorial abortions comports with choice of law theory and is unlikely barred by constitutional concerns, including the right to travel); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855 (2002) (concluding that abortion travel is not protected by the right to travel).

18 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 346 (2022) (Kavanaugh, J., concurring) ("[M]ay a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.").

19 Some may be unable to travel for a host of reasons: financial burdens, employment responsibilities, lack of transportation, or straightforward time constraints. At least one survey reports that eleven percent of Americans have never traveled outside the state they were born in. Lea Lane, *Percentage of Americans Who Never Traveled Beyond the State Where They Were Born? A Surprise*, FORBES (May 2, 2019, 10:56 AM), https://www.forbes.com/sites/lealane/2019/05/02/percentage-of-americans-who-never-traveled-beyond-the-state-where-they-were-born-a-surprise/?sh=72f908af2898 [https://perma.cc/73VX-ZX6E]. Even for those who can travel, doing so to get an abortion can be traumatizing. *See* Press Release, Center for Reproductive Rights, Texas Woman Who Needs Emergency Abortion Forced to Flee State (Dec. 11, 2023), https://reproductiverights.org/Texas-woman-who-needs-emergency-abortion-forced-to-flee-state

Before *Roe* struck down state abortion bans, more than forty percent of abortions were performed on women outside their state of residence.[20] By 2019, that figure had fallen to just over nine percent.[21] With *Roe* overturned, it seems likely to rebound—and travel protections will be essential.[22]

A subcategory of abortion travel bans exclusively targets minors and, unlike its more generally applicable analogues, the constitutionality of such laws is far from clear.[23] For example, a newly enacted Idaho law makes it a crime to procure an abortion for a minor by transporting them within the state.[24] Similarly, a legislative proposal in South Carolina would make it a felony for anyone to bring a pregnant minor to another state to obtain an abortion.[25] More such laws are likely to be proposed soon.[26] The conduct these regulations proscribe is not hypothetical: there

---

[https://perma.cc/SP2S-FUWM] ("She desperately wanted to be able to get care where she lives and recover at home surrounded by family. While [she] had the ability to leave the state, most people do not, and a situation like this could be a death sentence.").

20 Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, PEW RSCH. CTR. (Jan. 11, 2023), https://www.pewresearch.org/fact-tank/2022/06/24/what-the-data-says-about-abortion-in-the-u-s-2 [https://perma.cc/U3WQ-YXRP] (describing data for the years immediately preceding *Roe*).

21 *Id.*

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

23 There has been occasional criticism of the Child Custody Protection Act, a perennially reintroduced *federal* law that would prohibit taking minors across state lines to avoid parental notification requirements in the minor's home state. S. 16, 117th Cong. § 2 (2021); S. 1645, 105th Cong. § 2 (1998). However, this criticism has primarily focused on the merits of the bill's policy or the federal government's authority to enact it. *See* Rebekah Saul, *The Child Custody Protection Act: A 'Minor' Issue at the Top of the Antiabortion Agenda*, GUTTMACHER INST. (Aug. 1, 1998), https://www.guttmacher.org/gpr/1998/08/child-custody-protection-act-minor-issue-top-antiabortion-agenda [https://perma.cc/9JKQ-B3B7] (criticizing on policy grounds); Joanna S. Liebman, Note, *The Underage, the "Unborn," and the Unconstitutional: An Analysis of the Child Custody Protection Act*, 11 COLUM. J. GENDER & L. 407, 418–24 (2002) (analyzing congressional power). On the other hand, state-level juvenile travel bans have received little scrutiny.

24 IDAHO CODE § 18-623 (2023). The statute ostensibly targets exclusively in-state conduct, perhaps sensitive to extraterritorial enforcement challenges. *See* sources cited *supra* note 17. But the statute plainly contemplates—and effectively proscribes—interstate abortion travel. IDAHO CODE § 18-623(3) ("It shall not be an affirmative defense . . . that the abortion provider or the abortion-inducing drug provider is located in another state.").

25 S. 1373, 124th Gen. Assemb. § 44-41-880 (S.C. 2022), https://www.scstatehouse.gov/sess124_2021-2022/bills/1373.htm [https://perma.cc/7J2L-QYXW]. The law would similarly bar travel to obtain an abortifacient. *Id.*

26 The National Right to Life Committee has drafted a model law that would, among other things, ban people from facilitating juvenile abortion travel without parental consent. Memorandum from James Bopp, Jr., Gen. Couns., Nat'l Right to Life Comm., Courtney Turner Milbank & Joseph D. Maughon, to Nat'l Right to Life Comm. 14 (June 15, 2022), https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf

is a documented phenomenon of more minors seeking out-of-state abortions when in-state restrictions such as parental notification requirements are imposed.[27]

The threat of juvenile travel bans is significant, and this Note provides a roadmap to protection. It argues that, in the absence of a constitutional abortion right, abortion access can and should be secured through other constitutional doctrines. The right to travel is a strong contender for three reasons: it is deeply rooted in our nation's legal tradition, it bolsters federalism interests, and it may eventually serve to protect other rights on the Court's chopping block.[28]

Part I of this Note explores the history and justification of the constitutional right to travel, in both interstate and intrastate contexts. It then explains how fundamental rights in general—and the right to travel in particular—have been evaluated, and occasionally diminished, when applied to minors. Part II identifies a gap in the literature: while there has been litigation over minors' right to *intra*state travel, there has been little academic or judicial analysis of their right to *inter*state travel. The Part then argues that minors have a fundamental right to interstate travel that should be subject to the same heightened scrutiny as the parallel adult right. Finally, Part II demonstrates why juvenile abortion travel bans are unlikely to survive such scrutiny.

I. BACKGROUND

A. *The Right to Travel*

The right to interstate travel is not explicitly mentioned in the text of the Constitution[29] but is nonetheless fundamental.[30] It protects three things: the right to physically travel to another state and back, the right to be "treated as a welcome visitor" when present in another state, and—should one choose to permanently move to another state—the right of a

[https://perma.cc/G46B-KZF7]. The authors of *The New Abortion Battleground* captured a snapshot of the website posting the model law before it was apparently removed. *See* Cohen, Donley & Rebouché, *supra* note 22, at 5 n.15.

27 Alexandra Rex, Note, *Protecting the One Percent: Relevant Women, Undue Burdens, and Unworkable Judicial Bypasses*, 114 COLUM. L. REV. 85, 115 (2014) (referencing the empirical findings of Virginia G. Cartoof & Lorraine V. Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 AM. J. PUB. HEALTH 397).

28 In particular, restrictions on youth gender-affirming care are at risk. *See* Dawson, Kates & Musumeci, *supra* note 9. To be sure, this constitutional approach also has drawbacks, which I identify and address *infra* note 286.

29 *See* Saenz v. Roe, 526 U.S. 489, 500–02 (1999); U.S. CONST. art. IV, § 2; *id.* amend. XIV.

30 *See* United States v. Wheeler, 254 U.S. 281, 293 (1920).

new citizen to be treated like any other resident.[31] Each of these three protections derives from a distinct constitutional source,[32] and each constitutional source yields a distinct doctrine.[33] Only the first conception of the right to travel (free movement) is squarely implicated by abortion travel bans.[34] However, the history of the other two protections provides insight into the spirit and purpose of the travel right writ large.[35]

1. Free Ingress and Egress

The right to travel long predates the founding of the United States. The 1215 Magna Carta explicitly protected the right, albeit in circumscribed terms, by providing that the King's subjects could leave England and return without sacrificing their allegiance to the Crown.[36] By the eighteenth century, the right to free movement was a well-enshrined aspect of English law, with Blackstone commenting that the "power of locomotion" was intrinsic to liberty.[37]

---

31 *Saenz*, 526 U.S. at 500. This tripartite framework has not been revisited by the Supreme Court and is regularly cited by the courts of appeals. *See, e.g.*, Hope v. Comm'r of Ind. Dep't of Corr., 9 F.4th 513, 523 (7th Cir. 2021); Harris v. Hahn, 827 F.3d 359, 369 (5th Cir. 2016).

32 *See Saenz*, 526 U.S. at 500–03.

33 Pollack v. Duff, 793 F.3d 34, 40 (D.C. Cir. 2015) ("[T]he Court has developed different doctrines to analyze the constitutionality of governmental action under each of the various provisions of the Constitution that protect the right to travel.").

34 Travel bans do not discriminate against out-of-state travelers or new residents. They simply prevent certain people from traveling out of state for a particular purpose.

35 *See infra* Section I.A.2.

36 *The 1215 Magna Carta: Clause 42*, THE MAGNA CARTA PROJECT (H. Summerson et al. trans.), http://magnacartaresearch.org/read/magna_carta_1215/Clause_42 [https://perma.cc/YZ5Z-AJPN]. Clause 42 made it "lawful . . . for every man to depart from [the] kingdom, and to return to it, safely and securely." *Id.* Compare this to Justice Stevens's statement in *Saenz v. Roe* that the right to travel includes the "right of a citizen of one State to enter and to leave another State." 526 U.S. at 500. *Saenz* focuses on whether other states can bar a foreigner from entry; the 1215 Magna Carta focuses on whether the home state can bar its citizens from leaving. The 1215 version of the Magna Carta did not last long, and Clause 42 was absent in the 1225 Magna Carta ten years later. *See Magna Carta, 1225*, NAT'L ARCHIVES, https://www.nationalarchives.gov.uk/education/resources/magna-carta/magna-carta-1225-westminster [https://perma.cc/J8ZL-EEY4].

37 1 WILLIAM BLACKSTONE, COMMENTARIES *134 ("[P]ersonal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct . . . ."). *See generally* Stewart Abercrombie Baker, Comment, *A Strict Scrutiny of the Right to Travel*, 22 UCLA L. REV. 1129, 1129 n.3 (1975). However, Blackstone recognized that the right was not unlimited. For example, the King was entitled to issue a writ *ne exeat regnum*, an equitable writ barring "subjects from going into foreign parts without licence." 1 BLACKSTONE, *supra*, at *137; *see* United States v. Shaheen, 445 F.2d 6, 9 (7th Cir. 1971) ("[T]he writ ne exeat regnum[] was a prerogative writ enabling the sovereign to compel a man to remain within the realm to help in the defense of his country."). The discretion of the sovereign to issue such writs was apparently limited to situations "necessary for the public service, [or] safeguard of the commonwealth." 1 BLACKSTONE, *supra*, at *137; *see also Shaheen*, 445 F.2d at 9.

The Founders of the United States endeavored to include similar protections. The Articles of Confederation explicitly guaranteed "free ingress and regress"[38] between states so as to "secure and perpetuate mutual friendship and intercourse" among them.[39] The 1788 Constitution, however, did not mention travel in such clear terms.[40] Somewhat more abstractly, it guaranteed that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[41] Much has been made of the differences between Article IV of the Articles of Confederation and Article IV of the 1788 Constitution.[42] But the removal of explicit protection for "free ingress and regress"[43] was not apparently intended to evince an abrogation of the right.[44] Rather, the

---

38 "Ingress" is the "act of entering." *Ingress*, BLACK'S LAW DICTIONARY (11th ed. 2019). "[R]egress" is "[t]he act or an instance of going or coming back; return or reentry." *Regress*, BLACK'S LAW DICTIONARY (11th ed. 2019). Regress is distinct from "egress," which is "[t]he act of going out or leaving [or] [t]he right or ability to leave." *Egress*, BLACK'S LAW DICTIONARY (11th ed. 2019). It is not clear how much meaning can be ascribed to the Articles of Confederation's use of "regress" rather than "egress." The Magna Carta similarly placed the right to leave in the context of a right to return afterward. *See supra* note 36 and accompanying text. If this was intended to cabin the right to travel, that interpretation did not last: one of the first Supreme Court cases to consider the right to travel struck down a tax on leaving the state. *See infra* text accompanying notes 48–52. Accordingly, this Note uses "ingress and egress" in a general sense to mean "the right to go from one place to another, including the right to cross state borders while en route," *Saenz*, 526 U.S. at 500, without intending to draw any distinctions between "egress" and "regress."

39 ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1. Though the Articles dropped the English *ne exeat* exception, there remained exceptions for "paupers, vagabonds and fugitives from justice." *Id.*

40 *See* U.S. CONST. art. IV, § 2, cl. 1.

41 *Id.* This Note distinguishes between this Clause and Section 1, Clause 2 of the Fourteenth Amendment by referring to the former as the Privileges *and* Immunities Clause and the latter as the Privileges *or* Immunities Clause. *Compare id.* ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."), *with id.* amend. XIV, § 1, cl. 2 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."). One reading of this distinction is that the conjunctive form establishes an entitlement to positive rights—both privileges and immunities—while the disjunctive form provides protection against state infringement of *either* privileges or immunities. Mark Strasser, *The Privileges of National Citizenship: On* Saenz*, Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 553, 556 (2000). Though elegant, this explanation has not stopped anyone from confusing the two. *See infra* note 64; *see also Privileges or Immunities Clause*, WIKIPEDIA, https://en.wikipedia.org/wiki/Privileges_or_Immunities_Clause [https://perma.cc/6LSR-C2HT] (Feb. 29, 2024) ("Not to be confused with the related Privileges and Immunities Clause.").

42 *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 54–57 (2021).

43 ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.

44 BARNETT & BERNICK, *supra* note 42, at 54–57 ("[I]t seems unlikely that this change sprang from a newfound tolerance of economic protectionism by the states. More plausibly, it was driven by the conviction that Congress already had power over interstate commerce that it could use to thwart interstate protectionism . . . ." (footnote omitted)).

right to travel was thought to be "so elementary" that explicit protection was unnecessary in the constitutional text.[45]

The earliest discussion in American jurisprudence of free movement as a fundamental right was in *Corfield v. Coryell*.[46] There, Justice Washington confirmed that the right to travel from one's home state to another, for both personal and professional reasons, was protected under the Privileges and Immunities Clause.[47] Then, in *Crandall v. Nevada*, the Court struck down a Nevada tax on people leaving the state.[48] The Court explained that citizens of each state, in their capacity as citizens of the United States, have a right to "come to the seat of government,"[49] which requires travel through the several states.[50] And though the tax at issue in *Crandall* was de minimis, and there was no evidence that the tax imposed a real burden on travel to the seat of government, the Court held that it was unconstitutional.[51] Two Justices concurred in the result but argued that the tax violated the Commerce Clause by erecting a barrier to interstate commerce.[52] These first few cases provided a relatively murky account of the right to travel that was not clarified until the early twentieth century.[53]

---

45 United States v. Guest, 383 U.S. 745, 758 (1966).

46 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). The opinion was authored by Justice Bushrod Washington, riding circuit in the Eastern District of Pennsylvania.

47 *Id.* at 552. Justice Washington phrased the right to travel as the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise." *Id.*

48 73 U.S. 35, 40, 49 (1867).

49 *Id.* at 44.

50 *See id.* (stating that the right to travel to the seat of government must be "independent of the will of any State over whose soil [one] must pass" to do so). To travel overland between non-adjacent states, one must necessarily pass through an intermediate state (or foreign country). *See The National Atlas of the United States of America*, U.S. GEOLOGICAL SURV. (2003), https://maps.lib.utexas.edu/maps/united_states/us_general_reference_map-2003.pdf [https://perma.cc/2RVF-NSE8].

51 *Crandall*, 73 U.S at 46. The Court's reasoning was simple:

> [I]f the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State. And thus one or more States . . . may totally prevent or seriously burden all transportation of passengers from one part of the country to the other.

Id.

52 *Id.* at 49 (Clifford, J., and Chase, C.J., dissenting).

53 *See* Baker, *supra* note 37, at 1131 n.11. That clarification began with *Edwards v. California*, 314 U.S. 160 (1941). But even then, judges have disagreed about what aspect of the right to travel each case turned on. *See id.* at 178–80 (Douglas, J., concurring); Baker, *supra* note 37, at 1131 n.11.

Modern right to travel jurisprudence began to be developed in earnest with *Edwards v. California*.[54] In *Edwards*, a California law made it a misdemeanor to knowingly bring an indigent person into the state.[55] Edwards, a California resident, drove his brother-in-law—who had no money by the time he arrived—into California.[56] Reiterating that transporting persons is "commerce,"[57] the Court struck down the California law as an "unconstitutional barrier to interstate commerce."[58] Because the law's "express purpose and inevitable effect" was to prevent the interstate transport of persons, the Court held that the burden on interstate commerce was "intended and immediate."[59] The majority passed no judgment on whether the law imposed a burden on the right to travel.[60]

Four Justices took issue with that omission.[61] Justice Douglas, joined by Justices Black and Murphy, wrote in a concurrence that the "right of free movement is a right of national citizenship" that "stands on firm historical ground."[62] Justice Douglas argued that *Crandall* broadly implies a right to travel that was, prior to the enactment of the Fourteenth Amendment, a right of national citizenship.[63] Accordingly, the right to travel is a privilege protected by the Privileges or Immunities Clause of the Fourteenth Amendment against state interference.[64]

---

54 314 U.S. 160. Baker characterizes *Edwards* as "the beginning of the modern right to travel." Baker, *supra* note 37, at 1131. Others have pointed to an earlier case, *United States v. Wheeler*, 254 U.S. 281 (1920), as the first time a fundamental right to interstate travel was announced. *See* Kathryn E. Wilhelm, Note, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 B.U. L. REV. 2461, 2465 (2010). But *Wheeler*, though important, simply confirmed the idea that free ingress and regress was protected by the Privileges and Immunities Clause. 254 U.S. at 294.

55 *Edwards*, 314 U.S. at 171.

56 *Id.* at 170–71.

57 The majority stated that it was "settled beyond question that the transportation of persons is 'commerce.'" *Id.* at 172. Though that may be true as a matter of precedent, it is not obvious as a matter of common sense. *Id.* at 182 (Jackson, J., concurring). On the other hand, "travel" is definitionally the movement of persons through some mode of transportation. But the words "travel" and "movement" are conspicuously absent from the majority opinion.

58 *Id.* at 172–73 (majority opinion).

59 *Id.* at 174.

60 *See id.*

61 *See infra* notes 62, 71 and accompanying text.

62 *Edwards*, 314 U.S. at 181 (Douglas, J., concurring).

63 *Id.* at 178–79.

64 *Id.* at 179; *see also* Slaughter-House Cases, 83 U.S. 36, 79 (1872). Justice Douglas erroneously referred to the "privileges *and* immunities clause of the Fourteenth Amendment." *Edwards*, 314 U.S. at 179 (Douglas, J., concurring) (emphasis added). As discussed *supra* note 41, this Note refers to it as the Privileges *or* Immunities Clause. U.S. CONST. amend. XIV, § 1, cl. 2.

Justice Douglas distinguished this Fourteenth Amendment protection of the right to travel from the Article IV protection.[65] The Privileges and Immunities Clause of Article IV is "primarily concerned with the incidents of residence . . . and the exercise of rights within a State."[66] That is, it bars state discrimination against nonresidents of a state.[67] In Justice Douglas's view, the Article IV Privileges and Immunities Clause had not been applied in *Crandall* because Nevada's tax on leaving the state did not distinguish between residents and nonresidents.[68] But because the right to travel is a right of national citizenship,[69] Justice Douglas argued that the Privileges or Immunities Clause of the Fourteenth Amendment would have applied, had it existed at the time.[70]

In a separate concurrence, Justice Jackson essentially agreed with Justice Douglas's Privileges or Immunities analysis.[71] But he also recognized that the right to travel under the Privileges or Immunities Clause is not "unlimited,"[72] and thus explained why indigence is not a constitutionally valid reason to abridge that right. First, he compared indigence to "race, creed, or color," other "neutral fact[s]" that are "constitutionally an irrelevance."[73] Second, he argued that conditioning a civil right on the possession of property or money threatens the "security of property" itself.[74]

The Court reiterated its view that the right to free ingress and egress is protected in *United States v. Guest*.[75] Six defendants had been indicted for, among other things, conspiracy to "injure, oppress, threaten, and intimidate [Black] citizens of the United States in the free exercise and enjoyment of" their right to travel.[76] The indictment did not explain how

---

65 *See infra* notes 66–70 and accompanying text.

66 *Edwards*, 314 U.S. at 180 (Douglas, J., concurring).

67 *Id.* at 180–81 (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 511 (1939)).

68 *Id.*

69 *See supra* note 62 and accompanying text.

70 As Justice Douglas explained, the *Crandall* majority's reasoning rested "on the broader ground of rights of national citizenship . . . . On that broader ground it should continue to rest." *Edwards*, 314 U.S. at 180 (Douglas, J., concurring). The Fourteenth Amendment was not adopted until 1868, one year after *Crandall*. *See* U.S. CONST. amend. XIV.

71 *Edwards*, 314 U.S. at 184 (Jackson, J., concurring).

72 *Id.* at 184. Justice Jackson suggested that fugitives or those carrying contagions could be restricted from travel without violating the Fourteenth Amendment. And he conceded that there were "perhaps other[]" reasons that did "not occur to [him] now." *Id.*

73 *Id.* at 184–85.

74 *Id.* at 185.

75 383 U.S. 745 (1966).

76 *Id.* at 757 (quoting the indictment). Specifically, the indictment stated that they were deprived of "[t]he right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia." *Id.* The operative criminal statute was 18 U.S.C. § 241. *Id.* at 746–47.

the specific facts it alleged imposed a burden on the right to travel.[77] But given the procedural posture, the Court looked only at whether the right to travel was a federal "right or privilege secured . . . by the Constitution or laws of the United States," as required by 18 U.S.C. § 241.[78] While the Court declined to identify the source of the right to travel,[79] it unconditionally affirmed that such right exists.[80]

Only Justice Harlan dissented from that holding.[81] He argued that, though there is a right to travel, it is not protected against private interference—only against state action.[82] Unlike the majority, he "examine[d] the several asserted constitutional bases for the right to travel, and the scope of its protection in relation to each source."[83] Characterizing *Crandall* as being expressly limited to state action,[84] he concluded that the Privileges and Immunities Clause conception of the right to travel should be viewed as a "method of breaking down state provincialism, and facilitating the creation of a true federal union."[85] This harkens back to the purpose of the Privileges and Immunities Clause of the Articles of Confederation: "[T]o secure and perpetuate mutual friendship and intercourse" among the states.[86] Justice Harlan also suggested that he agreed with a conception of the right to travel as a component of due process.[87]

Just a quarter century later, *Guest*'s protection of interstate travel against private interference was somewhat limited in *Bray v. Alexandria Women's Health Clinic*.[88] There, the Supreme Court held that antiabortion protesters who prevented women from getting to abortion clinics did not violate the women's right to interstate travel.[89] As the

---

77 The defendants allegedly used various means, including shooting, beating, killing, pursuing and threatening, destroying the property of, and causing false arrests of Black people. The indictment also alleged the defendants "burn[ed] crosses at night in public view." *Id.* at 747 n.1 (quoting the indictment).

78 18 U.S.C. § 241 (1964).

79 *Guest*, 383 U.S. at 759 ("[T]here have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, [and] there is no need here to canvass those differences further."). The failure to explain the source of the constitutional right was criticized not only by Justice Harlan, *see infra* notes 82–87 and accompanying text, but also by later commentators, Baker, *supra* note 37, at 1135 n.42.

80 *Guest*, 383 U.S. at 759.

81 *Id.* at 762–63 (Harlan, J., concurring in part and dissenting in part).

82 *Id.* at 763.

83 *Id.* at 764.

84 *Id.* at 764–66.

85 *Id.* at 767.

86 ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.

87 *Guest*, 383 U.S. at 769–70 (Harlan, J., concurring in part and dissenting in part).

88 506 U.S. 263 (1993).

89 *Id.* at 274–77.

Court explained, there were no "actual barriers to interstate movement."[90] Rather, the only physical barrier was near the abortion clinic itself. So, an interstate traveler could freely enter the state but, like other in-state residents, could not access the clinic. The Court held that a local restriction of interstate travelers' movement—so long as it affects purely intrastate travelers equally—is constitutional.[91]

Moreover, though many of the women had traveled from another state, the demonstrators were protesting abortion categorically.[92] That is, the purpose of the protest was not to prevent women from traveling interstate, but rather to prevent them from obtaining an abortion—regardless of where they were from.[93] The Court explained that some "purpose" of depriving a fundamental right was required.[94] And when the "predominant purpose" of preventing intrastate travel is to in fact prevent interstate travel, the right to travel is violated.[95]

The distinctions between interstate and intrastate travel identified in *Bray* are vitally important to understanding the application of the right to travel. After all, anyone traveling between states necessarily travels within each state on their way to and from the border.[96] Some purely intrastate restrictions undoubtedly burden interstate travel in a trivial sense,[97] and other restrictions may lack the "predominant purpose" *Bray* requires.[98]

There are also a number of situations in which the right to travel has surprisingly been found not to be implicated.[99] States can sometimes apply their laws to events that occur outside their borders.[100] International travel, when done with illicit intent, can be criminalized at a federal level.[101] Similarly, interstate travel for an illicit purpose can be criminalized at a federal level under the Commerce Clause.[102] States too may consider a defendant's interstate travel in the criminal context. For example, in the face of a right to travel challenge, the Court of Appeals of Wisconsin upheld a statutory sentencing enhancement that applied to

---

90 *Id.* at 277 (quoting Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982)).

91 *Id.*; *see also id.* at 333 (Stevens, J., dissenting).

92 *See id.* at 276 (majority opinion).

93 *Id.*

94 *Id.*

95 *Id.* at 275 (quoting United States v. Guest, 383 U.S. 745, 760 (1966)).

96 *Cf.* sources cited *supra* note 50.

97 For example, a speed limit on a state road may prevent someone from leaving the state as fast as they wish. But it is not an "actual barrier" because, as *Bray* explains, it affects purely intrastate conduct.

98 *Bray*, 506 U.S. at 275–76 (quoting *Guest*, 383 U.S. at 760).

99 *See* cases cited *infra* notes 100–103.

100 *See* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

101 United States v. Bredimus, 352 F.3d 200, 209–10 (5th Cir. 2003).

102 United States v. Tykarsky, 446 F.3d 458, 470, 472 (3d Cir. 2006).

drug dealers who traveled outside of the state while distributing drugs.[103] In fact, a state can wholly criminalize certain interstate travel when such a law mirrors a federal ban. In *Edmondson v. Pearce*, the Oklahoma Supreme Court upheld a ban on traveling through the state with birds intended to be used in cockfighting, even if cockfighting was legal in the ultimate destination.[104] The Oklahoma court made clear, though, that the right to travel was not implicated because there was already a federal law which banned exactly the same conduct.[105]

2. Other Conceptions of Travel

The second aspect of the right to travel identified in *Saenz*—the right to be treated as a welcome visitor—also motivated the adoption of the Privileges and Immunities Clause.[106] At the Founding, the most significant distinction between states was their embrace or abolition of slavery.[107] There was a real concern that states would use their local power to discriminate against travelers from states with which they had a profound moral disagreement over slavery.[108] The Privileges and Immunities Clause was apparently an attempt to prevent that from happening.[109]

The third component of the right to travel is similar to the second, since it too prevents a state from discriminating. The difference is that while the latter protects noncitizens from discrimination while traveling in a foreign state, this right protects new citizens from discrimination after settling in their new home state.[110] The inclusion of the Fugitive

---

103 State v. Johnson, 386 Wis. 2d 629 (Ct. App. 2019) (unpublished table decision).

104 91 P.3d 605, 625–26 (Okla. 2004).

105 *Id.* at 626–27.

106 Kreimer, *supra* note 17, at 464; *see also* BARNETT & BERNICK, *supra* note 42, at 56–57 ("On the second reading, when sojourning in other states, citizens of the United States were entitled to nondiscrimination with respect to whatever set of privileges or immunities were afforded by states to their own citizens.").

107 Kreimer, *supra* note 17, at 464, 464 n.38.

108 *Id.* at 464–65; *see also* Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1249, 1273 (2010). Many Americans at the time were skeptical of the power of state governments, which were often "self-serving, and sometimes corrupt." *Id.* at 1249.

109 Lash, *supra* note 108, at 1258–59. Professor Lash suggests that the adoption of Article IV of the Articles of Confederation was a direct attempt to clarify what citizens "could expect when traveling to, or through, other states." *Id.* The Privileges and Immunities Clause of the 1788 Constitution was simply a "streamlined version." *Id.* at 1259.

110 *See infra* note 117 and accompanying text.

Slave Clause[111] in the 1788 Constitution gives some, albeit bleak, credence to an account of the Privileges and Immunities Clause as the source of this component of the right to travel.[112] The Fugitive Slave Clause prevented free states from emancipating slaves who came within their jurisdiction.[113] The implication is that, without such a clause, free states would have been entitled to emancipate escaped slaves within their jurisdiction.[114] That is, the Constitution was designed to protect the right to travel to another state—and become an equal citizen under the laws thereof—except in the case of slavery.[115] With slavery abolished,[116] the first half of the proposition remains: one is entitled to travel to a foreign state, become a citizen of that state, and be treated equally under its laws.[117]

While neither of these somewhat abstract conceptions of the right to travel are directly implicated by travel bans, they indicate that the Founders were extremely concerned by the possibility that states would treat people differently based on their residence, and considered the right to travel, writ large, to be a protection against anti-federal discord.

B. *Fundamental Rights of Minors*

Minors are broadly protected by the Constitution.[118] But not every right is extended to them in equal measure, and the framework for determining the extent to which fundamental rights apply to minors is relatively complex.[119] This Section begins by outlining the lenses through

---

111 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.").

112 *See* Kreimer, supra note 17, at 464. My argument here borrows heavily from Professor Kreimer. His focus, however, is on the broader constitutionality of extraterritorial application of state law.

113 *See* U.S. CONST. art. IV § 2, cl. 3.

114 Kreimer, *supra* note 17, at 464.

115 *See id.*

116 U.S. CONST. amend. XIII.

117 *See* Kreimer, *supra* note 17, at 464.

118 *See, e.g.*, *In re* Gault, 387 U.S. 1 (1967) (holding that juvenile delinquency proceedings must satisfy Fourteenth Amendment due process standards); New Jersey v. T.L.O., 469 U.S. 325 (1985) (analyzing children's Fourth Amendment right to be free from unreasonable searches by school officials).

119 *See* Laurence D. Houlgate, *Three Concepts of Children's Constitutional Rights: Reflections on the Enjoyment Theory*, 2 U. PA. J. CONST. L. 77, 77–79 (1999) (gathering cases where the Court held, among other things, that children lacked a right to a jury trial, bail, or protection from corporal punishment, that children did not have a freedom of speech coextensive with that of adults, and that children were less protected by the Fourth Amendment when at school).

which juvenile rights can be analyzed.[120] Then, it surveys the major Supreme Court decisions in this area.[121]

Scholars have suggested three methods of analyzing laws that target minors.[122] First, one can view them as an infringement on the parent-child relationship: a law that targets juveniles damages the primacy of the parent in their relationship with their child.[123] Second, and similarly, one can view them through the lens of the parent-state relationship: because parents are in full control over their children, a law restricting children impliedly restricts the parent and must be examined as if it targeted the parent directly.[124] Third, one can view them through the lens of the child-state relationship: children are individuals with their own unique relation to the state that includes certain privileges and restrictions distinct from those possessed by adults.[125] These methods have frequently arisen in cases determining the rights of minors, particularly abortion rights.[126]

In the wake of *Roe v. Wade*,[127] courts took up challenges to numerous laws that restricted minors' abortions through indirect means.[128] In two significant cases, the Court held that some parental consent requirements were unconstitutional.[129]

The first case, *Planned Parenthood of Central Missouri v. Danforth*, struck down a Missouri statute that required unmarried minors in their first twelve weeks of pregnancy to obtain the written consent of at least one parent or guardian before having an abortion.[130] Missouri argued that minors can be subjected to stricter regulation than their adult

---

120 *See infra* text accompanying notes 122–125.

121 *See infra* text accompanying notes 130–164.

122 *See, e.g.*, David A. Herman, Note, *Juvenile Curfews and the Breakdown of the Tiered Approach to Equal Protection*, 82 N.Y.U. L. REV. 1857, 1877 (2007); Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 592–600 (2002).

123 *See* Guggenheim, *supra* note 122, at 599–603.

124 *See* Herman, *supra* note 122, at 1877. While both the first and second views are grounded in the importance of the parent, they are subtly and importantly distinct. The second is simplest to understand in that it treats children as something like the property of their parents, where any act by a child is imputed to the parent. Under this view, when a child is barred from doing something, it is the parent who suffers a deprivation. On the other hand, the first view acknowledges that children have agency. But it treats the parent-child relationship as an independent interest that is furthered by the parent's authority.

125 *See* Guggenheim, *supra* note 122, at 596–99.

126 *See id.* at 592–600 (identifying cases applying the three analytical methods).

127 410 U.S. 113 (1973).

128 *E.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 58–59 (1976) (addressing various restrictions including a requirement that abortion-seekers fill out consent forms, a ban on certain types of abortion procedures, a requirement for strict recordkeeping, and a statutory duty on physicians to preserve fetal life).

129 *Id.* at 75; Bellotti v. Baird, 443 U.S. 622, 647–48 (1979) (plurality opinion).

130 428 U.S. at 72. The statute excepted situations where the abortion was deemed necessary to save the life of the mother. *Id.*

counterparts when the state has an interest in doing so.[131] The state's interest extends to a duty to protect the general welfare of juveniles.[132] So, for example, laws that restrict the sale of alcohol, the extension of credit, and the exposure of obscene literature to minors, written with the intent to protect juveniles from their inability to act in their own best interest, satisfy a high enough state interest.[133] Similarly, Missouri argued, an abortion may be against the pregnant child's best interest, and requiring parental consent would help ensure that interest was protected.[134]

Missouri also argued that the parent-child relationship—and thus the parent's authority to approve or reject the child's abortion request—should be protected from state interference.[135] The district court[136] agreed with this second rationale, holding that the state had a compelling interest in protecting the supremacy of the parent-child relationship.[137]

The Supreme Court reversed.[138] It acknowledged the state's heightened authority to regulate juvenile conduct, but clarified its limits.[139] First, the Court stated that there must be a "significant state interest . . . not present in the case of an adult."[140] Then, the Court found that the proffered state interest in preserving the family unit and parental authority, though perhaps significant, was not likely to be furthered by a parental consent requirement.[141] Finally, the Court compared the parental interest in the abortion decision to the child's privacy interest in abortion, holding (without explanation) that the former is "no more weighty" than the latter.[142] This suggests an interesting dichotomy in the Court's analysis. The first aspect—whether there is significant state interest—seems to ask whether the state interest rises to a fixed, objective level of importance. The second aspect—comparing the state interest to

131 *Id.*

132 *Id.* at 72–73.

133 *Id.* at 72.

134 *Id.* at 72–73.

135 *Id.* at 73.

136 The challenge was heard by a three-judge district court panel pursuant to the now-repealed 28 U.S.C. § 2281, which required such panels in cases seeking "interlocutory or permanent injunction[s] restraining the enforcement, operation or execution of a State statute." Act of June 25, 1948, ch. 646, § 1, 62 Stat. 968, *repealed by* Act of Aug. 12, 1976, Pub. L. No. 94-381, § 1, 90 Stat. 1119. The Supreme Court was entitled to exercise immediate appellate jurisdiction—bypassing the courts of appeals—under 28 U.S.C. § 1253 ("[A]ny party may appeal to the Supreme Court from an order granting or denying [injunctive relief] in any civil action . . . heard and determined by a district court of three judges.).

137 *Danforth*, 428 U.S. at 73.

138 *Id.* at 74.

139 *Id.* at 74–75.

140 *Id.* at 75.

141 *Id.*

142 *Id.*

the child's interest—seems more flexible and dependent on the right at issue. And it raises the question of whether both aspects are required: Could an insignificant state interest that nevertheless outweighs a negligible juvenile interest justify targeted restrictions on minors?

Around the same time, the Court decided *Bellotti v. Baird*.[143] In the aftermath of *Roe*, Massachusetts had passed a law similar to Missouri's, requiring unmarried pregnant minors to obtain parental consent before undergoing an abortion.[144] In some ways, the Massachusetts law was more liberal than Missouri's: it provided that a minor could seek judicial consent in the absence of parental consent, and the judge was not allowed to consider parental objections based on any factor other than the child's best interest.[145] But the Massachusetts law was otherwise extremely strict. It required parents to consider only the best interests of the child when deciding whether to consent;[146] it allowed the judge to disregard the fact that a minor was making an "informed and reasonable decision";[147] and it barred a child from seeking judicial consent if she had not first sought parental consent.[148] As Justice Stevens characterized it, every minor's attempt to obtain an abortion was "subject to an absolute third-party veto."[149]

---

143 443 U.S. 622 (1979) (plurality opinion). In fact, the Court decided an initial question in *Bellotti v. Baird* on the same day as *Danforth* in 1976. *See* Bellotti v. Baird, 428 U.S. 132 (1976); *Danforth*, 428 U.S. 52. (Issuing two abortion decisions in a day seems to have been a popular move in the Burger Court. *Compare* Roe v. Wade, 410 U.S. 113 (1973), *with* Doe v. Bolton, 410 U.S. 179 (1973).) That first case, *Bellotti I*, held that one plausible interpretation of a Massachusetts parental consent requirement would be constitutional, but remanded with instructions to certify to the Massachusetts Supreme Judicial Court for a definitive interpretation of the requirement. 428 U.S. at 147, 151–52. That interpretation, discussed here, was then challenged in *Bellotti II*. 443 U.S. 622. For simplicity, this Note refers to *Bellotti II* as *Bellotti* (and does not further discuss *Bellotti I*). For a fascinating biographical account of the lead plaintiff in both cases, William Baird, see Nick Kolev, *50 Years Later: Revisiting the Moment in BU History That Helped Shape the Abortion Rights Battle*, BU TODAY (July 11, 2022), https://www.bu.edu/articles/2022/activist-bill-baird-abortion-rights-bu-lecture [https://perma.cc/9LCZ-BK9Q]. Both the ACLU and Planned Parenthood opposed Baird's efforts to secure reproductive rights through the courts and refused to provide him with representation. *Id.* He was instead represented by local criminal defense attorney Joseph Balliro all the way to the Supreme Court. *See* Brief of Appellees, *Bellotti*, 443 U.S. 622 (Nos. 78-329, 78-330), 1979 WL 199882; *cf.* Roy Lucas, *New Historical Insights on the Curious Case of* Baird v. Eisenstadt, 9 ROGER WILLIAMS U. L. REV. 9, 35 (2003) (describing Baird's decision to drop Balliro on the eve of oral argument in an earlier contraceptive case).

144 *Bellotti*, 443 U.S. at 625.

145 *Id.* at 630.

146 *Id.* ("[J]udicial consent for an abortion shall be granted, parental objections notwithstanding, . . . if found to be in the minor's best interests. The judge 'must disregard all parental objections, and other considerations, which are not based exclusively' on that standard." (quoting Baird v. Att'y Gen., 360 N.E.2d 288, 293 (Mass. 1977))).

147 *Id.*

148 *Id.*

149 *Id.* at 654 (Stevens, J., concurring).

A fractured plurality struck down the law.[150] Constitutional principles and values, the Court explained, must be applied to children with a "sensitivity" to both the unique demands of children and the family structure itself.[151] To that end, the Court identified three factors to consider in determining whether the constitutional rights of children are coextensive with those of adults.[152]

First, the Court expressed a concern for the "peculiar vulnerability of children."[153] The Court has generally found this factor dispositive in procedural due process cases, holding that children have nearly exactly the same rights as adults.[154] However, in some cases—again, out of concern for children's vulnerability—the Court has sanctioned minor changes to the juvenile legal system that allow for additional compassion and support.[155] This approach focuses on the child-state relationship and the distinct nature of children in considering their treatment under the law.

The second consideration is children's "inability to make critical decisions in an informed, mature manner."[156] In cases dealing with positive rights, such as those protected by the First Amendment, the Court will consider the extent to which children may be harmed by their choices.[157] When there is some risk to children, a restriction of their liberty is constitutionally acceptable.[158]

Third and finally, the Court will consider the value of parental authority over raising one's children.[159] In general, parents are allowed to have some say over their children's lives—sometimes over their children's objections.[160] The process of raising children, the Court explained, is

---

150 *Id.* at 651 (plurality opinion). Eight justices agreed that the statute was unconstitutional. Four signed on to Justice Powell's opinion; four signed on to Justice Stevens's.

151 *Id.* at 634.

152 *Id.*

153 *Id.*

154 *Id.* (first citing *In re* Gault, 387 U.S. 1 (1967) (holding that children in juvenile proceedings are entitled to notice, counsel, and confrontation); and then citing *In re* Winship, 397 U.S. 358 (1970) (holding that juveniles can only be found guilty on proof beyond a reasonable doubt, and are entitled to the privilege against self-incrimination)).

155 *Id.* at 635 ("[T]he State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'" (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971) (plurality opinion) (holding that juveniles are not always entitled to a jury trial))).

156 *Id.* at 634.

157 *Id.* at 635–37.

158 *Id.* at 636 (explaining that lewd magazines were a "danger against which [children] should be guarded").

159 *Id.* at 634.

160 *Id.* at 638.

outside the scope of the government's expertise.[161] Accordingly, the fact that a restriction on a minor encourages the parental role weighs in favor of that restriction's constitutionality.[162] In so explaining, the Court seemed to highlight both the parent-child relationship and the parent-state relationship.

In *Bellotti*, the Court put a premium on these considerations. The plurality only barely found the Massachusetts law unconstitutional, holding that there was a strong interest in family decision-making around abortion.[163] The Court allowed the parental consent requirement to continue, so long as the minor could obtain judicial relief—without parental notification—when a court found it was in the minor's best interest.[164]

C. *Minors' Right to Travel*

Courts have not yet decided the extent to which minors have a right to interstate travel. However, some courts have analyzed the extent to which minors have a right to intrastate travel in the context of juvenile curfews.[165] Local curfew ordinances bar children from traveling outside their homes between certain nighttime hours, sometimes even with parental consent.[166] While the underlying right is different—intrastate versus interstate travel[167]—the application of juvenile curfew laws is remarkably analogous to juvenile abortion travel bans. And the variety of methods that courts have employed in evaluating the former is instructive

---

161 *Id.* The Court explained that the "affirmative process of teaching, guiding, and inspiring" children is "beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice." *Id.*

162 *Id.* at 638–39.

163 *Id.* at 648.

164 *Id.*

165 The most common juvenile curfews generally bar people under eighteen wandering, playing, or generally hanging out in public places during certain evening hours. *E.g.*, Ramos v. Town of Vernon, 353 F.3d 171, 172 (2d Cir. 2003). Some curfews only apply to children sixteen and under. *E.g.*, Hutchins v. District of Columbia, 188 F.3d 531, 534 (D.C. Cir. 1999) (en banc) (plurality opinion). Most have exceptions or "defenses," including running errands at a parent's instruction or with parental accompaniment; emergency, interstate, employment-related, or school-related travel; or exercising First Amendment rights through religious observance or public protest. *See id.* at 535; *Ramos*, 353 F.3d at 172.

166 *See Ramos*, 353 F.3d at 172–73.

167 Importantly, not every circuit has recognized a constitutional right to intrastate travel. *Compare Ramos*, 353 F.3d at 176 (recognizing a federal constitutional right to intrastate travel or "free movement"), *with* Wardwell v. Bd. of Ed. of City Sch. Dist. of City of Cincinnati, 529 F.2d 625 (6th Cir. 1976) (holding that intrastate travel lacks federal constitutional protection).

for analysis of the latter. In particular, a split has formed among the D.C., Second, and Ninth Circuits[168] on what level of scrutiny should be applied. This Section describes that split, evaluates each Circuit's methodology, and draws parallels to minors' interstate travel rights.

1. Intermediate Scrutiny

Two courts of appeals have held that minors' right to intrastate travel is subject to intermediate scrutiny but have diverged in their application of that review. In *Hutchins v. District of Columbia*, the D.C. Circuit upheld a juvenile curfew in a divided opinion.[169] A plurality held that the curfew did not infringe on any fundamental rights of children or their parents.[170] But the court went on to explain that, had the right to travel been implicated,[171] intermediate scrutiny would apply and be satisfied.[172]

In finding no fundamental right, the plurality clearly delineated between interstate travel, as described in *Saenz*,[173] and the freedom of movement burdened by the curfew.[174] The court characterized the right to travel as a protection against interstate discrimination rather than a general right to intrastate movement.[175] And in rejecting as dicta the Supreme Court's occasional suggestion of a general right to movement, the plurality took some care to note that a restriction on interstate travel would be "subject to a more exacting standard."[176] This distinction is important because it suggests that stricter scrutiny would be needed if the right to interstate travel was implicated by a restriction on minors.

The plurality in *Hutchins* also rejected the notion that the curfew infringed upon parents' right to control their children.[177] Though the court agreed that parents have such a right in the abstract—and that the constitutional inquiry should be stricter than mere rational basis review—it held that the right was not implicated by the curfew.[178] The

---

168 *See Hutchins*, 188 F.3d 531; *Ramos*, 353 F.3d 171; Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997).

169 188 F.3d 531, 548.

170 *Id.* at 534.

171 *Id.* at 548–49 (Edwards, C.J., concurring).

172 *Id.* at 541, 545 (plurality opinion).

173 Saenz v. Roe, 526 U.S. 489, 500 (1999) (describing a "right to go from one place to another, including the right to cross state borders while en route").

174 *Hutchins*, 188 F.3d at 536–37.

175 *Id.* at 536.

176 *Id.* at 537.

177 *Id.* at 540.

178 *Id.*

parental interest, in the plurality's view, extended only so far as the boundaries of the home and the child's educational environment[179]: those "intimate family decisions" protected "against undue, adverse interference by the state."[180] Accordingly, with neither parents nor children suffering a burden on a fundamental right, the court could have simply applied a rational basis test under which the curfew would have been upheld.[181]

Instead, the court assumed for the sake of argument that a fundamental right *was* implicated, and examined and upheld the curfew under intermediate scrutiny accordingly.[182] In doing so, the court asked whether the ordinance was substantially related to a government interest by looking at the factual basis for the curfew, the curfew's connection to those facts, and the breadth of the restriction.[183] It held that intermediate scrutiny was satisfied.[184] Among other things, the court noted the "reams of evidence" showing the effect of juvenile crime in the District of Columbia, and concluded that ensuring the safety of minors is undoubtedly an "important government interest."[185]

In *Ramos v. Town of Vernon*,[186] the Second Circuit also applied intermediate scrutiny to a similar juvenile curfew ordinance but, unlike the D.C. Circuit, struck down the law.[187] Because the Second Circuit recognizes intrastate travel as a fundamental right, the court initially acknowledged that, had the curfew applied to adults, strict scrutiny would have applied.[188] The question was whether, and to what extent, minors possess that same right.[189]

---

179 *Id.* at 540–41.

180 Schleifer v. City of Charlottesville, 159 F.3d 843, 852–53 (4th Cir. 1998); *Hutchins*, 188 F.3d at 540–41.

181 *Hutchins*, 188 F.3d at 563, 566 (Rogers, J., concurring in part and dissenting in part) ("[R]ational basis scrutiny applies to burdens on rights that do not qualify as fundamental."). Judge Rogers characterized rational basis review as "rarely-fatal." *Id.* at 563.

182 Only four judges thought that no fundamental right was implicated. Their views are summarized in a footnote in Judge Rogers's concurrence. *Id.* at 553 n.1. This suggests perhaps that the inclusion of an intermediate scrutiny analysis (and the court's decision to go further than mere rational review) was an attempt to garner more support for the ultimate plurality opinion.

183 *Id.* at 541–42.

184 *Id.* at 545.

185 *Id.* at 542.

186 353 F.3d 171 (2d Cir. 2003).

187 *Id.* at 187.

188 *Id.* at 176. Strict scrutiny applies when a law burdens a fundamental right. *Id.* at 175.

189 *Id.* at 176.

The court identified three possible approaches to account for minors' unique position when analyzing their rights.[190] The first "den[ies] the existence of a constitutional right" and applies rational basis review.[191] The next approach posits that a fundamental right warrants strict scrutiny in all circumstances, but allows consideration of the particular interests and infirmities of minors when determining whether there is a compelling government interest that overcomes strict scrutiny.[192] The final approach, adopted in *Ramos*, acknowledges the fundamental right but lowers the level of scrutiny "to compensate for children's special vulnerabilities."[193]

Such a reduction is usually disfavored.[194] Standards of scrutiny are "typically . . . determined by the right, not the class, affected."[195] But when blindness to a characteristic is not the ultimate goal of the protected right—and relevant differences between classes exist—intermediate scrutiny has been deemed appropriate.[196] Because "[y]outh-blindness is not a constitutional goal" and the differences between children and adults are significant,[197] the Second Circuit applied intermediate scrutiny.[198] The identification of those differences harkens back to the state's concern for the "peculiar vulnerability of children" identified in *Bellotti*,[199] and likewise suggests a focus on the child-state relationship justifying increased restrictions.[200]

To satisfy intermediate scrutiny, a law's discriminatory classification must be "substantially related" to accomplishment of "important

---

190 *Id.* at 176–77. These approaches are different than the "methods of analy[sis]" discussed *supra* Section I.B. While those provide a variety of theoretical lenses and justifications, these are more practical, answering the question: At which step of the constitutional analysis should we recognize the minor's special status?

191 *Ramos*, 353 F.3d at 176–78. For example, in *Hutchins*, the court held that there was simply no constitutional right for minors "to be on the streets at night without adult supervision." Hutchins v. District of Columbia, 188 F.3d 531, 538 (D.C. Cir. 1999) (en banc) (plurality opinion). That is, by narrowly defining the supposed right at issue—and denying its status as fundamental—the court set itself up to apply rational review.

192 *Ramos*, 353 F.3d at 177.

193 *Id.* at 176. This borrows from the Supreme Court's concern for the "peculiar vulnerability of children" expressed in *Bellotti v. Baird*. 443 U.S. 622, 634 (1979) (plurality opinion); *see also supra* notes 153–155 and accompanying text.

194 *Ramos*, 353 F.3d at 178 ("[*L*]*owering* the level of review on account of children's minority *status* is a relatively unusual step . . . .").

195 *Id.*

196 *Id.* at 179 (comparing race-based laws to gender-based laws).

197 *Id.* at 179–80.

198 *Id.* at 180 ("[W]e choose the second of the three approaches described above and apply intermediate scrutiny.").

199 Bellotti v. Baird, 443 U.S. 622, 634 (1979) (plurality opinion).

200 *See supra* text accompanying note 125.

governmental objectives."[201] Such objectives must be unique to the class being discriminated against.[202] The Town of Vernon argued that it had an interest in protecting minors from becoming victims of crime at night, preventing minors from committing crime at night, and encouraging parents to sensibly control their children.[203] The Second Circuit agreed that the first two interests were legitimate,[204] but found inadequate evidence to support a causal connection between juveniles being out at the restricted hours and an increase in criminal activity.[205] As to the interest in responsible parenting, the court noted the "irony" of promoting such parenting by stripping parents of authority over their children.[206] As to whether the ordinance was sufficiently related to government interests, the court interrogated the factual premises proffered, the connection between those premises and the law, and how broad the law was, and found the relationship insufficient.[207]

2. Strict Scrutiny

In *Nunez v. City of San Diego*, the Ninth Circuit applied strict scrutiny to strike down a juvenile curfew ordinance.[208] First, the court stated that there is a fundamental right to both free movement and interstate travel.[209] Then, without distinguishing between interstate and intrastate travel, the court held that minors have a "fundamental right to free movement."[210] Viewed in light of *Ramos* and *Hutchins*, this is a

---

201 *Ramos*, 353 F.3d at 180 (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

202 *Id.*; *see also* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976) (requiring a state interest "not present in the case of an adult").

203 *Ramos*, 353 F.3d at 181. The last interest was characterized as "promoting responsible parenting." *Id.*

204 *Id.* at 181.

205 *Id.* at 185–87.

206 *Id.* at 182.

207 *Id.* at 184–87. Among other things, the Town of Vernon provided evidence that groups of children had been "seen gathering on the streets" and police "perceived an increase in gang activity." *Id.* at 184–85. But the observations had not been conducted at times of day covered by the curfew. *Id.* at 186. And it was not clear that the gang activity was performed by children subject to the curfew either. *Id.* As the Court explained: "For all we know, gang members . . . might have been mostly over 18 years old." *Id.* at 186.

208 114 F.3d 935, 949 (9th Cir. 1997).

209 *Id.* at 944.

210 *Id.* at 945.

radical proposition. As both of those cases explained, most courts have distinguished between interstate and intrastate travel.[211]

To determine whether the fundamental right to travel should be analyzed differently for minors and adults, the court seemed poised to apply the *Bellotti* factors.[212] But, mentioning only briefly that none of those factors suggested a compelling state interest in broader restrictions on minors than adults, the court quickly concluded that strict scrutiny should apply.[213] Taking one of the approaches suggested in *Ramos*,[214] the court then explained that strict scrutiny as applied to minors means something different than as applied to adults.[215] Because courts must consider minors' particular interests, more significant burdens may be permissible.[216] After finding that there was a compelling government interest in reducing juvenile crime and protecting children, the court found that the curfew at issue was not narrowly tailored to such an interest and struck down the law.[217]

Despite the number of cases examining minors' right to intrastate travel, very little has been written about the corollary right to interstate travel—and when it has, it has nearly always remained in the broader context of intrastate travel.[218] For example, some courts have suggested that juvenile curfew laws violate the right to interstate travel.[219] The Fifth Circuit has acknowledged that the right to travel "within and between the

---

211 *Ramos*, 353 F.3d at 176 (expressly grounding its decision in the right to intrastate travel and noting that the Second Circuit has recognized such a right); Hutchins v. District of Columbia, 188 F.3d 531, 537 (D.C. Cir. 1999) (en banc) (acknowledging circuit split); *cf.* Spencer v. Casavilla, 903 F.2d 171, 174 (2d Cir. 1990) (noting that the Supreme Court has not yet considered whether to draw such a distinction, and declining to do so (citing Memorial Hosp. v. Maricopa Cnty., 415 U.S. 250, 255–56 (1974))).

212 *Nunez*, 114 F.3d at 945.

213 *Id.* at 945–46.

214 *See supra* text accompanying note 192.

215 *Nunez*, 114 F.3d at 946.

216 *Id.* ("[S]trict scrutiny in the context of minors may allow greater burdens . . . than would be permissible on adults as a result of the unique interests implicated in regulating minors.").

217 *Id.* at 947–49.

218 *See infra* notes 219–221 and accompanying text.

219 *Cf.* Kevin C. Siebert, Note, *Nocturnal Juvenile Curfew Ordinances: The Fifth Circuit "Narrowly Tailors" a Dallas Ordinance, but Will Similar Ordinances Encounter the Same Interpretation?*, 73 WASH. U. L.Q. 1711, 1732 (1995). Siebert states that the court in *McCollester v. City of Keene*, 586 F. Supp. 1381 (D.N.H. 1984), held that a curfew "unconstitutionally infringe[d] upon juveniles' rights to travel interstate." Siebert, *supra*, at 1732, 1732 n.132. This overstates the specificity of the court's holding. The court noted that the right to interstate travel existed. *McCollester*, 586 F. Supp. At 1384. But it struck down the ordinance for being "so broadly drawn that it impermissibly curtail[ed] . . . juveniles' personal liberty interest in free movement," without reference to any interstate element of that movement. *Id.* at 1385.

states . . . certainly extends in some measure to juveniles."[220] And in *Bykofsky v. Borough of Middletown*, the Middle District of Pennsylvania held that an explicit exemption to a juvenile curfew for interstate travel meant that the right to interstate travel was not violated.[221] But that does not mean the converse would be true: without an exemption, the right to interstate travel might still not have been violated.[222]

Thus, minors' right to interstate travel remains substantially unexamined.

II. ANALYSIS

This Part clarifies the extent to which minors have a right to interstate travel by examining the constitutionality of juvenile abortion travel restrictions. A recent statute in Idaho[223] and a proposal in South Carolina are representative of the form such restrictions will take.[224] Roughly, they make it a felony for anyone to bring a pregnant minor to another state in order to obtain an abortion.[225] It is important to note here

---

220 *See, e.g.*, Johnson v. City of Opelousas, 658 F.2d 1065, 1072 (5th Cir. 1981). *Johnson* was decided on overbreadth grounds, with the court explicitly noting that a "narrowly drawn curfew to protect society's valid interests" might still be constitutional. *Id.* at 1074.

221 401 F. Supp. 1242, 1261 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir. 1976); *see also* Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993) (upholding juvenile curfew that had interstate travel exceptions).

222 Many juvenile curfews do contain the interstate travel exception, even if it is not obviously necessary. *See* Elyse R. Grossman & Kathleen S. Hoke, *Guidelines for Avoiding Pitfalls When Drafting Juvenile Curfew Laws: A Legal Analysis*, 8 ST. LOUIS U. J. HEALTH L. & POL'Y 301, 318–21 (2015).

223 IDAHO CODE § 18-623 (2024).

224 S. 1373, 124th Gen. Assemb. § 44-41-880 (S.C. 2022), https://www.scstatehouse.gov/sess124_2021-2022/bills/1373.htm [https://perma.cc/7J2L-QYXW].

225 *Id.* Specifically, the South Carolina bill would make it "unlawful to . . . recruit, harbor, or transport a pregnant minor who resides in this State to another state to procure an abortion or to obtain an abortifacient." *Id.* This Part assumes that parent and child would agree on the abortion-travel decision. That is, it is assumed that a prosecution under this law would happen—and be challenged—when a parent agrees to transport their child to another state to obtain an abortion. This assumption is necessary because the constitutionality of parental consent requirements is unclear post-*Dobbs*, so a parent may be able to veto any abortion-related decision by their child. *But cf.* Jessica Quinter & Caroline Markowitz, Note, *Judicial Bypass and Parental Rights After* Dobbs, 132 YALE L.J. 1908 (2023) (noting that *Dobbs* raises the specter of an attack on judicial bypass of parental consent requirements, but ultimately concluding that judicial bypass will survive constitutional challenges in states that do not ban abortion outright).

The Idaho statute contemplates this possibility. It only criminalizes those acting with an "intent to conceal an abortion from the parents or guardian" of the pregnant minor. IDAHO CODE § 18-623(1). It also provides as an affirmative defense that the parent or guardian "consented to trafficking of the minor." *Id.* § 18-623(2). This seems to set up precisely the "coverture-style"

that the fact that these statutes target "transporters" and not the pregnant minor herself is beside the point: recall that the appellant in *Edwards* was not the indigent person, but rather the relative who drove him into California.[226] Justice Douglas found that the right to travel was implicated nonetheless.[227]

A. *Strict Scrutiny Should Apply*

The right to travel is fundamental.[228] Restrictions on fundamental rights are ordinarily subject to strict scrutiny.[229] Though the level of scrutiny, or the analysis it requires, can be adjusted in certain situations, none of those situations occur here.[230] The *Bellotti* factors suggest that strict scrutiny should apply.[231] The first—concern for the particular

situation Quinter and Markowitz warn against, in which children are at the mercy of their parents' compassion—or cruelty. Quinter & Markowitz, *supra* note 225, at 1914.

226 Edwards v. California, 314 U.S. 160, 170 (1941).

227 *Id.* at 177 (Douglas, J., concurring). While neither the second nor third components of the right to travel identified in *Saenz* squarely apply, the right to be treated as a welcome visitor could—under another regulatory scheme—come into play. This aspect could be implicated if a state chose to ban abortions *only* for residents of foreign states that have abortion travel bans. Though odd, there are a few reasons an abortion-friendly state might do this. First, the state could be acting out of paternalistic concern for abortion travelers who would be subject to prosecution after returning home. Second, the abortion-friendly state could be concerned that the foreign state would attempt to enforce its antiabortion laws by prosecuting providers who treat abortion travelers. *See generally* sources cited *supra* note 17. Finally, in states where abortion rights are heavily contested, it might be passed as a Faustian legislative concession to protect abortion rights for state residents.

228 *See supra* Section I.A.

229 Nunez v. City of San Diego, 114 F.3d 935, 944 (9th Cir. 1997) ("If the classification disadvantages a 'suspect class' or impinges a 'fundamental right,' the ordinance is subject to strict scrutiny." (quoting Plyler v. Doe, 457 U.S. 202, 216–17 (1982))).

230 *See supra* Section I.B.

231 Bellotti v. Baird, 443 U.S. 622, 634 (1979) (plurality opinion); *see also supra* Section I.B. On November 8, 2023, the District of Idaho preliminarily enjoined the state attorney general from enforcing Idaho Code § 18-623. Matsumoto v. Labrador, No. 23-CV-00323, 2023 WL 7388852, at *18 (D. Idaho Nov. 8, 2023). The plaintiffs, an individual and two organizations who help people access abortions, challenged the law on vagueness, First Amendment, interstate travel, and intrastate travel grounds. Matsumoto v. Labrador, No. 23-CV-00323, 2023 WL 7386998, at *1 (D. Idaho Nov. 8, 2023). On a motion to dismiss, the court held that the plaintiffs plausibly stated a claim on the interstate travel claim, as well as the vagueness and First Amendment claims. *Id.* at *3, *5. The court focused on the legislature's intent to impede interstate travel writ large, and on the deterrence effect on the adult and organizational plaintiffs. *Id.* at *5. But, while acknowledging that strict scrutiny would apply, the court declined to weigh at that early stage the parental interests that defendants argued would satisfy review. *Id.* at *4, *5 n.7.

The court briefly addressed those interests in its simultaneous order granting the preliminary injunction, acknowledging the *Bellotti* factors and highlighting the primacy of the parent in childrearing. *Matsumoto*, No. 23-CV-00323, 2023 WL 7388852, at *22 (first citing Prince v.

vulnerability of children[232]—has usually been found to caution against a reduction in scrutiny.[233] Even when this concern has cut the other way, the Court has permitted those juvenile rights to deviate only slightly from their adult corollaries.[234] A slight procedural change for a delinquency hearing[235] is a far cry from a travel ban's complete abrogation of the right to travel.[236]

The second *Bellotti* factor provides, at first glance, the strongest argument for examining juvenile travel bans through a different lens than for adults. This factor—consideration of children's inability to make informed and mature critical decisions[237]—derives at least in part from Justice Stewart's concurrence in *Ginsberg v. New York*.[238] There, he suggested that a minor lacked the "full capacity for individual choice[,] which is the presupposition" of their First Amendment rights.[239] Accordingly, he reasoned, other rights that also implicate some capacity for choice, such as the right to marry or the right to vote, could be restricted as well.[240]

Massachusetts, 321 U.S. 158, 166 (1944); and then citing Bellotti v. Baird, 443 U.S. 622, 633–34 (1979)). But it did so only insofar as was required to determine the balance of equities. *Id.* at *2; Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."). And the court explicitly noted that the injunction was issued based only on the First and Fourteenth Amendment claims. *Matsumoto*, No. 23-CV-00323, 2023 WL 7388852, at *6 n.13 ("[T]he Court will not discuss the claims involving the right to travel . . . ."). Thus, though perhaps indicative of one judge's view of parental rights, the analysis is not dispositive as to the right to travel.

232 *See supra* notes 153–155 and accompanying text.

233 *Bellotti*, 443 U.S. at 634.

234 *Id.* at 635.

235 *See* McKeiver v. Pennsylvania, 403 U.S. 528, 547–48 (1971) (plurality opinion).

236 Arguably, *McKeiver* also completely abrogated a right: that is, the Sixth Amendment right to a jury trial. *Id.*; U.S. CONST. amend. VI. But that characterization undersells *McKeiver*'s surprising sensitivity to the challenges of juvenile adjudication. The Court acknowledged both the juvenile system's "deficiencies and disappointments," *McKeiver*, 403 U.S. at 546, and its "idealistic prospect," *id.* at 545. Ultimately, the Court sought to support that prospect in the face of a "regressive" return to that which the juvenile system was designed to escape from: "[T]he routine of the criminal process." *Id.* at 547. And the ultimate standard against which the Court judged was "fundamental fairness." *Id.* at 543. In other words, the Court declined to extend the right to a jury trial to juvenile proceedings because the underlying interest of that right—fairness—would not be satisfied. Here, though, the underlying interests suggest that one should be able to avail themselves of another state's law. *Cf.* Kreimer, *supra* note 17, at 510 (criticizing extraterritorial enforcement of state law as "supervening national citizenship"). In that view, unlike the proceedings in *McKeiver*, travel bans violate not only the letter but also the spirit of the right.

237 *See supra* notes 156–158 and accompanying text.

238 390 U.S. 629 (1968).

239 *Id.* at 649–50 (Stewart, J., concurring).

240 *Id.* at 650.

Of course, obtaining an abortion is an exercise of choice,[241] so it falls within the ambit of Justice Stewart's reasoning and satisfies the *Bellotti* standard.[242] Furthermore, it is exactly the type of important and critical decision with "potentially serious consequences"[243] that the second factor considers.[244] But the no-longer-extant right to an abortion, and the choice to have one, is not the right that a juvenile travel ban infringes on: it is the right to travel itself. The question, then, should be whether interstate travel is the type of important decision that *Bellotti* requires courts to consider.[245]

The decision to travel interstate is likewise a choice. But interstate travel is not, on its own, a "critical decision[]"[246] with "potentially serious consequences."[247] Adults do it often;[248] children regularly travel with their families.[249] It seems unlikely that courts would classify such a commonplace choice within the same category as such weighty decisions as marriage, or as such politically important actions as voting or protesting. Accordingly, when the right at issue is properly framed, the second *Bellotti* factor does not weigh in favor of reducing the level of scrutiny applied.

The third *Bellotti* factor considers the importance of the parental role in child rearing.[250] This Note assumes that a minor whose travel would be impacted by an abortion travel ban would have the support of their parents,[251] and the *Bellotti* Court tacitly approved of regulations that increase the parental role, albeit against a child's wishes.[252] This principle

---

241 Abortion is the archetypical individual choice, to such an extent that "choice" has become euphemistic for "abortion rights." *See Pro-choice*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/pro-choice [https://perma.cc/Y93S-RMGN].

242 Bellotti v. Baird, 443 U.S. 622, 635–37 (1979) (plurality opinion).

243 *Id.* at 635.

244 *Id.* at 642–43.

245 *See id.*

246 *Id.* at 634.

247 *Id.* at 635.

248 For example, consider the number of people who live in New Jersey but work in New York City, likely commuting regularly. *The Ins and Outs of NYC Commuting*, NYC PLANNING (Sept. 2019), https://www.nyc.gov/assets/planning/download/pdf/planning-level/housing-economy/nyc-ins-and-out-of-commuting.pdf [https://perma.cc/66KG-QUXG] (presenting data from 2017 showing that approximately 308,000 people living in northeastern New Jersey commute to Manhattan).

249 *See* LYNN MINNAERT, NYU SCH. OF PRO. STUD., FAMILY TRAVEL SURVEY 16 (2019), https://www.sps.nyu.edu/content/dam/sps/academics/departments/jonathan-m--tisch-center-for-hospitality/pdfs/Family_Travel_Survey_2019.pdf [https://perma.cc/5B4K-L7W2] (finding that seventy-seven percent of respondents had traveled with their children over the prior three years).

250 *Bellotti*, 443 U.S. at 634.

251 *See supra* note 225.

252 *Bellotti*, 443 U.S. at 638–39.

would seem to apply more broadly though: when the government interferes with the parent-child relationship, it wades into an area it is not well-suited to address.[253] As the *Bellotti* Court explained, "[A]ffirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice."[254] Moreover, "the custody, care and nurture of the child [must] reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply *nor hinder*."[255] That is, the state furthers its own interest in allowing parents to raise their children as they choose by preventing itself from regulating in that same area.

And for a state to prevent a parent from allowing their child to travel to another state would usurp that parental authority. In cases where the parent sought to bring their pregnant child across the border themselves, a travel ban would seem to completely sever the parent's control over their child. The parent must either prevent their child from exercising their right to travel, or face prosecution.[256] Therefore, this factor weighs heavily against reducing the level of scrutiny applied.

Nonetheless, some courts have reduced the level of scrutiny for restrictions on intrastate travel.[257] The fundamentally different nature of interstate travel, however, renders any analogy inapt.[258] On the one hand, states have presumptive power to regulate in-state conduct, including movement within a state, as an exercise of the state's sovereign police power.[259] On the other hand, a restriction on movement between states fundamentally impedes the federal system, in which citizens can "vote

253 *Id.* at 638.

254 *Id.*

255 Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (emphasis added); *see also supra* note 161 and accompanying text.

256 The South Carolina proposal is punitive rather than preventative. S. 1373, 124th Gen. Assemb. § 44-41-880 (S.C. 2022), https://www.scstatehouse.gov/sess124_2021-2022/bills/1373.htm [https://perma.cc/7J2L-QYXW] (providing only for criminal penalties). It does not grant the state the power to remove a pregnant child from their parent upon crossing the border—rather, it empowers the state to retroactively punish those who do. *Id.* The parent technically retains immediate custody over their child but is faced with a dilemma that renders such control meaningless. They must either decline to exercise their right to travel, or face prosecution.

257 *See supra* Section I.C.1.

258 *See infra* notes 259–263 and accompanying text.

259 *See* Jeffrey M. Schmitt, *Rethinking the State Sovereignty Interest in Personal Jurisdiction*, 66 CASE W. RSRV. L. REV. 769, 780 (2016) (noting that "a state's police power justifies regulation of in-state conduct"); *cf.* Michael S. Finch, *Choice-of-Law Problems in Florida Courts: A Retrospective on the Restatement (Second)*, 24 STETSON L. REV. 653, 668 n.71 (1995) (explaining that the location of a tort matters more when the law governing it is "intended to regulate specific in-state conduct"). *But cf.* Rosen, *supra* note 17, at 863–64 (arguing that states have presumptive power to regulate their citizens' out-of-state conduct but acknowledging that most courts have disagreed).

with their feet."[260] If restrictions on movement are incompatible with this theory of federalism, then the right to interstate travel is fundamentally required by the constitutional structure[261] in a way that the right to intrastate travel is not.[262] Furthermore, unlike the right to intrastate travel, the right to interstate travel has a long history, clearly established at the founding, with textual support in the Constitution.[263]

Because none of the *Bellotti* factors suggest that the level of scrutiny should be reduced,[264] and because of the unique concerns underlying the right to interstate travel,[265] strict scrutiny should apply.

B. *Juvenile Abortion Travel Bans Likely Do Not Survive Strict Scrutiny*

Strict scrutiny is the most searching form of judicial review and is rarely overcome.[266] In order to survive strict scrutiny, there must be a compelling government interest and the regulation must be narrowly tailored to that interest.[267] A state government may have an interest in

---

260 *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 270 (1992) (explaining the Privileges and Immunities Clause as intending to, among other things, "preserv[e] the states as separate polities"); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 157 (2001) (noting that an "important aspect[] of federalism" is that "people [are] able to accommodate their own preferences by voting with their feet"). *See generally* Douglas Laycock, *Voting with Your Feet Is No Substitute for Constitutional Rights*, 32 HARV. J.L. & PUB. POL'Y 29, 30 (2009) (criticizing the discourse of "voting with your feet" as providing an excuse for some states to "less vigorous[ly]" enforce rights).

261 *See generally supra* Section I.C.

262 *See supra* note 168 and accompanying text (identifying a circuit split on the question of whether intrastate travel is a fundamental right). *See generally* Section I.A (exploring applications of the right to interstate travel).

263 *See supra* Section I.A (analyzing the early history and textual sources of the right to travel).

264 *See supra* Section II.A (applying *Bellotti* factors).

265 *See supra* notes 260–262 and accompanying text.

266 Strict scrutiny was once famously characterized as "'strict' in theory and fatal in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *see also* Matthew D. Bunker, Clay Calvert & William C. Nevin, *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 349 (2011) (referencing Gunther's "famous[]" statement).

267 *See, e.g.*, Nunez v. City of San Diego, 114 F.3d 935, 946 (9th Cir. 1997).

preventing abortions.[268] But courts have not yet had the occasion to decide whether that interest rises to the level of "compelling." In fact, what makes an interest compelling is not exactly clear.[269] Sometimes, straightforward matters of government policy, such as catching criminals or protecting consumers, can be considered compelling.[270] In other contexts, the Supreme Court has cautioned that few interests may rise to the level of compelling.[271] But even if that interest is found to be compelling, there remain important problems with any asserted state interest here.

Though the state has more authority to regulate juvenile conduct than adult conduct, if it chooses to do so, it must be because of a state interest that is nonexistent in the adult context.[272] It is hard to imagine how the state interest here could be framed as unique to minors.[273] For example, a state interest in preventing abortions applies with equal significance to pregnant adults as it does to pregnant minors.[274] Moreover, the state interest of parental authority proffered in *Danforth* fails to carry the same weight here.[275] There, the Court considered the state's strong interest in protecting parental authority over children.[276]

---

268 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 301 (2022) ("These legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability." (citation omitted) (first citing Gonzales v. Carhart, 550 U.S. 124, 157–58 (2007); and then citing Roe v. Wade, 410 U.S. 113, 150 (1973))).

269 Republican Party of Minn. v. White, 416 F.3d 738, 749 (8th Cir. 2005) ("Precisely what constitutes a 'compelling interest' is not easily defined. Attempts at definition generally use alternative, equally superlative language . . . .").

270 *See id.* at 750 n.5.

271 *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 766 n.15 (2007) (Thomas, J., concurring) (noting that the Court has "narrowly restricted the interests that qualify as compelling"); Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 543 (1980) ("Mere speculation of harm does not constitute a compelling state interest.").

272 *See supra* Section I.B; Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74–75 (1976).

273 The state interests at issue are those of the individual states (such as South Carolina) seeking to restrict juvenile abortion travel. This is distinct from any federal interest. It is not clear, though, that even the most compelling state government interest could outweigh a fundamental right that derives from the privileges of national citizenship. *See supra* notes 62–63 and accompanying text. The Supremacy Clause would likely preclude that subversion. *See* U.S. CONST. art. VI, cl. 2.; *see also* Kreimer, *supra* note 17, at 510.

274 One could attempt to draw the state interest so narrowly that it is trivially unique. For example: "The state interest is in preventing minors from traveling to obtain abortions in other states." But this begs the question: the state interest might as well be in having its laws found constitutional.

275 *Danforth*, 428 U.S. at 75.

276 *Id.* at 74–75.

But as described above, that interest cuts the other way here because the juvenile abortion travel would occur only with parental consent.[277]

Even if a compelling state interest is found, it is unclear whether a juvenile travel ban would be sufficiently narrowly tailored to survive strict scrutiny.[278] In part, that is because narrow tailoring is intimately connected to the government interest: it requires a "nexus" between the interest and the classification created by the regulation.[279] The classification in this case is between juveniles and adults.[280] Though a travel ban may prevent abortions in general, the question then ultimately returns to whether there is a unique interest in preventing juvenile abortions; as discussed above, it seems likely there is not.[281]

Protecting juvenile abortion travel through the right to travel may prove especially effective for a few reasons. First, the right to travel has a long and deeply rooted history.[282] As courts increasingly prioritize original constitutional understanding, advocates would be wise to ground their arguments in a doctrine that draws on that legal tradition. Second, history shows that early American conceptions of the right to interstate travel relied less on individualistic notions of freedom and more on interstate federalism concerns. While individual freedom is of course a valuable interest, it lacks durability in the context of laws that target juveniles. As explained above, courts are not always willing to recognize that children possess individual liberty interests commensurate with their adult counterparts.[283] Meanwhile, a conception of the right to travel that focuses on interstate federalism interests applies broadly, regardless of the age targeted. When a state bars its residents from accessing the privileges afforded by another state's government, it threatens to undermine the very structure of the federal system.[284]

Finally, putting the right to travel to use protecting abortion rights may eventually provide a foundation to protect other rights as well. Some state laws have been proposed that would restrict juvenile travel for

---

277 *See supra* note 225.

278 *See* Nunez v. City of San Diego, 114 F.3d 935, 946 (9th Cir. 1997) (explaining narrow tailoring).

279 *Id.*

280 S. 1373, 124th Gen. Assemb. § 44-41-880 (S.C. 2022), https://www.scstatehouse.gov/sess124_2021-2022/bills/1373.htm [https://perma.cc/7J2L-QYXW] (barring transporting only minors, not adults, to procure an abortion).

281 *See supra* notes 272–274 and accompanying text.

282 *See supra* Section I.A.

283 *See supra* Section I.B.

284 As Justice Brandeis famously explained: "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 without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

gender-affirming care.[285] Because the right to travel is valuable independent of the underlying purpose of that travel,[286] such laws may ultimately be analyzed—and rights protected—under the same framework.

CONCLUSION

As more states move to limit or outright ban abortion after *Dobbs*, women in those states will increasingly seek abortions elsewhere.[287] Some of them will be minors.[288] Indifferent to—or perhaps because of—minors' unique position in the American legal system, lawmakers are beginning to target those children.[289] Certainly, the legal uncertainty of juvenile abortion travel restrictions will chill conduct, preventing pregnant minors from obtaining the care they are entitled to seek across state lines. This Note charts a path through those restrictions. When the time comes—soon—courts should follow.

---

285 *See* Dawson, Kates & Musumeci, *supra* note 9.

286 There is an argument that protecting disfavored rights through the backdoor is unprincipled, or potentially deleterious, given a broader acknowledgement of their importance. *See, e.g.*, Frederic J. Frommer, *Justice Ginsburg Thought Roe Was the Wrong Case to Settle Abortion Issue*, WASH. POST (May 6, 2022, 7:00 AM), https://www.washingtonpost.com/history/2022/05/06/ruth-bader-ginsburg-roe-wade [https://perma.cc/BHY4-39CF] (explaining how Justice Ginsburg disagreed with the substantive due process reasoning of *Roe*, and would have preferred an incremental approach or an equal protection basis); *see also* Kolev, *supra* note 143 (describing ACLU and Planned Parenthood opposition to reproductive rights litigation). The concern about protecting abortion through more durable legal mechanisms is valid—and was unfortunately vindicated by *Dobbs*. But it fails in this context: the right to travel has endured for at least 800 years. *See supra* note 36 and accompanying text.

287 Margot Sanger-Katz, Claire Cain Miller & Josh Katz, *Interstate Abortion Travel Is Already Straining Parts of the System*, N.Y. TIMES: THE UPSHOT (July 23, 2022), https://www.nytimes.com/2022/07/23/upshot/abortion-interstate-travel-appointments.html [https://perma.cc/S9AF-6RFX].

288 *See* Rudavsky & Fradette, *supra* note 2.

289 *See supra* notes 23–26 and accompanying text.