

ABORTION RIGHTS, FUGITIVES FROM SLAVERY AND THE NETWORKS THAT SUPPORT THEM*

REBECCA E. ZIETLOW**

The United States Supreme Court's 2022 decision in Dobbs v. Jackson Women's Health overruled decades of reproduction rights protections, established in Roe v. Wade. Dobbs has resulted in a new legal landscape, where the scope of people's ability to exercise reproductive autonomy depends on the state in which they live, and their ability to travel across state borders. Without the precedent of Roe to stop them, states have begun enacting severe restrictions on abortion rights. People seeking reproductive rights today will play a leading role in shaping those rights, not by filing lawsuits but through their "ordinary acts," crossing state borders in search of abortions.

This post-Dobbs landscape is reminiscent of the pre-Civil War era, when fugitives from slavery crossed state borders in search of their freedom. Fugitives from slavery could not have succeeded without the help of their allies on the ground, who engaged in civil disobedience and provided clandestine support, aiding fugitives in their travels through the Underground Railroad.

* 2025 Rebecca E. Zietlow.

** Dean, Distinguished University Professor, and Charles W. Fornoff Professor of Law and Values, University of Toledo College of Law. I have presented earlier versions of this work at the Wisconsin Constitutional Law Schmooze, Loyola Chicago Annual Constitutional Law Symposium, LevinsonFest2022/Roundtable/Federation and Secession, and published a related essay on Balkinization. See Rebecca Zietlow, *Federation, Individual Rights and State Borders*, BALKINIZATION (Jan. 6, 2023, 9:30 AM), <https://balkin.blogspot.com/2023/01/federation-individual-rights-and-state.html>. Thanks to my research assistants, Sarah Quieros and Zoe Koeninger. Thanks to all of the participants in those workshops for their comments and suggestions, and to Ash Bhagwat, David Cohen, Mark Graber, Mugambi Jouet, Sandy Levinson, Cynthia Merrill, Abigail Moncrief, Jim Pope, Franita Tolson, and Christopher Schmidt for comments on earlier versions of this paper. Thanks also to the members of the Reproductive Rights and Reproductive Justice Roundtable for their helpful comments, especially Susan Appleton, June Carbone, David Cohen, Jessie Hill, Linda McClain, Kim Mutcherson, Laura Portundo and Rachel Rebouche. I have done the best I can to respond to all your feedback, which has greatly improved the paper.

People seeking abortions, like fugitives from slavery before them, are engaged in what I call “transgressive constitutionalism,” making rights claims with their bodies and their actions. Like fugitives from slavery, people seeking abortions are transgressing not only state borders, but also the line between legality and illegality, to enforce a constitution of liberation, bodily autonomy, freedom of movement, and freedom of expression.

INTRODUCTION	106
II. THE TRANSGRESSIVE CONSTITUTIONALISM OF FUGITIVES FROM SLAVERY	113
III. ABORTION AND TRANSGRESSIVE CONSTITUTIONALISM	121
IV. TRANSGRESSIVE CONSTITUTIONALISM AND CONSTITUTIONAL CONFLICT	131
A. Disputes over Interstate Comity—Then and Now	132
B. Disputes Over Federalism—Then and Now	134
V. TRANSGRESSIVE CONSTITUTIONALISM AND THE RIGHT TO TRAVEL	136
A. Citizenship and the Right to Travel in the Antebellum Era	137
B. Disputes over the Right to Travel after-Dobbs	140
VI. FREEDOM OF SPEECH	144
A. Disputes over Freedom of Speech in the Antebellum Era	144
B. Freedom of Speech after Dobbs.....	146
CONCLUSION: COURTS, CONSTITUTIONAL ALLIES, AND THE CONSTITUTION OF LIBERTY	148

INTRODUCTION

In June 2022, the United States Supreme Court issued a groundbreaking ruling in *Dobbs v. Jackson Women’s Health Organization*, holding the United States Constitution does not guarantee the right to have an abortion.¹ The *Dobbs* ruling was uniquely disruptive because for fifty years preceding the ruling, the Court had consistently held that such a constitutional right existed.² In its 1973 decision, *Roe v. Wade*, the Court held that the right to choose an abortion was a fundamental right protected by the Fourteenth Amendment.³ Under *Roe* and its progeny, the government could regulate abortions and impose

1. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022).

2. *See Roe v. Wade*, 410 U.S. 113, 154 (1973).

3. *Id.*

restrictions.⁴ Still, relying on *Roe*, courts struck down numerous restrictions that states attempted to impose on reproductive liberty.⁵ Plaintiff Jane Roe, exercised her rights pursuant to what constitutional scholars generally consider the standard form of rights enforcement – she filed a lawsuit in federal court to enforce Fourteenth Amendment based rights against state infringement.⁶ After *Dobbs*, however, federal courts no longer serve as the primary arena for enforcement of abortion rights.⁷ Without the precedent of *Roe* and progeny to stop them, over half of states in this country have imposed severe restrictions or outright bans on abortion.⁸ We are now living in a new legal landscape, in which the scope of people’s rights to reproductive autonomy depends on the state in which they live and their willingness to travel to cross stateup borders to assert their rights.⁹ The Court’s ruling in *Dobbs* has unleashed an unprecedented wave of open and hidden abortion rights activism.¹⁰ Responding to the loss of federally protected fundamental, abortion rights activists are engaging in political action, practical support and clandestine activity to aid people attempting to assert their reproductive liberty.¹¹

In the post-*Dobbs* legal landscape, people seeking to exercise their reproductive rights will play a leading role in shaping those rights,

4. See *id.* at 164 (outlining a trimester approach under which abortions could be restricted in the second trimester and outlawed in the third trimester only with exceptions to preserve the health and life of the pregnant person); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878–79 (1992) (prohibiting states from imposing “undue burdens” on abortions prior to viability, and could only ban after viability with exceptions to preserve the health and life of the pregnant person); *Whole Women’s Health v. Hellerstedt*, 579 U.S. 582, 624 (2016) (holding that states cannot place requirements on abortion providers that impose an “undue burden”).

5. See e.g., *Casey*, 505 U.S. at 879 (reaffirming *Roe* and striking down restrictions on abortion imposed by the state of Pennsylvania); *Hellerstedt*, 579 U.S. at 591 (2016) (striking down Texas restrictions on abortion clinics). But see *Gonzales v. Carhart*, 550 U.S. 124, 166–67 (2007) (upholding the Partial Birth Abortion Act of 2003).

6. See REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* 130 (2006) [hereinafter *ENFORCING EQUALITY*].

7. Elizabeth Nash & Peter Ephross, *State Policy Trends 2022: In a Devastating Year, US Supreme Court’s Decision to Overturn Roe Leads to Bans, Confusion and Chaos*, GUTTMACHER (Dec. 2022), <https://www.guttmacher.org/2022/12/state-policy-trends-2022-devastating-year-us-supreme-courts-decision-overturn-roe-leads>

8. *Interactive Map: US Abortion Access After Roe*, GUTTMACHER, <https://states.guttmacher.org/policies/> (last updated Feb. 12, 2025).

9. See David S. Cohen, Greer Donley, & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 9–11 (2022).

10. See *infra* notes 143–189 and accompanying text. It is important to note that activists in the Reproductive Liberty movement have engaged in underground advocacy for years, mostly on behalf of women of color who lacked access under the *Roe* regime.

11. *Id.*

not by filing lawsuits but through their “ordinary acts,”¹² crossing state borders in search of abortions.¹³ The success of those seeking to enforce their rights will depend on their allies on the ground who assist them.¹⁴ Many people are obtaining abortions using medication that is shipped to them across state lines.¹⁵ Some activists are risking criminal and civil penalties by helping people cross state lines to obtain abortions.¹⁶ In abortion friendly states, officials are enacting laws to protect abortion seekers, and those who aid them, from criminal prosecution.¹⁷ As activist Cazembe Murphy Jackson observed, “I think activism is evolving post *Roe*. There are a lot of trainings for folks to become abortion doulas, to assist people getting abortions, raise money, drive them to clinics . . . I think we’re fired up.”¹⁸ These constitutional activists transgress not only state borders, but also the line between legal and illegal activity, placing themselves at the center of constitutional controversy. They are engaged in a crucial network of support for people seeking reproductive liberty.

The post-*Dobbs* landscape is reminiscent of another time in our history when conflicts over human rights and moral values occurred over state lines – the pre-Civil War era, when fugitives from slavery crossed state borders in search of the right to be free.¹⁹ By fleeing from enslavement and crossing state borders, they sought what Hanna Arendt

12. MARTHA S. JONES, *BIRTHRIGHT CITIZENS* 101 (2018) (describing how free Black people in Antebellum America asserted their rights by exercising their rights).

13. See Emily Bazelon, *Risking Everything to Offer Abortions Across State Lines*, N.Y. TIMES, Oct. 4, 2022, at 26; see also GUTTMACHER, *supra* note 8.

14. See *What it’s Like to Fight for Abortion Rights, Post-Roe*, ACLU NEWS & COMMENTARY (Jan. 30, 2023) <https://www.aclu.org/news/reproductive-freedom/what-its-like-to-fight-for-abortion-rights-post-ro> (describing the experiences of abortion rights activists); see also Bazelon, *supra* note 14, at 26; see generally Ronda Kaysen, *How Volunteers Open Their Homes to Women Seeking Abortions*, N.Y. TIMES (Oct. 15, 2022), <https://www.nytimes.com/2022/10/15/realestate/abortion-volunteer-homes.html>.

15. See Cohen, Donley, & Rebouché, *supra* note 9 at 6.

16. See Caroline Kitchener, *Covert Network Provides Pills for Thousands of Abortions in U.S. Post Roe*, WASH. POST. (Oct. 18, 2022), <https://www.washingtonpost.com/politics/2022/10/18/illegal-abortion-pill-network/>.

17. Scott Wilson, *Democratic Cities in Republican States Seek Ways Around Abortion Bans*, WASH. POST. (July 13, 2022), <https://www.washingtonpost.com/nation/2022/07/13/abortion-bans-blocked-cities/>; Michelle Goldberg, Opinion, *The Next Phase of the Abortion Fight Is Happening Right Now in New York*, N.Y. TIMES (Jan. 20, 2023), <https://www.nytimes.com/2023/01/20/opinion/new-york-abortion-rights-legislation.html>.

18. ACLU NEWS & COMMENTARY, *supra* note 14.

19. See Rebecca E. Zietlow, *Freedom Seekers: The Transgressive Constitutionalism of Fugitives From Slavery*, 97 NOTRE DAME L. REV. 1375, 1375 (2022) [hereinafter *Freedom Seekers*].

called the “right to have rights” – to be treated as human beings.²⁰ Fugitives from slavery were supported by activists on the ground, who openly engaged in the anti-slavery movement and provided both legal and political support for people who were captured and accused of being fugitives.²¹ States enacted laws protecting those accused of being fugitives, and local officials resisted enforcement of fugitive slave laws.²² Fugitives from slavery themselves asserted their rights by crossing state borders, but they could not have succeeded without the help of their allies on the ground who engaged in civil disobedience and provided clandestine support, aiding fugitives in their travels with the Underground Railroad.²³

People seeking abortions, like fugitives from slavery before them, are engaged in what I call “transgressive constitutionalism,” making rights claims with their bodies and their actions.²⁴ Like fugitives from slavery, people seeking abortions are transgressing not only state borders, but also the line between criminal and non-criminal activity, to assert their right to bodily autonomy. Most of these people do not consider themselves to be constitutional activists. Rather, they are desperate and seeking help. Nonetheless, they are engaging in constitutionalism. By asserting the right to bodily autonomy, their very acts are rights claims in the tradition of civil rights and labor activists engaging in civil disobedience.²⁵ Fugitives from slavery and people seeking abortions are not performing in front of an audience but instead are often acting in secret to avoid civil and criminal penalties. However, their acts do send a message to an audience — a message of determination and resilience which inspires political activists who support them.

To be clear, the institution of chattel slavery was a uniquely dehumanizing and cruel institution that defies any analogy.²⁶ Enslaved people were deprived of any human rights for their entire lives.²⁷ By

20. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296–97 (1951).

21. See Zietlow, *Freedom Seekers*, *supra* note 19, at 1399.

22. See *id.*

23. See *id.* at 1398–1400.

24. *Id.* at 1380.

25. See CHRISTOPHER W. SCHMIDT, *THE SIT-INS: PROTEST AND LEGAL CHANGE IN THE CIVIL RIGHTS ERA* 5 (2018).

26. See Pamela D. Bridgewater, *Ain't I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 *UCLA WOMEN'S L. J.* 89, 113 (2005).

27. See *id.* (observing that slavery in the United States “differed from historical slave societies in that it was based on race, was perpetual, and involved the complete domination of the lives of slaves by their owners.”)

contrast, people who are denied the right to an abortion suffer a temporary deprivation of liberty.²⁸ However, that deprivation of reproductive autonomy can endanger the life of the pregnant person and impact the rest of their lives.²⁹ It is also true that the deprivation of reproductive autonomy was a central component of the institution of slavery.³⁰ To this day, people who lack institutionalized power — disproportionately likely to be people of color and descendants of enslaved people — are more vulnerable to coercion and the deprivation of reproductive rights.³¹

Moreover, anti-abortion activists have long employed the analogy of slavery to advocate *against* abortion rights.³² They argue that a fetus is like an enslaved person because, like an enslaved person, a fetus lacks any human rights.³³ Anti-abortion activists have long analogized *Roe* to *Dred Scott v. Sanford*, the case in which the Court held that a slaveholder had a fundamental right to own an enslaved person.³⁴ Calling themselves “abortion abolitionists,” anti-abortion activists today advocate recognition of fetal personhood.³⁵ The anti-abortion group, Americans United for Life, have drafted a blueprint for “An Executive Order to Restore Constitutional Rights to All Human Beings,” urging the president to issue an executive order that would recognize a fetus as a

28. See Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 487 (1990) (“[t]he injury inflicted on women by forced motherhood is lesser in degree than that inflicted on blacks by Antebellum slavery, since it is temporary and involves less than total control over the body . . .”).

29. See Kelsey Butler, *Abortion Restrictions Shrink Women’s Income by 5%*, *Study Finds*, BLOOMBERG (Aug. 29, 2022), <https://www.bloomberg.com/news/articles/2022-08-19/every-anti-abortion-restriction-shrinks-a-woman-s-income-by-5>.

30. See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 6 (1997); see also Bridgewater, *supra* note 27, at 113; Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022) (“Black women’s sexual subordination and forced pregnancies were foundational to slavery.”), <https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html?referringSource=articleShare>.

31. See LORETTA ROSS & RICKIE SOLLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* 13 (Univ. of Cal. Press 2017).

32. See JUSTIN BUCKLEY DYER, *SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING* 58 (2014).

33. *Id.* at 61–62.

34. *Id.* at 68.

35. See Kristi Hamrick, *SFLAction Asks Pro-Life Americans to Encourage Minority Leader McConnell to Protect Infants from Their First Heartbeats*, STUDENTS FOR LIFE OF AM. (July 19, 2022), <https://studentsforlife.org/2022/07/19/sflaction-asks-pro-life-americans-to-encourage-minority-leader-mcconnell-to-protect-infants-from-their-first-heartbeats/>.

“preborn person” with rights under the Fourteenth Amendment.³⁶ They call their proposal the “Lincoln Proposal,” arguing the executive order would represent a second Emancipation Proclamation.³⁷ If adopted, this measure based on the anti-abortion analogy to slavery would ban abortion nationwide.³⁸

Regardless of whether the analogy between slavery and the lack of reproductive rights is persuasive, people seeking abortions today in over half of the states in our nation have an essential experience in common with enslaved people before them – the need to cross state borders to assert their fundamental right to bodily autonomy.³⁹ After *Dobbs*, people seeking abortions must also rely on means of constitutional activism that enslaved people seeking freedom relied on before them – using their own actions to assert their rights with help from activists on the ground, and relying on the political process to advocate for change.

Another parallel between people seeking abortions today and fugitives from slavery in the Antebellum era is the constitutional conflict that both movements engender. In the Antebellum era, fugitives from slavery provoked constitutional conflict over interstate comity and federalism, as well as the scope and existence of rights for enslaved and free Black people.⁴⁰ Like fugitives from slavery before them, people seeking abortions provoke disputes not only over the scope of their rights, but also between states with conflicting laws regulating abortions.⁴¹ Abortion rights activists and their opponents are generating constitutional conflicts reminiscent of those in the Antebellum era, over interstate comity, federalism, and the scope and meaning of fundamental rights.⁴² Scholars and commentators discussing the interstate conflicts engendered

36. See Catherine Glenn Foster, Chad Pecknold, & Josh Craddock, *Lincoln Proposal: An Executive Order to Restore Constitutional Rights to All Human Beings*, AMS. UNITED FOR LIFE, 1 (Sep. 2021), <https://aul.org/wp-content/uploads/2021/09/Lincoln-Proposal.pdf>.

37. *Id.* at 5.

38. See Mary Ziegler, Opinion, *The Next Step in the Anti-Abortion Playbook is Becoming Clear*, N.Y. TIMES (Aug. 31, 2022), <https://www.nytimes.com/2022/08/31/opinion/abortion-fetal-personhood.html>.

39. See Cohen, Donley, & Rebouché, *supra* note 9, at 22–23.

40. See Zietlow, *Freedom Seekers*, *supra* note 19, at 1375.

41. See Cohen, Donley & Rebouché, *supra* note 9, at 7.

42. See *id.* at 7, 44.

by the *Dobbs* ruling have noted the parallels between the Antebellum era and today.⁴³

Activists in the reproductive justice movement have long operated a network of support for people seeking abortions, especially people of color.⁴⁴ That movement was necessary even while *Roe* was still good law because under *Roe* access to abortion in this country was still limited, especially for low income people who are disproportionately women of color.⁴⁵ The United States Supreme Court failed to address the underlying racial and economic inequality that created barriers to abortion access for women of color.⁴⁶ Advocacy networks have significantly expanded since *Dobbs*, creating the space to further advocate for reproductive justice and address the systemic barriers to reproductive rights experienced by low income people, people of color and descendants of formerly enslaved people.⁴⁷

Until now, no scholar has undertaken an in-depth analysis of the parallels between fugitives from slavery and people travelling to receive an abortion, and the constitutional conflicts that they engendered. This essay seeks to remedy that oversight. Part II of this essay describes the transgressive constitutionalism of fugitives from slavery, who risked their

43. See, e.g., Seth 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, 464 (1992); see also Michael Hiltzik, *Threats to criminalize out-of-state abortions are a scary reminder of 1850s America*, L.A. TIMES (July 12, 2022), <https://www.latimes.com/business/story/2022-07-12/threats-to-criminalize-out-of-state-abortion>.

44. Jessica Pinkney, *We Don't Need an 'Abortion Underground Railroad'—Black and brown people already lead the most powerful abortion fund network in the country*, PRISM REPS. (Dec. 15, 2021), <https://prismreports.org/2021/12/15/we-dont-need-an-abortion-underground-railroad-black-and-brown-people-already-lead-the-most-powerful-abortion-fund-network-in-the-country/>.

45. See Roberts, *supra* note 30 at 6.

46. See ROSS & SOLLINGER, *supra* note 31, at 5 (“The Hyde Amendment, which prohibits the use of federal funds for abortion, profoundly curtails a poor woman’s decision making in ways that are consistent with . . . older laws, policies, and social norms that aimed to deny reproductive dignity to poor women.”); *Harris v. McRae*, 448 U.S. 297 (1980) (holding that states participating in Medicaid could withhold funding for even medically necessary abortions); Jessica Washington, *People REALLY need to Stop Comparing Abortion Restrictions to Slavery*, THE ROOT (Jun. 9, 2022), <https://www.theroot.com/people-really-need-to-stop-comparing-abortion-restricti-1849041172> (“[t]here’s a ton of evidence, that when abortion access is severely limited like it already is in much of this country, pregnant people, and especially Black pregnant people, do worse across a host of measures.”).

47. See generally Rebecca E. Zietlow, *Reproductive Justice and the Thirteenth Amendment*, 104 BOSTON UNIV. L. REV. ONLINE 143 (2024), <https://www.bu.edu/bulawreview/files/2024/05/ZIETLOW.pdf>.

lives to cross state borders in search of their freedom and fundamental human rights. In Part III, I argue that people crossing state borders to obtain abortions today are also engaged in transgressive constitutionalism, crossing borders to exercise what they believe to be their right to reproductive liberty. This is followed by Part IV, which maintains that in the Antebellum era and today, people engaging in transgressive constitutionalism are catalysts for constitutional conflict over interstate comity, federalism and individual rights. I build on this argument in Part V, where I discuss the importance of the right to travel to those engaged in transgressive constitutionalism, and illustrates the importance of the right to travel in the Antebellum era and today. The paper concludes by detailing the importance of freedom of expression to the anti-slavery and abortion rights movements, and describes limits on that freedom imposed by states restricting rights, both then and now.

II. THE TRANSGRESSIVE CONSTITUTIONALISM OF FUGITIVES FROM SLAVERY

This section considers another time in our nation's history when the scope of a person's fundamental rights depended on the states in which they lived – the Antebellum era of the early nineteenth century. Prior to the Civil War, states regulated the law of slavery – and while slavery was legal and essential to the economy of some states, it was illegal and reviled in other states. During this time, many enslaved people asserted their human rights by fleeing across state borders, provoking conflict between free and slave states. This section describes how activists on the ground supported fugitives asserting their rights, and engaged in a rights movement of their own. As a result of this activism, constitutional conflicts over the legality of slavery, and our structure of federalism played out, not in courts, but on the ground.

In the Antebellum era, the scope of the most basic human rights of people of African descent depended on the state in which they lived. Chattel slavery in the United States was a uniquely dehumanizing and cruel institution. Slavery in the United States “differed from historical slave societies in that it was based on race, was perpetual, and involved the complete domination of the lives of slaves by their owners.”⁴⁸ Enslaved people were treated as property, not as human beings, and

48. Bridgewater, *supra* note 26, at 113.

lacked fundamental human rights. They had no legal autonomy and were under the “absolute dominion” of the slaveholder.⁴⁹ In states where slavery was legal, free Black people were also constantly in danger of being kidnapped and sold into slavery.⁵⁰ Enslaved people lacked the freedom of movement entirely and were generally confined to the area in which they lived.⁵¹ By contrast, in states where slavery was not legal, free Black people were treated as human beings, albeit with diminished rights.⁵² Most importantly, in free states, free Black people could advocate for their rights and against slavery, exercising their freedom of expression and association.⁵³ Many enslaved people also engaged in their own form of advocacy, crossing state borders to free states to escape slavery, in search of the “right to have rights” and to be treated as a human being.⁵⁴

In the Antebellum era, few opponents of slavery won victories through litigation.⁵⁵ Most anti-slavery activists engaged in political, not legal action to assert their rights. Many simply used their bodies and actions to assert their anti-slavery views by escaping across borders and assisting those who escaped.⁵⁶ To exercise any rights at all, fugitives from slavery had to travel across state borders.⁵⁷ By traveling, they asserted their right to travel, a fundamental human right linked to citizenship.⁵⁸ When they escaped into free states, they were frequently aided by free Black people and their allies, who by their own transgressive acts also

49. See Lisa A. Crooms-Robinson, *The amendment ending slavery could be the key to securing abortion rights*, NBC News, (Jul. 5, 2022, 4:28 AM), <https://www.nbcnews.com/think/opinion/abortions-rights-new-supreme-court-strategy-based-13th-amendment-rcna36309> (“Denying the rights of reproductive health and choice, bodily integrity and personal autonomy was essential to U.S. slavery, which recognized enslavers’ complete dominion over the people they enslaved.”).

50. See JONES, *supra* note 12, at 21.

51. See HERBERT APTHEKER, *AMERICAN NEGRO SLAVE REVOLTS* 70 (5th ed.1993).

52. *Id.* at 25 (laws in many Northern states limited the right of free Black people to travel, enter into contracts, and bring lawsuits).

53. See *infra* notes 338–361 and accompanying text.

54. See Zietlow, *Freedom Seekers*, *supra* note 19, at 1393.

55. See generally LEA VANDERVELDE, *REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT* (2014); ANNE TWITTY, *BEFORE DRED SCOTT: SLAVERY AND LEGAL CULTURE IN THE AMERICAN CONFLUENCE, 1787–1857* (2016).

56. See Zietlow, *Freedom Seekers*, *supra* note 19, at 1393.

57. See *id.* at 1387.

58. See *id.* at 1404; see REBECCA E. ZIETLOW, *THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION* 31–33 (2018) [hereinafter *FORGOTTEN EMANCIPATOR*].

asserted the human rights of fugitives from slavery.⁵⁹ Anti-slavery activists supported fugitives from slavery, resisted slave catchers attempts to re-enslave them, and advocated for rights for free Black people.⁶⁰ Northern state officials responded to this activism by enacting legislation protecting the rights of people accused of being fugitives and openly resisting slave catchers.⁶¹ From vigilance societies to mob actions, free Black people and their allies openly advocated against slavery and provided crucial support for those who risked criminal penalties by secretly aiding fugitives from slavery.⁶²

Many anti-slavery activists argued that slavery was unconstitutional even before the Thirteenth Amendment.⁶³ They insisted that freedom was the default rule, a fundamental human right.⁶⁴ “Freedom national” was the motto of the anti-slavery, Free Soil, Free Labor Party.⁶⁵ The Republican Party platform also maintained that slavery was illegal in the federal territories.⁶⁶ As discussed in greater detail below, in the landmark 1857 Supreme Court case, *Dred Scott v. Sandford*, the Court ruled against the enslaved plaintiff who was seeking his freedom.⁶⁷ It ruled squarely in favor of slavery, blocking both legal and political avenues for anti-slavery advocacy.⁶⁸ *Dred Scott* was not an anomaly – it was one of many pro-slavery Court rulings in the Antebellum era.⁶⁹

59. See JONES, *supra* note 12, at 101 (“the act of travelling gave rise to the right to travel.”).

60. See Zietlow, *Freedom Seekers*, *supra* note 19, at 1406.

61. While the existence and history of the antebellum Underground Railroad is widely known, the “above ground” activism of free Black communities and their antislavery allies in white communities is not. Fortunately, a number of historians have recently written about their efforts. See, e.g., R.J.M. BLACKETTE, *THE CAPTIVE’S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY* (2018); CHRISTOPHER JAMES BONNER, *REMAKING THE REPUBLIC: BLACK POLITICS AND THE CREATION OF AMERICAN CITIZENSHIP* (2020); KATE MASUR, *UNTIL JUSTICE BE DONE: AMERICA’S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION* (2021); JONES, *supra* note 12, at 26.

62. See BLACKETTE, *supra* note 61, at xiv; ERIC FONER, *GATEWAY TO FREEDOM: THE HIDDEN HISTORY OF THE UNDERGROUND RAILROAD* 15 (2015) [hereinafter *GATEWAY*].

63. See ZIETLOW, *FORGOTTEN EMANCIPATOR*, *supra* note 58, at 11.

64. *Id.*

65. *Id.*

66. ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 83 (1995).

67. *Dred Scott v. Sandford*, 60 U.S. 393, 455 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

68. *Id.*

69. See also *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (upholding the 1793 federal Fugitive Slave Act); *Ableman v. Booth*, 62 U.S. 506 (1858) (upholding the 1850 Fugitive Slave Act).

Though some anti-slavery activists brought lawsuits, the vast majority confined their activism to the political realm.⁷⁰

The transgressive constitutionalism of fugitives from slavery sparked controversy over the scope and extent of their citizenship, due process, and other fundamental rights.⁷¹ Fugitives from slavery raised constitutional questions over the legality of slavery when they crossed from states in which slavery was legal to those in which it was not.⁷² Their movement across state lines led to important court battles, and to a denial of comity by both Northern and Southern courts.⁷³ When slave catchers chased fugitives from slavery across state lines, they demanded assistance to capture the people who had fled.⁷⁴ Many Northern officials refused to return fugitives.⁷⁵ Tensions rose between slave and free states over the capture and rendition of accused fugitives ultimately culminating in a Civil War.⁷⁶ As historian Richard Blackette explained, “the crisis caused by escaping slaves was not enough to bring on the Civil War, but there is no doubt that it was a major contributing factor.”⁷⁷ By their actions, the slaves placed themselves at the center of the political debate about the future of slavery.⁷⁸

It is certainly true that most fugitives from slavery did not view themselves as political activists.⁷⁹ However, some fugitives from slavery did engage in political advocacy with the anti-slavery movement after they escaped.⁸⁰ Some of the most prominent leaders in the anti-slavery movement in the decade leading up to the Civil War, including Frederick Douglass, Henry Box Brown, and Henry Bibb, were fugitives from slavery.⁸¹ Douglass and Bibb published anti-slavery newspapers and were active speakers on the anti-slavery circuit.⁸² Box Brown went a step

70. See Zietlow, *Freedom Seekers*, *supra* note 19, at 1383–84.

71. See *id.* at 1402.

72. See PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 137 (1981); Zietlow, *Freedom Seekers*, *supra* note 19 at 148–49.

73. *Id.* at 4.

74. BLACKETTE, *supra* note 61, at xiii.

75. See FINKELMAN, *supra* note 72, at 7.

76. See FONER, *GATEWAY*, *supra* note 62, at 218 (noting that fugitive slaves were named as an “immediate cause” of secession by NC, SC, and other lower Southern states).

77. BLACKETTE, *supra* note 61, at xv.

78. *Id.*

79. See Zietlow, *Freedom Seekers*, *supra* note 19, at 1380.

80. MANISHA SINHA, *THE SLAVES CAUSE: A HISTORY OF ABOLITION* 421 (Yale University Press 2016).

81. See *id.* at 425–30.

82. *Id.* at 430–31.

further by re-enacting his escape from slavery before audiences in the United States and England.⁸³ Brown escaped by hiding in a box and mailing himself to freedom.⁸⁴ By recreating his escape, Brown literally performed the plight of a fugitive from slavery, a forceful and effective plea for freedom. However, the vast majority of fugitives hid and did not pursue public activism. Still, even in secret, they were engaging in transgressive constitutionalism. By transgressing state borders, they exercised their right to be treated as human beings.⁸⁵ They provided a powerful inspiration for those who engaged in the anti-slavery movement on their behalf – both openly and in secret.

During the Antebellum era, numerous anti-slavery activists engaged in civil disobedience to help fugitives from slavery to escape to free spaces.⁸⁶ Abolitionists saw aid to fugitives as a form of “practical anti-slavery action,” which combined aiding people escaping from slavery, protecting free people from kidnapping, and combatting the illegal slave trade.⁸⁷ In Northern cities, free Black activists and their allies formed “vigilance committees” to protect suspected fugitives and free Blacks from being kidnapped by slave catchers.⁸⁸ Eventually, the vigilance societies evolved into the Underground Railroad, a clandestine network who sheltered fugitives in their homes and organized networks of safe houses to aid fugitives to travel to places where they would be free.⁸⁹ Many of these activists also showed public support for the rights of free Black people, claiming citizenship rights for free Blacks, including the right to vote, to an education, and to economic opportunities.⁹⁰ Free Black activists felt a commonality of interest with the fugitives that they aided.⁹¹

Fugitives from slavery and their Northern allies were so effective at undermining the capture of suspected fugitives that Southerners demanded federal legislation to bolster their efforts.⁹² In 1850, Congress enacted a new Fugitive Slave Act (FSA), which created the first federal

83. DAPHNE A. BROWN, *BODIES IN DISSENT* 4 (Duke Univ. Press, 2006).

84. *Id.*

85. Zietlow, *Freedom Seekers*, *supra* note 19, at 1403.

86. *Id.* at 1399–401.

87. FONER, *GATEWAY*, *supra* note 62, at 20.

88. *Id.* at 20.

89. *See id.* at 15; BLACKETTE, *supra* note 61, at 144.

90. FONER, *GATEWAY*, *supra* note 62, at 20.

91. Zietlow, *Freedom Seekers*, *supra* note 19, at 1402.

92. *See* FONER, *GATEWAY*, *supra* note 62, at 25.

police force to aid Southern slave catchers and required Northern state officials to cooperate with them.⁹³ The 1850 act was a devastating blow to free Black communities.⁹⁴ Many fugitives who had settled in free Black communities, and free Black people who had never been enslaved, moved to Canada because they no longer felt safe in the United States.⁹⁵ The FSA radicalized the anti-slavery movement.⁹⁶ Local communities in Northern states often shunned federal commissioners enforcing the FSA.⁹⁷ “[L]oud and rowdy black crowds” showed up at hearings of people accused of being fugitives.⁹⁸ Some crowds pushed their way into courtrooms where hearings were being held.⁹⁹ Crowds of free Black people often “overwhelmed the authorities capacity to control them,” and mobs sometimes grew violent.¹⁰⁰ According to Richard Blackette, “these black crowds were the foot soldiers without whom resistance would have been muted if not impossible.”¹⁰¹

The crowds of protestors succeeded in creating safe havens for fugitives.¹⁰² Slave catchers avoided Northern cities such as Detroit and Chicago because the Black communities there were determined to resist enforcement of the fugitive slave law.¹⁰³ When a slave catcher kidnapped John Price, a Black man who they suspected of being a fugitive, in Oberlin, Ohio in 1857, 300-400 people, including prominent Oberlin citizens, stormed the hotel where Price was held and rescued him from captivity.¹⁰⁴

93. Zietlow, *Freedom Seekers*, *supra* note 19, at 1397.

94. See NIKKI M. TAYLOR, *FRONTIERS OF FREEDOM: CINCINNATI’S BLACK COMMUNITY, 1802–1868* 155 (Ohio Univ. Press, 2005); see FONER, *GATEWAY*, *supra* note 62, at 134.

95. See BLACKETTE, *supra* note 61, at 163; FONER, *GATEWAY*, *supra* note 62, at 26; ANGELA F. MURPHY, ‘MY FREEDOM I DERIVED FROM GOD’: JERMAIN LOGUEN’S REJECTION OF FREEDOM PURCHASE 8 (draft on file with author). An estimated 30,000 to 40,000 formerly enslaved people escaped to Canada on the underground railroad. See Natasha Henry-Dixon, *Underground Railroad, The Canadian Encyclopedia*, <https://www.thecanadianencyclopedia.ca/en/article/underground-railroad> (Mar. 3, 2023).

96. See FONER, *GATEWAY*, *supra* note 62, at 145.

97. BLACKETTE, *supra* note 61, at 58–59.

98. *Id.* at 66.

99. *Id.* at 67.

100. See *id.* at 73, 79.

101. *Id.* at 73.

102. See *id.* at 161–64.

103. *Id.*

104. FINKELMAN, *supra* note 72, at 42. The activists ushered the suspected fugitive across Lake Erie to safety in Canada.

In Milwaukee, Wisconsin, abolitionist Sherman Booth was arrested by federal authorities when he and a group of activists stormed a jail to help a person accused of being a fugitive escape.¹⁰⁵ Booth and his allies insisted that the 1850 FSA, which authorized his arrest, was unconstitutional.¹⁰⁶ The Wisconsin Supreme Court agreed and issued a writ of habeas, ordering the federal government to release Booth.¹⁰⁷ The United States Supreme Court overturned the Wisconsin Supreme Court and upheld the constitutionality of the 1850 FSA in *Ableman v. Booth*.¹⁰⁸

Northern state legislators responded to anti-slavery activism by enacting laws protecting fugitives from slavery and their allies.¹⁰⁹ Some states enacted personal liberty laws to impede the enforcement of the federal law, banning state and local correctional facilities from holding fugitive slaves.¹¹⁰ For example, Vermont guaranteed trial by jury and habeas to those accused of being fugitives.¹¹¹ The governor of Vermont said that the state law “protected the citizen from all unlawful imprisonment,” a “stunning” affirmation that the state recognized fugitives from slavery as citizens.¹¹² Helping fugitives was dangerous and could lead to fines and imprisonment, but few activists suffered legal consequences because Northern officials seemed to have little interest in prosecuting.¹¹³

Over time, opposition to slavery, and support for the fugitives who fled its evils, grew substantially in the North.¹¹⁴ By the mid-1850s, the Underground Railroad was conducting its activities in the open in Pennsylvania, New York City and upstate New York.¹¹⁵ Sparked by the interstate travel of the fugitives from slavery, the civil disobedience of

105. See Jeffrey Schmitt, *Rethinking Ableman v. Booth and States' Rights in Wisconsin*, 93 VA. L. REV. 1315, 1328 (2007).

106. *Id.* at 1324.

107. See *id.* at 1340.

108. See *Ableman v. Booth*, 62 U.S. 506 (1859).

109. See FINKELMAN, *supra* note 72, at 131–133. In *Prigg v. Pennsylvania*, the United States Supreme Court held the Pennsylvania Personal Liberty Act to be invalid because preempted by the federal 1793 Fugitive Slave Act. See *Prigg v. Pennsylvania*, 41 U.S. 539 (1842). The Pennsylvania state legislature responded by enacting another Personal Liberty Act. See FINKELMAN, *supra* note 72, at 137.

110. BLACKETTE, *supra* note 61, at 35–36.

111. *Id.* at 36.

112. *Id.*

113. *Id.* at 21.

114. *Id.* at 223.

115. See *id.* at 156, 178.

Northern activists greatly undermined the institution of slavery.¹¹⁶ In 1854, the Republican Party formed as an anti-slavery party.¹¹⁷ Once elected to Congress, members of the Republican Party led efforts to limit, and eventually abolish, slavery after the Civil War.¹¹⁸

Fugitives from slavery brought legal challenges to courts, claiming that by crossing borders they had transformed their legal status from enslaved to free. Some of these suits were successful in lower courts.¹¹⁹ However, as noted above, in 1856, the United States Supreme Court's ruling in *Dred Scott v. Sanford* foreclosed all judicial avenues for fugitives seeking freedom.¹²⁰ Plaintiff Dred Scott claimed that by crossing from the slave state of Missouri to the free state of Illinois, he had become a free man and a citizen of the state of Illinois.¹²¹ The Court disagreed.¹²² According to Chief Justice Taney, no person of African descent could be a citizen of any state or the United States.¹²³ Notwithstanding the Court's ruling in *Dred Scott*, freedom seekers continued to cross borders from slave states to free, exercising their right to travel, a fundamental right of citizenship, even though the Court had held that they could never be citizens.¹²⁴ Thanks to the help of their allies in the Underground Railroad, thousands of people achieved freedom through their transgressive constitutionalism.¹²⁵

Five years after *Dred Scott*, during the Civil War, thousands more enslaved people transgressed battle lines and volunteered for the Union Army.¹²⁶ Leaders of the Underground Railroad also fought for the Union army.¹²⁷ For example, in 1863, Harriet Tubman served as a spy for the Union army, guiding Union forces who liberated over 700 enslaved people in a daring raid on a Combahee River plantation.¹²⁸ Their efforts were essential to the Union victory.¹²⁹ After that victory, Congress

116. See BLACKETTE, *supra* note 61, at XV.

117. See ZIETLOW, FORGOTTEN EMANCIPATOR, *supra* note 58, at 39.

118. See generally *id.* at 108–129.

119. See generally VANDERVELDE, *supra* note 55; TWITTY, *supra* note 55.

120. *Dred Scott v. Sandford*, 60 U.S. 393, 455 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

121. *Id.* at 394.

122. *Id.*

123. *Id.* at 407.

124. See FONER, GATEWAY, *supra* note 62, at 212.

125. *Id.* at 8.

126. See *id.* at 225.

127. See FONER, GATEWAY, *supra* note 62, at 225.

128. *Id.*

129. See *id.*

overturned *Dred Scott* with the Citizenship Clause of the 1866 Civil Rights Act.¹³⁰ This was followed by the incorporation of the Citizenship Clause of the Fourteenth Amendment, which enshrined their claims into constitutional law.¹³¹ Of course, fugitives from slavery alone did not end the institution of slavery. However, they did provoke constitutional change, and their actions were essential to the success of the anti-slavery movement.

III. ABORTION AND TRANSGRESSIVE CONSTITUTIONALISM

Like in the Antebellum era, in the post-*Dobbs* world, fundamental rights again vary from state to state, with the scope of those rights depending on the state in which a person lives. This section discusses the new abortion rights landscape after *Dobbs* and highlights how crucial the ability to cross state borders is for people in need of abortions. Abortion rights activists are supporting people seeking abortions both openly and secretly – and provoking constitutional conflict over rights and interstate comity that is reminiscent of the Antebellum era. Since the Court’s ruling in *Dobbs*, disputes over abortion rights have been divisive.¹³² Even before the Court’s ruling in *Dobbs*, access to abortion in this country varied widely from state to state.¹³³ Many pregnant people already needed to travel across state borders to state with less restrictive laws to obtain abortions.¹³⁴ The rates of such travel have predictably increased in the wake of *Dobbs* – as has the rate of activism supporting the travelers.¹³⁵

As a result of the Court’s ruling in *Dobbs*, people living in over half of the states in this country need to cross state borders to obtain an abortion.¹³⁶ Since the *Dobbs* ruling, states have adopted a patchwork of

130. See Rebecca E. Zietlow, *The Other Citizenship Clause*, in *THE GREATEST AND THE GRANDEST ACT: THE CIVIL RIGHTS ACT OF 1866 FROM RECONSTRUCTION TO TODAY* 37, 37 (Christian Samito, Ed. 2018).

131. See U.S. CONST. amend. XIV, § 1.

132. See Stacy Weiner, *Abortion in America: From Roe to Dobbs and Beyond*, AAMC NEWS (Sept. 21 2023), <https://www.aamc.org/news/abortion-america-roe-dobbs-and-beyond>.

133. See *Latest Data Confirm People Are Traveling Farther Distances to Access Abortion Care Post-Dobbs*, GUTTMACHER (June 13, 2024), <https://www.guttmacher.org/news-release/2024/latest-data-confirm-people-are-traveling-farther-distances-access-abortion-care> [hereinafter *Latest Data*].

134. See *id.*

135. *Id.*

136. See Cohen, Donley, & Rebouché, *supra* note 9, at 13 (“[A]bortion travel will become an essential part of the post-Roe reality . . .”).

laws regulating abortion¹³⁷. As of the fall of 2024, fourteen states, including Texas, Alabama, Louisiana and Indiana, have enacted outright abortion bans, some without any exceptions.¹³⁸ In addition, Florida, Georgia, Iowa, and South Carolina have enacted bans on abortion after six weeks of gestation, which functionally amounts to a complete ban of the procedure.¹³⁹ On the other end of the spectrum, ten states, including Washington D.C., New Jersey and Vermont, do not ban abortions at all.¹⁴⁰ Nine states – California, Michigan, Ohio, Arizona, Colorado, New York, Maryland and Vermont, have established a constitutional right to choose an abortion in their state constitutions.¹⁴¹ Fourteen states restrict abortions only after viability, with exceptions to protect the life and health of the pregnant person.¹⁴² State borders are now demarcation lines limiting the scope of reproductive liberty.

137. *See* GUTTMACHER, *supra* note 7.

138. *See id.* (noting that states with total bans as of the fall of 2024 are Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* *See also, e.g.*, WASH. REV. CODE ANN. § 9.02.110 (explaining how exceptions apply either during pre-viability stages or for the life or health of the mother); DEL. CODE ANN. tit. 24, § 1790(b) (allowing for exceptions for termination prior to viability if “in the good faith medical judgement of the physician, the termination is necessary for the protection of the woman’s life or health or in the event of a fetal anomaly for which there is not a reasonable likelihood of the fetus’s sustained survival outside the uterus without the extraordinary medical measures”); 775 ILL. COMP. STAT. ANN. 55/1-10 (allowing exceptions for abortions to be performed until when “there is a significant likelihood of a fetus’ sustained survival outside the uterus without the application of extraordinary medical measures”); R.I. GEN. LAWS § 23-4.13-2 (West 2019) (stipulating termination is prohibited after viability, defined as when “there is a reasonable likelihood of the fetus’ sustained survival outside of the womb with or without artificial support,” unless “when necessary, in the medical judgement of the physician, to preserve the life or health of that individual”); ME. REV. STAT. tit. 22, § 1598 1-B (allowing abortions after viability “only when it is necessary in the professional judgement of a physician licensed” in the state); MD. CODE ANN., HEALTH-GEN. § 20-209 (allowing termination either before viability or during the pregnancy if “necessary to protect the life or health of the woman” or “[t]he fetus is affected by genetic defect or serious deformity or abnormality”); N.Y. PUB. HEALTH LAW § 2599-bb (finding that a health care practitioner may perform an abortion when “the patient is within twenty-four weeks from the commencement of pregnancy, or there is an absence of fetal viability, or the abortion is necessary to protect the patient’s life or health”); UTAH CODE ANN. § 76-7-302 (allowing several exceptions for abortions to be performed, including prior to the unborn fetus reaching “18 weeks gestational age”); MASS. GEN. LAWS ch. 112, § 12M-N (explaining that abortions after the twenty-four week mark of the unborn fetus may not be performed unless “necessary to preserve the life of the patient,” “necessary to preserve the patient’s physical or mental health,” “warranted because of a lethal fetal anomaly or diagnosis,” or “warranted because of a grave fetal diagnosis that indicates that the fetus is incompatible with sustained life outside

In our new legal landscape, crossing state borders is a more effective means of asserting rights than filing lawsuits.¹⁴³ After *Dobbs*, abortion clinics through the country closed down or greatly restricted their services.¹⁴⁴ Suddenly, people who expected to be able to obtain medical treatment were left with significantly fewer options. The new restrictions have a disproportionate impact on people of color, especially Black people.¹⁴⁵ In states where abortions are banned, pregnant people are also less likely to receive pre-natal care, leading to an increase in infant mortality.¹⁴⁶ Areas marked by rural and urban poverty, have the least access to reproductive health care.¹⁴⁷ Because of this, *Dobbs* has exacerbated the racial and economic barriers to reproductive rights throughout this country, increasing the need for a broader abortion rights movement to help those crossing state borders in search of reproductive liberty.¹⁴⁸

The thousands of people living in states where abortion is now illegal likely had never believed themselves to be constitutional activists, and most probably still do not. However, when they seek abortions, they are constitutional actors because they are exercising a fundamental right – a right that was protected by the federal constitution until *Dobbs*, and

of the uterus without extraordinary medical interventions”); NEV. REV. STAT. § 442.250 (permitting abortions to be performed under certain circumstances, including “to preserve the life or health of the pregnant woman”); 18 PA. CONS. STAT. § 3211 (prohibiting abortions after the gestation age of the unborn fetus is at least twenty-four weeks, unless a “physician reasonably believes that it is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman”).

143. For example, after Kate Cox failed to obtain a court order authorizing her to have a medically necessary abortion in Texas state court, she travelled to New Mexico to obtain her abortion. See Eleanor Klibanoff, *Texas Supreme Court Blocks Order Allowing Abortion; Woman who Sought it Leaves State*, TEX. TRIBUNE (Dec. 11, 2023, 6:00 PM), <https://www.texastribune.org/2023/12/11/texas-abortion-lawsuit-kate-cox/>.

144. See Caroline Kitchener, Kevin Schaul, N. Kirkpatrick, Daniela Santamaría, & Lauren Tierney, *States Where Abortion is Legal, Banned or Under Threat*, WASH. POST (June 24, 2022, 10:23 AM), <https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe/>.

145. Karen Attiah, *As Abortion Rights Collapse, Black and Brown Women will Suffer Most*, WASH. POST (July 1, 2022, 3:33 PM), <https://www.washingtonpost.com/opinions/2022/07/01/abortion-rights-loss-black-hispanic-women-suffer-most/>.

146. See Jill Wieber Lens, *Fetal Life Hypocrisies*, on file with the author.

147. See Caitlin Murphy, Peter Shin, Feygle Jacobs, & Kay Johnson, *In State with Abortion Bans, Community Health Center Patients Face Challenges Getting Reproductive Care*, COMMONWEALTH FUND (Sept. 5, 2024), <https://www.commonwealthfund.org/blog/2024/states-abortion-bans-community-health-center-patients-face-challenges-getting-reproductive-care/>.

148. *Id.*

is still recognized by nine state constitutions.¹⁴⁹ Like fugitives from slavery before them, they are engaging in transgressive constitutionalism by asserting rights claims with their very actions. Similarly, they are also inspiring a network of people supporting them openly and secretly as they assert their rights.

Since *Dobbs*, the number of pregnant people crossing state lines has increased substantially – as has the distance that needed to travel to obtain an abortion.¹⁵⁰ A 2019 study predicted that if *Roe* was overturned, the average person would experience a 249-mile increase in travel distance, causing the abortion rate to fall by 32.8%.¹⁵¹ “Abortion deserts” are developing, mostly in Midwestern and Southern states.¹⁵² A Guttmacher Institute Study, completed in June 2023, supports the predictions of the 2019 research.¹⁵³ It revealed substantial increases in abortions in “border states” – states where abortion is legal that border states where abortion is banned or highly restricted.¹⁵⁴

For example, in 2023, more than 3,500 people traveled from Louisiana to states with less restrictive laws, including Florida, Illinois, and Georgia to obtain abortions.¹⁵⁵ But after *Dobbs*, both Florida and Georgia have banned abortions after six weeks – requiring Louisiana

149. The California, Michigan, Ohio, and Vermont constitutions contain protections for abortion rights. See GUTTMACHER, *supra* note 7.

150. See *Ballot Tracker: Status of Abortion-Related State Constitutional Amendment Measures for the 2024 Election*, KAISER FAM. FOUND. (Aug. 23, 2024), <https://www.kff.org/womens-health-policy/dashboard/ballot-tracker-status-of-abortion-related-state-constitutional-amendment-measures/>.

151. See Cohen, Donley, & Rebouché, *supra* note 10, at 11 (citing Caitlyn Myers, Rachel Jones, & Ushma Upadhyay, *Predicted Changes in Abortion Access and Incidence in a Post-Roe World*, CONTRACEPTION, Nov. 2019, at 367, 372.).

152. See Isaac Maddow-Zimet, Kelley Baden, Rachel K. Jones, Isabel DoCampo, & Jesse Philbin, *New State Abortion Data Indicate Widespread Travel for Care*, GUTTMACHER INST.: MONTHLY ABORTION PROVISION STUDY POL’Y ANALYSIS (Sept. 7, 2023), <https://www.guttmacher.org/2023/09/new-state-abortion-data-indicate-widespread-travel-care>; Cohen, Donley, & Rebouché, *supra* note 9, at 11 (citing Lisa Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER L. & JUST. 76, 79–80 (2015)).

153. See Isaac Maddow-Zimet, Kelley Baden, Rachel K. Jones, Isabel DoCampo, & Jesse Philbin, *New State Abortion Data Indicate Widespread Travel for Care*, GUTTMACHER INST.: MONTHLY ABORTION PROVISION STUDY POL’Y ANALYSIS (Sept. 7, 2023), <https://www.guttmacher.org/2023/09/new-state-abortion-data-indicate-widespread-travel-care>.

154. *Id.* Perhaps not coincidentally, many of the border states today, such as Illinois and Pennsylvania, were also crucial border states in the Antebellum era. *Id.*; see BLACKETTE, *supra* note 61, at 42.

155. GUTTMACHER, *Latest Data*, *supra* note 133.

residents to travel even further to obtain abortions.¹⁵⁶ Though availability of medication abortions is mitigating the need for people in early-stage pregnancies to travel,¹⁵⁷ they will still need access to out-of-state medical providers and pharmacists in order to obtain the necessary medication.¹⁵⁸ Some patients are travelling across borders to states that allow abortions by remote health care.¹⁵⁹ Providers are considering placing mobile clinics near borders.¹⁶⁰ Some people have their medication mailed to someone in a state where it is legal, then have that person forward it to them.¹⁶¹ The availability of interstate travel, and interstate commerce, will be crucial to those seeking to assert their right to reproductive autonomy in this post-*Roe* world.

Like anti-slavery activists in the Antebellum era, supporters of reproductive liberty today are engaging in activism at all levels in support of the right to receive an abortion. Many are engaging in political activism at the state and local level, supporting state referenda on constitutional amendments, state legislation protecting abortion rights, and galvanizing support for reproductive liberty.¹⁶² State and local officials are supporting measures to protect reproductive rights and resisting federal and state efforts to restrict those rights.¹⁶³ Underlying all of these efforts is a network of activists supporting people seeking abortions on the ground, employing legal and illegal measures to assist people seeking reproductive liberty.

Even before the *Dobbs* decision, millions of activists engaged in demonstrations in favor of women's rights, protesting the Court's cutbacks to abortion access.¹⁶⁴ Since *Dobbs*, abortion rights activists have dramatically increased their efforts.¹⁶⁵ It is too early to know precisely

156. *Id.*

157. See Cohen, Donley, & Rebouché, *supra* note 9, at 14.

158. *Id.* at 15.

159. *Id.* at 17.

160. *Id.*

161. *Id.*

162. See *infra*, notes 189-196 and accompanying text.

163. See *infra*, notes 197-206 and accompanying text.

164. See ASHUTOSH A. BHAGWAT, OUR DEMOCRATIC FIRST AMENDMENT 141 (2020) (for example, after the 2017 election of Donald Trump, half a million people attended the Women's March in Washington D.C., and over seven million people demonstrated in support of women's rights nationwide).

165. See Eleanor J. Bader, 'We Are in Survival Mode': How the End of *Roe v. Wade* Changed Abortion Activism, PROGRESSIVE MAG. (Jan. 22, 2024, 5:37 PM), <https://progressive.org/latest/how-the-end-of-roe-v-wade-changed-abortion-activism-bader-20240122/>.

the impact of this newly energized pro-abortion rights movement. However, there are signs that the issue has mobilized voters and spurred a new abortion rights movement. For example, in August 2022, voters in Kansas turned out in general election level numbers to reject a ballot initiative that would have banned abortion. The initiative failed by a sixty-four percent vote.¹⁶⁶ In November 2022, Vermont voters approved a state constitutional amendment which guarantees “an individual’s right to reproductive liberty and autonomy.”¹⁶⁷ In August 2023, voters in Ohio soundly rejected a ballot measure that would have made it harder to amend the state Constitution right before the voters would weigh in on a proposed abortion rights amendment in November.¹⁶⁸ In November, fifty-seven percent of Ohio voters approved the abortion rights amendment.¹⁶⁹ Unlike Vermont, Kansas and Ohio are both conservative states which Republican presidential candidate Donald Trump won easily in 2016 and 2020.¹⁷⁰ Voters in California, Kentucky, Michigan, and Montana have also approved measures protecting reproductive liberty or rejected measures which would have restricted it.¹⁷¹ Abortion rights measures were on the ballot of as many as ten states in the fall of 2024.¹⁷²

State officials are responding to this advocacy, enacting measures protecting reproductive liberty. Even before the *Dobbs* opinion was

166. Annie Gowen & Colby Itkowitz, *Kansans Resoundingly Reject Amendment Aimed at Restricting Abortion Rights*, WASH. POST, <https://www.washingtonpost.com/nation/2022/08/02/kansas-abortion-referendum/> (Aug. 3, 2022, 1:12 AM).

167. *Planned Parenthood Vermont Action Fund Celebrates the Passage of the Reproductive Liberty Amendment*, PLANNED PARENTHOOD (Nov. 8, 2022), <https://www.plannedparenthoodaction.org/pressroom/planned-parenthood-vermont-action-fund-celebrates-the-passage-of-the-reproductive-liberty-amendment>.

168. Vanessa Williamsen & Itai Grofman, *Ohio voters reject Issue 1—here’s what that means for democracy*, BROOKINGS (Aug. 9, 2023), <https://www.brookings.edu/articles/ohio-voters-reject-issue-1-heres-what-that-means-for-democracy/>.

169. Amanda Becker, *Ohio’s abortion protections take effect, but the fight over access continues*, THE 19 (Dec. 7, 2023), <https://19thnews.org/2023/12/ohios-abortion-protections-take-effect-issue-1-fight-access/>.

170. *See 2016 Presidential Election, 270 TO WIN*, https://www.270towin.com/2016_Election/ (last visited Jan. 31, 2025); *Presidential Election Results 2020: Biden Wins*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html> (last visited Jan. 31, 2025).

171. Julie Carr Smyth, *Ohio voters enshrine abortion access in constitution in latest statewide win for reproductive rights*, AP NEWS, <https://apnews.com/article/ohio-abortion-amendment-election-2023-fe3e06747b616507d8ca21ea26485270> (last updated Nov. 7, 2023 11:31 PM).

172. *See* KAISER FAM. FOUND., *supra* note 150.

officially released, the Connecticut state legislature enacted a bill to shield abortion providers and others who assist people in obtaining abortions from civil liability.¹⁷³ In July 2022, the Massachusetts state legislature enacted a bill that expanded access to abortion and shields providers from out-of-state prosecution.¹⁷⁴ The bill also makes emergency contraceptives available in vending machines and requires medication abortion availability at public colleges and universities.¹⁷⁵ The California state legislature is considering a similar bill.¹⁷⁶

In addition to proposed state measures, in states where abortion is now illegal or heavily restricted some local officials are openly resisting those laws.¹⁷⁷ Some cities are creating safe havens in which local prosecutors pledge not to enforce anti-abortion laws within the city limits, including Charlotte, North Carolina, Atlanta, Georgia, and Indianapolis, Indiana.¹⁷⁸ In New Orleans, Louisiana, city council member Helena Moreno spoke in support of a non-prosecution resolution, “we cannot ease up, we must continue to fight, because we all know what is truly at stake . . . we’re a blue dot here, a city that is fighting for its people, for all of its people.”¹⁷⁹ These local officials are following in the footsteps of those in the Antebellum era who refused to assist with capturing people who were accused of being fugitives from slavery.¹⁸⁰

As in the Antebellum era, networks of activists have formed to help people who are seeking abortions. Such networks existed long before the ruling in *Dobbs*, and are , operated primarily by and for women

173. Caroline Kitchener, *Conn. lawmakers pass bill to be ‘place of refuge’ for abortion patients*, WASHINGTON POST (Apr. 30, 2022, 8:31 AM), <https://www.washingtonpost.com/politics/2022/04/30/connecticut-abortion-rights/>.

174. Matt Stout, *Baker signs abortion rights expansion bill into law*, BOSTON GLOBE (Jul. 29, 2022, 5:04 PM), <https://www.bostonglobe.com/2022/07/29/metro/baker-signs-abortion-rights-expansion-bill-into-law/>. According to a Suffolk University poll of Massachusetts residents, 78 percent of those responding believed that abortion should be legal in all or most cases. *Id.*

175. *Id.*

176. *See In Response to Supreme Court Decision, Governor Newsom Signs Legislation to Protect Women and Providers in California from Abortion Bans by Other States*, GOVERNOR GAVIN NEWSOM, <https://www.gov.ca.gov/2022/06/24/in-response-to-supreme-court-decision-governor-newsom-signs-legislation-to-protect-women-and-providers-in-california-from-abortion-bans-by-other-states/> (last visited Sept. 12, 2024).

177. Scott Wilson, *Democratic cities in Republican states seek ways around abortion bans*, WASHINGTON POST (Jul. 13 2022, 9:00 AM), <https://www.washingtonpost.com/nation/2022/07/13/abortion-bans-blocked-cities/>.

178. *Id.*

179. *Id.*

180. *See, e.g.*, FINKELMAN, *supra* note 72, at 149.

of color¹⁸¹ Over eighty organizations have been providing on the ground support for over thirty years.¹⁸² The longevity of these organizations reflects the fact that, as noted above, even before *Dobbs*, access to abortion was limited in the United States, especially for already marginalized people.¹⁸³ The *Dobbs* ruling aggravates that history and expands hardship for millions of people in our country, necessitating an expanded network of activists aiding people seeking to assert their reproductive rights. Since *Dobbs*, the number of people and organizations joining these networks has blossomed.¹⁸⁴

For example, in California, an organization called Access to Reproductive Justice has been providing funding, transportation, lodging, and childcare to promote access for people who lack the resources to obtain reproductive care on their own.¹⁸⁵ Similarly, the Brigid Alliance books, coordinates and pays for travel, expenses, and childcare for people seeking abortion care.¹⁸⁶ Other organizations focus on the needs of people in particular geographic areas, primarily in Southern and Midwestern states.¹⁸⁷ Cobalt Advocates, a Colorado based organization, provides funds for travel expenses for those who travel to Colorado for abortion care, with the goal of “guarantee(ing) comprehensive, universal access to reproductive healthcare, including abortion.”¹⁸⁸ Indigenous Women Rising is an abortion fund for indigenous people in the United States and Canada.¹⁸⁹ The Agnes Reynolds Jackson Fund supports abortion access

181. ROBERTS, *supra* note 30 at 5; Pinkney, *supra* note 44; LAURA KAPLAN, THE STORY OF JANE: THE LEGENDARY UNDERGROUND FEMINIST ABORTION SERVICE (2022).

182. See ACCESS REPRODUCTIVE JUSTICE, <https://accessrj.org/> (last updated 2024); Pinkney, *supra* note 44.

183. Moreover, it is undeniable that, throughout our nation’s history, women of color have historically been deprived of reproductive autonomy and borne the brunt of state restrictions on that autonomy. See Bridgewater, *supra* note 26, at 92.

184. See KAISER FAM. FOUND., *supra* note 150.

185. See ACCESS REPRODUCTIVE JUSTICE, <https://accessrj.org/> (last updated 2024).

186. BRIGID ALLIANCE, <https://brigidalliance.org/> (last visited Sept. 13, 2024).

187. See ACCESS REPROD. CARE SE., <https://arc-southeast.org/> (last visited Sept. 13, 2024) (supporting people who live in Alabama, Florida, Georgia, Mississippi, South Carolina and Tennessee); LILITH FUND, <https://www.lilithfund.org/> (last visited Sept. 13, 2024) (funding travel for people who live in Texas); MIDWEST ACCESS COALITION, <https://www.midwestaccesscoalition.org> (last visited Sept. 13, 2024) (helping people in North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Wisconsin, Michigan, Ohio, Illinois, Indiana, Iowa, and Missouri).

188. COBALT, <https://cobaltadvocates.org/> (last visited Sept. 13, 2024).

189. *Abortion Fund*, INDIGENOUS WOMEN RISING, <https://www.iwrrising.org/abortion-fund> (last visited Sept. 13, 2024).

in Toledo, Ohio and surrounding areas.¹⁹⁰ In addition, a number of corporations, including Target, Amazon, Bank of America, Citigroup, Dick's Sporting Goods, Procter & Gamble, and Walt Disney, have pledged to expand insurance coverage and provide funding for employees who must travel to obtain abortions.¹⁹¹

As in the Antebellum era, people are forming a new network of clandestine activists reminiscent of the Underground Railroad.¹⁹² In addition to those organizations and companies that are openly providing support for people seeking abortions, grassroots organizers and activists are developing an informal, and sometimes private, network of support, including offering funding, transportation, and lodging.¹⁹³ These organizations often use coded language, for example, referring to obtaining an abortion as "camping."¹⁹⁴ Others set up private Facebook groups, such as the Guardians Network and Abortion Support, to protect the identity of their volunteers, and of people using their resources.¹⁹⁵

People supporting abortion travel who post on those Facebook pages express concern over their safety and fear of reprisal. For example, Facebook user #1 posted in one such group stating, "Im [sic] in Wisconsin [unsafe state] . . . and [I am] at risk of having to go camping, even with safe sex practices I would rather have a plan in place, im so scared."¹⁹⁶ Facebook user #2 responded, "[i]f you are a person who suddenly find yourself with a need to go *camping* in another state friendly towards *camping*, just know that I will happily drive you, support you, and not talk about the *camping* trip to anyone ever."¹⁹⁷ Facebook user #3

190. AGNES REYNOLDS JACKSON FUND, <https://www.aggiefund.com/> (last visited Sept. 13, 2024).

191. Kate Gibson, *These companies are paying for abortion travel*, CBS NEWS: MONEYWATCH, (July 2, 2022, 9:18 AM) <https://www.cbsnews.com/news/abortion-travel-companies-paying-benefits-amazon-starbucks-target/>.

192. Bader, *supra* note 165.

193. See, e.g., *r/auntienetwork*, REDDIT, <https://www.reddit.com/r/auntienetwork/> (last visited Sept. 13, 2024) (suspended due to safety concerns); *r/GoingCamping*, REDDIT, <https://www.reddit.com/r/GoingCamping/> (last visited Sept. 13, 2024); ONLINE ABORTION RES. SQUAD, <https://abortionsquad.org/> (last visited Sept. 13, 2024); MIDWEST ACCESS COALITION, <https://www.midwestaccesscoalition.org> (last visited Sept. 13, 2024); Ronda Kaysen, *How Volunteers Open Their Homes to Women Seeking Abortions*, N.Y. TIMES (Oct. 15, 2022), <https://www.nytimes.com/2022/10/15/realestate/abortion-volunteer-homes.html?smid=nytcore-ios-share&referringSource=articleShare>.

194. *r/Going Camping*, REDDIT, <https://www.reddit.com/r/GoingCamping> (last visited Sept. 13, 2024).

195. *Id.*

196. User post, FACEBOOK (June 27, 2022) (on file with author).

197. User post, FACEBOOK (June 26, 2022) (on file with author).

said they have “been an OR [operating room] nurse for over 20 years and if there are any places needed in protecting women’s rights, count me in. Especially in or near Arkansas.”¹⁹⁸ Facebook user #4 responded “Pm me” to a user who reported that they just found out that they are pregnant and need help.¹⁹⁹ Numerous posts ask for financial help to aid them in assisting people.²⁰⁰ Another poster noted that they are helping a woman who is a victim of domestic violence to escape her abuser, as well as assisting her in obtaining an abortion.²⁰¹ The author of the post noted “we also help domestic violence victims to escape. We didn’t plan on it but we quickly found a link between domestic violence and abortion.”²⁰² The poster said that their network had helped fifteen women since *Roe* has been overturned.²⁰³ Referring to the Facebook group, the poster wrote “this has been lifesaving, mentally, emotionally, financially, and for some physically.”²⁰⁴

In addition to the relatively secret activity of abortion rights activists on private websites and other networks, some abortion rights activists are openly challenging laws and risking criminal prosecution.²⁰⁵ For example, the Dutch doctor Rebecca Gomperts, the founder of an international group called Women on Waves, collaborated with doctors in the U.S. with the goal of creating a floating abortion clinic in the Gulf of Mexico to serve clients from the conservative states of Texas, Louisiana, Alabama, and Mississippi.²⁰⁶ Dr. Gomperts and her partners hope to take advantage of the fact that the boat will be in international

198. User post, FACEBOOK (Aug. 1, 2022) (on file with author).

199. User post, FACEBOOK (Sept. 12, 2022) (on file with author) (pm is an abbreviation for Personal Message).

200. User post, FACEBOOK (Sept. 12, 2022) (on file with author).

201. User post, FACEBOOK (Aug. 6, 2022) (on file with author).

202. User post, FACEBOOK (Aug. 6, 2022) (on file with author). *See also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 891–94 (1992) (noting the link between abortion and domestic violence when striking down a Pennsylvania law requiring spousal consent for an abortion as an “undue burden” on abortion rights); Christina C. Pallito, Claudia García-Moreno, Henrica A.F.M. Jansen, Lori Heise, Mary Ellsberg, & Charlotte Watts, *Intimate Partner Violence, abortion, and unintended pregnancy: Results from the WHO Multi-country study on Women’s Health and Domestic Violence*, 120 INT’L J. OF GYNECOLOGY AND OBSTETRICS 3, 3–9 (2013).

203. User post, FACEBOOK (Aug. 6, 2022) (on file with author).

204. *Id.*

205. *See infra* notes 213–215 and accompanying text.

206. *See SemDem, By ship, drone, or bulletproof van: Persecuted patients in abortion-banning states won’t be deserted*, DAILY KOS (Sept. 30, 2022, 7:59:01 AM), <https://www.dailykos.com/stories/2022/9/30/2111653/-By-ship-drone-or-bulletproof-van-Persecuted-patients-in-abortion-banning-states-won-t-be-deserted>.

waters, thus free from restrictive state laws.²⁰⁷ Another group of activists has created bulletproof mobile abortion clinics that patrol red states borders.²⁰⁸ These providers are skirting legal boundaries and risking civil and criminal penalties by openly operating on the edges of the law. Abortion rights activists are engaged in a multifaceted combination of activism, lawmaking, and civil disobedience, both in secret and in the open, on behalf of people seeking to exercise their human rights.

IV. TRANSGRESSIVE CONSTITUTIONALISM AND CONSTITUTIONAL CONFLICT

As in the Antebellum era, people today are transgressing state borders to assert their rights. Their act of crossing borders generates conflicts between states with differing laws governing those rights. This section describes these efforts in the Antebellum era and today and notes the similarities between the constitutional conflicts generated by each movement. Then and now, people traveling across state borders are generating constitutional conflict. They are asserting fundamental rights, like freedom of expression, the right to travel and the right to bodily autonomy. In doing so, they generate disputes over the existence of those rights. Now, as then, people who transgress state borders to assert their rights, and their allies, are in danger of suffering legal penalties.²⁰⁹

By crossing from slave states to free states, fugitives from slavery created tension over slave catchers efforts to kidnap and return suspected fugitives.²¹⁰ Officials from their home states insisted that fugitives were still enslaved even though they had left the state.²¹¹ Officials and activists in free states argued that fugitives had attained freedom by crossing into their states.²¹² As mentioned previously, Congress attempted to resolve the conflicts in 1850, enacting a Fugitive Slave Act that created a federal administrative state and police force to return suspected fugitives when local officials refused to do so.²¹³ Activists and local officials resisted the

207. *Id.*

208. See Ruth Conniff, *Abortion Care on Wheels*, WIS. EXAMINER (June 7, 2022, 7:00 AM), <https://wisconsinexaminer.com/2022/06/07/abortion-care-on-wheels/>.

209. See Zietlow, *Freedom Seekers*, *supra* note 19 at 1393.

210. *Id.* at 1394–95.

211. *Id.*

212. *Id.* at 1395.

213. *Id.* at 1397–98.

federal law, challenging our system of federalism.²¹⁴ These conflicts escalated and served as a major cause of the Civil War.²¹⁵ Today, people crossing state borders to obtain reproductive liberty are again serving as provoking conflict over interstate comity. The Biden administration's post *Dobbs* attempts to protect abortion rights challenged our system of federalism.²¹⁶ While the impacts of a federal abortion ban remain unknown, resistance to that ban is likely to escalate. Just as resistance to the Fugitive Slave Act escalated in the Antebellum era.²¹⁷

A. *Disputes over Interstate Comity—Then and Now*

During the Antebellum era, and today, people crossing state borders to exercise their rights raise questions about the scope and very existence of those rights and inspire interstate conflict over those rights. In the Antebellum era, when fugitives from slavery crossed state borders from slave state to free, they asserted their right to freedom and tested the legality of slavery.²¹⁸ By transgressing state borders, fugitives created constitutional conflicts over interstate comity.²¹⁹ Today, people who cross borders seeking abortions are asserting their right to reproductive autonomy. Like the fugitives before them, they are provoking constitutional conflicts between states in which abortion is legal and those in which it is prohibited.

During the Antebellum era, fugitives from slavery raised the issue of whether the legal status of enslaved people changed when they entered states in which slavery was illegal.²²⁰ Article IV, section two of the United States Constitution contained the so-called Fugitive Slave Clause. This clause required that persons “held to Service or Labour” in one state be “delivered up on Claim of the Party to whom Service or Labour may be due” if they escaped into another state.²²¹ Arguably, the Fugitive Slave Clause “was a tacit recognition that, absent constraint, local law could emancipate slaves who found their way across borders whatever the rule

214. *Id.* at 1393.

215. See BLACKETTE, *supra* note 61, at xv.

216. See FONER, GATEWAY, *supra* note 62, at 216.

217. See *id.*

218. See Zietlow, *Freedom Seekers*, *supra* note 19 at 1377.

219. See BLACKETTE, *supra* note 61, at xv; FINKELMAN, *supra* note 72, at 4.

220. See BLACKETTE, *supra* note 61, at 1403; FINKELMAN, *supra* note 72, at 4.

221. U.S. CONST. art. IV, § 2, cl. 3.

in their home state.”²²² Anti-slavery activists argued that this was because freedom was the natural state of man, and only positive law could impose slavery.²²³ Pro-slavery interests countered that the Fugitive Slave Clause recognized the legality of slavery, and that a person’s enslaved status continued when they entered a free state.²²⁴ As discussed below, Congress took the side of the pro-slavery activists when it enacted the 1793 and 1850 Fugitive Slave Acts.²²⁵ Disputes over interstate comity led slave states to restrict the travel, not only of fugitives from slavery, but also of free Black people.²²⁶

Just as in the Antebellum era, people travelling across borders today are raising complex legal issues relating to interstate comity. These issues include the question of whether states have the power to penalize out of state conduct, including obtaining abortions and assisting people to obtain abortions, and whether states have the power to insulate their residents from out-of-state liability.²²⁷ According to Seth Kreimer, our system of federalism “should not be a system in which citizens carry home-state law with them as they travel, like escaped prisoners dragging a ball and chain.”²²⁸ However, like fugitives from slavery, people crossing state lines to obtain abortions may find it difficult to escape the laws of their state of residence.

Interstate comity also raises the question of whether states can criminalize aiding a person to travel out of state and receive an abortion.²²⁹ Courts have generally held that states cannot use criminal laws to prosecute people for crimes committed outside their borders.²³⁰ However, states can prosecute someone for criminal actions outside the state if the crime has a strong enough effect on an in-state resident.²³¹ A state that outlaws all abortions might consider a person who travels out of state to get an abortion guilty of murdering a “living, distinct” resident of the state – the fetus.²³² If a state declares a fetus a separate life, that

222. See Kreimer, *supra* note 43, at 464.

223. See ZIETLOW, FORGOTTEN EMANCIPATOR, *supra* note 58, at 398.

224. See FINKELMAN, *supra* note 72, at 180.

225. See *id.* at 320; see also FONER, GATEWAY, *supra* note 62, at 24, 121.

226. See *supra* notes 222–30; *infra* note 232–39 and accompanying text.

227. See Cohen, Donley, & Rebouché, *supra* note 9, at 22–23.

228. Kreimer, *supra* note 43, at 464.

229. See Cohen, Donley, & Rebouché, *supra* note 9, at 21.

230. See *id.* at 22–23.

231. *Id.* at 31.

232. *Id.*

declaration “could result in almost endless criminal prosecutions related to out-of-state abortions.”²³³ Regardless of whether those prosecutions are ultimately ruled valid, the threat of prosecution has a strong chilling and deterrent effect on providers and others from helping people who are seeking abortions.²³⁴

States enacting abortion sanctuary laws also raise the issue of interstate comity. Can a state shield its residents from other states’ imposition of civil liability or prosecution?²³⁵ Article IV of the U.S. Constitution does not contain any provision that is directly on point, but the Full Faith and Credit Clause provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”²³⁶ Shielding residents from judicial proceedings in other states would appear to violate the principle behind this clause. All of these issues are raised by people crossing state borders in search of reproductive liberty, using their bodies and their actions to challenge restrictions imposed by the states in which they live. Their actions prompt not only litigation, but also political controversy as they make visible the harm that abortion bans cause not only to them individually, but also to our system of interstate comity.

B. *Disputes Over Federalism—Then and Now*

During the Antebellum era, conflicts over interstate comity escalated and Southern slaveholders became increasingly frustrated with their inability to capture suspected fugitives who fled into free states.²³⁷ Many Northern officials simply refused to comply with the 1793 Fugitive Slave.²³⁸ Slaveholders demanded stronger federal measures.²³⁹ As mentioned, in 1850, Congress responded with a new Fugitive Slave Act which created a federal administrative system for capturing suspected

233. *Id.* at 32.

234. See Jamelle Bouie, *The Limit Does Not Exist for Republicans*, NEW YORK TIMES (Aug. 15, 2023), <https://www.nytimes.com/2023/08/15/opinion/abortion-republicans-ohio-idaho.html?smid=nytcore-ios-share&referringSource=articleShare>.

235. See Cohen, Donley, & Rebouché, *supra* note 9, at 44 (explaining that this would “strike at the heart of basic, fundamental principles of law in the United States’ federalist system—interstate comity and cooperation.”).

236. U.S. CONST. art. IV, § 1.

237. See BLACKETTE, *supra* note 61, at 4–5.

238. See Schmitt, *supra* note 105, at 1318.

239. See BLACKETTE, *supra* note 61, at xv.

fugitives and returning them to the states from which they had fled.²⁴⁰ The 1850 Act created the first federal police system composed of federal magistrates who were tasked with assisting Southern slave catchers.²⁴¹ In the North, the anti-slavery movement evolved into a state's rights movement, resisting federal incursion on their states' anti-slavery laws.²⁴² The conflict escalated, and the country descended into civil war.²⁴³

For years, anti-abortion activists (and justices on the Supreme Court) have argued that overturning *Roe v. Wade* would have the salutary effect of returning the issue to the state legislatures and the democratic process.²⁴⁴ As this article has described, overturning *Roe* has returned the issue of abortion rights to state governments, and it has also given rise to litigation in the courts.²⁴⁵ It is possible that *Dobbs* could lead to the federalization of anti-abortion laws – an idea popular with anti-abortion activists.²⁴⁶ Some anti-abortion members of Congress have already indicated that they intend to introduce a bill to create a federal abortion ban.²⁴⁷ Moreover, a ruling by the Alabama Supreme Court that embryos are “children” raises the possibility that the United States Supreme Court may rule similarly in similar cases.²⁴⁸ Such a ruling would create new

240. Fugitive Slave Act, ch. 60, 9. Stat. 462 (1850).

241. See BLACKETTE, *supra* note 61, at xv.

242. See Schmitt, *supra* note 105 at 1319.

243. See BLACKETTE, *supra* note 61, at xv.

244. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurrence in part) (“by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.”).

245. See, e.g., *Zurowski v. Texas*, No. 23-0629 (Tex. 2024) (rejecting a challenge to a Texas state abortion ban); *Preterm-Cleveland v. Yost*, No. 24 CV 2634 (Ohio C.P. 2024) (striking down a six-week abortion ban as violating the Ohio constitution).

246. See Ziegler, *supra* note 38; Cohen, Donley, & Rebouché, *supra* note 9, at 2 (“Antiabortion activists have made clear that overturning *Roe* is the first step toward their goal of making abortion illegal nationwide.”).

247. Lisa Lerer & Elizabeth Dias, *Trump Allies Plan New Sweeping Abortion Restrictions*, N.Y. TIMES (Feb. 17, 2024), <https://www.nytimes.com/2024/02/17/us/politics/trump-allies-abortion-restrictions.html?smid=nytcore-ios-share&referringSource=articleShare>.

248. See Dan Rosenzweig-Ziff, *Alabama Supreme Court Rules Frozen Embryos are Children, Imperiling IVF*, WASH. POST (Feb. 20, 2024, 3:30 PM), <https://www.washingtonpost.com/politics/2024/02/19/alabama-supreme-court-embryos-children-ivf/>.

federal/state conflicts – with resistance coming from state officials that favor reproductive liberty.²⁴⁹

V. TRANSGRESSIVE CONSTITUTIONALISM AND THE RIGHT TO TRAVEL

This section considers the importance of the right to travel. Both for fugitives from slavery and free Black people in the Antebellum era, and for people today crossing state borders in search of abortion rights. In both eras, states enacted laws restricting the right to travel, thus restricting the exercise of other fundamental human rights.²⁵⁰

By transgressing state borders in search of their fundamental rights, fugitives from slavery, and people seeking abortions, are asserting the right to travel. While not expressly mentioned in the Constitution, courts have long recognized that the right to travel is an essential attribute of citizenship, linked to the structure of our federal government.²⁵¹ As the Supreme Court explained in the 1867 case of *Crandall v. Nevada*, Americans have a right to movement that is “in its nature independent of the will of any State over whose soil he must pass in the exercise of it.”²⁵² Freedom of movement is a fundamental human right, recognized by international law.²⁵³ The right to travel is essential to political freedom because it enables people to choose the government policies one wishes to live under.²⁵⁴ The right to interstate travel is also a structural right, with its roots in interstate comity; a recognition that state governments are not

249. See Carolina Kitchener, *Roe's Gone. Now antiabortion lawmakers want more.*, WASH. POST (June 25, 2022, 7:52 PM), <https://www.washingtonpost.com/politics/2022/06/25/roe-antiabortion-lawmakers-restrictions-state-legislatures/> (debating the question of whether Congress would have the power to legislate to regulate abortion); Richard H. Fallon Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS L.J. 611, 622 (2007) (depends on the commerce clause doctrine).

250. See *infra* notes 266–276 and accompanying text (restrictions on travel of enslaved and free Black people in antebellum era); *infra* notes 295–301 and accompanying text.

251. See ILYA SOMIN, *FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM* (2020).

252. *Crandall v. Nevada*, 73 U.S. 35, 44 (1867).

253. See *Williams v. Fears*, 179 U.S. 27, 274 (1900) (“[T]he right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the 14th Amendment and by other provisions of the Constitution.”)

254. See SOMIN, *supra* note 251, at 89 (arguing that people can exercise freedom of movement to “escape unwanted impositions” which “greatly reduce conditions of domination, even if not completely eliminate them.”)

separate countries but part of the larger country.²⁵⁵ Most importantly, the right to travel is essential not only to the exercise of rights, but travelling itself is an act of transgressive constitutionalism. Thus, people transgressing borders are asserting their right to bodily autonomy – not only to make decisions about their reproductive lives, but for freedom of movement itself.

In the Antebellum era, many states enacted laws restricting the rights of free Black people to travel as part of their effort against fugitives from slavery.²⁵⁶ Free Black people risked being kidnapped and sold into slavery every time they traveled near slave states.²⁵⁷ Today, even pregnant people who are not seeking abortions may hesitate to travel into states where abortion is not legal, because if they suffer a complication with their pregnancy they could endanger their health. Now, as in the Antebellum era, the right to travel to is under threat.

A. *Citizenship and the Right to Travel in the Antebellum Era*

Debates over the right to travel were central to the Antebellum controversy over slavery and the rights of free Black people. In the Antebellum era, states in which slavery was legal had the most stringent laws restricting movement.²⁵⁸ In the 1830s and 1840s plantation owners feared that abolitionists, and their accompanying ideology, might incite their slaves to revolt.²⁵⁹ In the 1850s, slaveholders felt a “sense of impending calamity” as anti-slavery activism grew in the North.²⁶⁰ They created slave patrols and state militias to police the movement of enslaved people and free Blacks, and to hunt and capture fugitives.²⁶¹ Plantation owners established slave patrols, hiring poor whites, who weren’t always enthusiastic about it, but felt vulnerable to competition from free Blacks.²⁶² In Texas, slaveholders recruited Texas law enforcement

255. See Kreimer, *supra* note 43, at 487 (“States, as members of a federal union, are not free to treat other states as foreign countries.”)

256. See JONES, *supra* note 12, at 91–93.

257. *Id.* at 21; FONER, GATEWAY, *supra* note 62, at 21–23.

258. APTHEKER, *supra* note 51 at 74–76.

259. *Id.* at 50.

260. *Id.* at 51.

261. *Id.* at 67.

262. See Viola Franziska Müller, *Illegal But Tolerated: Slave Refugees in Richmond, Virginia, 1800–1860*, in FUGITIVE SLAVES AND SPACES OF FREEDOM IN NORTH AMERICA 137, 145 (Damian Alan Pargas ed., 2018).

officials to capture and deliver fugitive slaves.²⁶³ Because their movement was so restricted, most enslaved people had little sense of space or distance.²⁶⁴ Enslaved people would try to get permission to run errands for their masters in order to gather information that they needed to plan their escape.²⁶⁵ When they did escape, slave catchers would cross state borders to try to capture and re-enslave them.²⁶⁶ Slave states enacted laws limiting the mobility of enslaved people and authorizing the forcible capture of those who sought to cross state lines.²⁶⁷ Congress reinforced those laws with the Fugitive Slave Acts, which required Northern officials to cooperate with the capture of accused fugitives.²⁶⁸

Many Northern officials refused to cooperate with Southern slave catchers.²⁶⁹ Some Northern states, including Pennsylvania, enacted “Personal Liberty Laws” which recognized due process rights for those accused of being fugitives.²⁷⁰ At the same time, however, other Northern states, including Illinois and Indiana, enacted laws restricting the movement of free Black people.²⁷¹ Free Black people, especially those in border states, lived in constant fear that they might be kidnapped by slave catchers who mistook them (or pretended to mistake them) for people who were fleeing slavery.²⁷² The federal fugitive slave laws contained no procedural protections for people accused of being fugitives, so free Black people had little legal recourse when they were falsely accused.²⁷³ Many restricted their own movement to protect themselves.²⁷⁴ They also formed Vigilance Societies to protect free Blacks and fugitives from slavery and from being kidnapped by slave catchers.²⁷⁵

263. See Mekala Audain, “Design His Course to Mexico:” *The Fugitive Slave Experience in the Texas-Mexico Borderlands, 1850–1853*, in PARGAS, *supra* note 268, at 232, 242.

264. *Id.* at 235.

265. *Id.*

266. See FINKELMAN, *supra* note 72, at 10.

267. See JONES, *supra* note 12, at 90.

268. See Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864); Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864).

269. See MASUR, *supra* note 61, at 90; JONES, *supra* note 13, at 25.

270. See FINKELMAN, *supra* note 72, at 137; *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (striking down a Pennsylvania Personal Liberty Law as preempted by the 1793 Fugitive Slave Act).

271. See JONES, *supra* note 12, at 97; MASUR, *supra* note 61, at 88.

272. See MASUR, *supra* note 61, at 88.

273. See FINKELMAN, *supra* note 72 at 147.

274. See JONES, *supra* note 12, at 97.

275. See BLACKETTE, *supra* note 61, at xiii.

The question of whether free Black people had the right to travel safely into slave states was highly contested during the Antebellum era.²⁷⁶ Civil rights activists in Northern states viewed claiming the rights of citizenship, including the right to travel, as central to their agenda.²⁷⁷ Some free Black people sought U.S. passports to travel abroad and prove their citizenship.²⁷⁸ Others claimed U.S. citizenship to resist the threat of being forced to travel out of the country by the popular colonization movement.²⁷⁹ Still, other free Black people simply traveled without travel permits that were required in many border states, asserting the right to travel by exercising that right.²⁸⁰ According to historian Kate Masur, the rights of citizenship, including the right to travel, became central to the free Black civil rights movements.²⁸¹ The concept of personhood had its foundation in the Bill of Rights and the Article IV citizenship clause.²⁸² The experience of fugitives from slavery and free Black people during the Antebellum era illustrates the fact that bodily autonomy, including freedom of movement, is essential to the right to be treated as human beings.

After the Civil War, the Fourteenth Amendment established the federal government as the protector of the right to travel, and made that right enforceable against state governments via the Privileges or Immunities Clause.²⁸³ The Fourteenth Amendment re-established the Union as a country in which fundamental rights should not differ from state to state, and enabled people to travel between states to exercise those rights.²⁸⁴ In the twentieth century, formerly enslaved people and their

276. See JONES, *supra* note 12, at 27 (pointing out that the debate over the Missouri compromise centered around issues of citizenship).

277. See *id.* at 11 (arguing that citizenship was considered a gateway to rights); BONNER, *supra* note 61, at 2–3 (From the 1820s–1860s Black people “relied on the concept of citizenship to challenge restrictions and seek specific rights and protections.”); *Id.* at 4 (“By claiming rights as citizens, black people . . . made citizenship more important.”).

278. See BONNER, *supra* note 61, at 81. *But see id.* (explaining how the Secretary of State sometimes refused to issue passports to Black people).

279. See JONES, *supra* note 12, at 38–40.

280. See *id.* at 101.

281. See MASUR, *supra* note 61, at xiii.

282. See *id.* at xviii.

283. Kreimer, *supra* note 43, at 462, 504 (“[t]he Framers of the Fourteenth Amendment inherited a legal landscape in which a state’s sovereignty was limited to its own borders, and they established a supervening national citizenship which guaranteed the right to travel and to take advantage of the legal entitlements of neighboring jurisdictions.”).

284. *But see* Fallon, *supra* note 249, at 635 (noting that another interpretation of the Privileges and Immunities Clause is that it is only a non-discrimination provision “prohibit[ing] host states from imposing hostile regulations on out-of-state visitors.”).

ancestors continued to exercise their rights in search of a better life.²⁸⁵ Between 1880 and 1920, over one million Black people migrated northward in a period known as the Great Migration. They did so to escape the violence and disenfranchisement of the Jim Crow South and in search of economic opportunities.²⁸⁶ This history illustrates the fundamental importance of the right to travel to people asserting rights claims.²⁸⁷

B. *Disputes over the Right to Travel after-Dobbs*

In the summer of 2023, Texas passed S.B.8, which allowed county officials to deputize private citizens to bring lawsuits against anyone travelling through the county whom they believe to be aiding a person to obtain an abortion.²⁸⁸ This enabled private citizens to act as vigilantes and block people seeking abortions from traveling.²⁸⁹ The driving force behind these efforts, anti-abortion activist Mark Lee Dickson, explained, “[t]his really is building a wall” to stop what he calls “abortion trafficking.”²⁹⁰ In an article written while the Court was considering overruling *Roe* and *Casey*, legal scholar Richard Fallon predicted that in a post-*Roe* world, “the scope of freedom that currently attends national citizenship would diminish” as states adopted conflicting laws regulating abortions.²⁹¹ Fallon predicted that states would make competing claims about citizenship, with some states asserting the authority to “immunize their citizens from prosecution under the laws of another state for conduct occurring within the borders of the citizens’ own state.”²⁹² Since the *Dobbs* decision, Fallon’s prediction is proving to be true. State and local officials in anti-abortion states are erecting barriers

285. SOMIN, *supra* note 251, at 47 (noting that “A 1917 publication of the National Association for the Advancement of Colored People (NAACP) explained that migration to the North was “the most effective protest against Southern lynching, lawlessness, and general deviltry.”)

286. *Id.*

287. *Id.* at 3

288. See Texas Heartbeat Act of 2021, TEX. HEALTH & SAFETY CODE ANN. § 171.201.

289. Caroline Kitchener, *Highways are the next antiabortion target. One Texas town is resisting.* WASH. POST (Jan. 30, 2025), <https://www.washingtonpost.com/politics/2023/09/01/texas-abortion-highways/>.

290. *Id.*

291. Fallon, *supra* note 249, at 648.

292. *Id.* at 633–34.

to stop people from leaving their states in search of abortions.²⁹³ In the post-*Dobbs* world, the right to travel is again at the forefront of rights claims, as people seeking abortions across state lines to assert their right to reproductive liberty.²⁹⁴

Texas is not alone in restricting the right to travel. Idaho and Tennessee have enacted statutes prohibiting “abortion trafficking,” which they define as “recruiting, harboring or transporting” a pregnant minor to obtain an abortion or abortion medication without parental permission.²⁹⁵ Congress has not yet acted, in part because Republican lawmakers rejected a bill which would affirm the right of people seeking abortions to travel.²⁹⁶ A number of state legislatures, including Missouri, are considering adopting a National Right to Life Committee model law.²⁹⁷ This law would impose criminal and civil penalties on anyone who obtains an abortion outside the state, as well as anyone who “conspires to cause an illegal abortion” or “aids or abets” them.²⁹⁸ Laws authorizing bounty lawsuits against people obtaining an abortion and those who help them, such as Texas S.B.8, would also apply to out-of-state abortions.²⁹⁹ These laws and actions by state officials are reminiscent of Antebellum era states restricting the travel of free Black people and fugitives from slavery.³⁰⁰

293. See *supra* notes 261–62 and accompanying text.

294. See Cohen, Donley, & Rebouché, *supra* note 9, at 6 (“Abortion travel will become an essential part of the post-Roe reality.”).

295. See Anna Claire Vollers, *Helping a minor travel for an abortion? Some states have made it a crime*, IDAHO CAPITAL SUN (Aug. 26, 2024, 4:20 AM), <https://idahocapitalsun.com/2024/08/26/helping-a-minor-travel-for-an-abortion-some-states-have-made-it-a-crime/>. A federal judge has temporarily enjoined the enforcement of the Idaho law as violating the First and Fourteenth Amendments. See *Matsumoto v. Labrador*, 701 F. Supp. 3d 1032, 1053 (D. Idaho Nov. 8, 2023).

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

297. Memorandum from The Bopp Law Firm, PC to National Right to Life Comm. on NRLC Post *Roe* Model Abortion Law 1, 6 (June 15, 2022) (<https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf>).

298. *Id.*

299. See Michael Hiltzik, *Column: Threats to Criminalize Out-of-State Abortions Are a Scary Reminder of 1850s America*, YAHOO! (July 12, 2022), <https://www.yahoo.com/video/column-threats-criminalize-state-abortions-205811448.html>.

300. See *id.*

In his concurrence to *Dobbs*, Justice Brett Kavanaugh opined that laws restricting the right to travel would be unconstitutional.³⁰¹ It remains to be seen if this prediction is correct.³⁰² In the 2024 case of *Yellowhammer Fund v. Attorney General of Alabama*, a federal district court enjoined the Alabama Attorney General from prosecuting those who aid people to leave Alabama to obtain abortions for conspiracy to commit a crime.³⁰³ The court held that such a prosecution would violate the constitutional right to travel of those seeking abortions.³⁰⁴ According to the court, “the right to travel is one of our most fundamental constitutional rights . . . (because) [i]t cultivates national citizenship and curbs provincialism, and thus was key to fusing a league of states into a true federal union.”³⁰⁵ The state of Alabama argued that the right did not extend to those travelling to engage in criminal activity.³⁰⁶ However, the court pointed out that people leaving the state of Alabama to obtain abortions in other states were travelling to engage in activity that was legal in the state to which they were travelling.³⁰⁷ According to the court, the right to travel “includes both the right to move physically and to do what was legal in the destination state.”³⁰⁸ While the *Yellowhammer* ruling strongly upholds the right to travel to receive an abortion, how it will fare on appeal is still unknown. In the meantime, people who can become pregnant will live in uncertainty over whether they can travel to obtain what they believe to be a fundamental right.³⁰⁹

Restrictions on travel heighten the inequities already experienced by people seeking abortions. Financial barriers make it difficult for

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

302. See Cohen, Donley & Rebouché, *supra* note 9, at 26 (“[S]tates may struggle to enforce their laws extraterritorially against providers who refuse to appear at a summons or participate in a lawsuit.”).

303. See *Yellowhammer Fund v. Marshall*, 733 F. Supp. 3d 1167, 1201 (M.D. Ala. May 6, 2024) (enjoining the attorney general from proceeding with such prosecutions on the grounds that they would violate the First and Fourteenth Amendments).

304. *Id.*

305. *Id.* at 1185.

306. *Id.* at 1195.

307. See *id.* at 1185 (“[T]ravel has consistently been protected precisely so that people would be free to engage in lawful conduct while travelling.”).

308. *Id.* at 1186.

309. Jerusalem Demsas, *The Right to Move is Under Attack*, ATLANTIC (May 4, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/red-state-abortion-ban-help-people-move/629756/>.

people to move to states where abortion is legal.³¹⁰ In addition, we are already starting to see the type of scrutiny and monitoring of people reminiscent of the Antebellum era.³¹¹ People who suffer miscarriages are suspected of attempted abortions, and some are already being criminally prosecuted.³¹² State laws, such as Texas S.B.8, impose civil penalties on out-of-state doctors and others who aid in-state residents to obtain medication for abortions.³¹³ In 2024, the United States Supreme Court heard a challenge to the FDA approval of mifepristone, a drug used in medically induced abortions, even though there is no credible evidence that the drug causes any harm.³¹⁴ The Court dismissed the case for lack of justiciability, but left open the possibility of considering the challenge again in a future case.³¹⁵ Officials in anti-abortion states monitor the mail, email and social media of people to identify possible abortions.³¹⁶ This raises the threat of a police state in which people of childbearing age live in constant fear of prosecution.³¹⁷ Moreover, as mentioned previously, people who are pregnant may be reluctant to travel, even temporarily, to states with complete abortion bans, fearing the consequences if they suffer an emergency health crisis.³¹⁸ As New York Times columnist Jamelle Bouie has argued, “[w]hen a state claims the right to limit your travel on account of your body — when it claims one of the most fundamental aspects of your personal liberty in order to take control of

310. *Id.*

311. Jolynn Dellinger & Stephanie K. Pell, *The Criminalization of Abortion and Surveillance of Women in a Post-Dobbs World*, BROOKINGS INSTITUTION (Apr. 18, 2024), <https://www.brookings.edu/articles/the-criminalization-of-abortion-and-surveillance-of-women-in-a-post-dobbs-world/>.

312. Layla Quran, Maca Lenel Buhre, & Amna Nawaz, *The Increasing Risk of Criminal Charges for Women Who Experience a Miscarriage*, PBS NEWS (Jan. 9, 2024, 6:25 PM), <https://www.pbs.org/newshour/show/the-increasing-risk-of-criminal-charges-for-women-who-experience-a-miscarriage>.

313. *See supra*, notes 303–10 and accompanying text.

314. *See* FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024); Kierra Frazier & Alice Miranda Ollstein, *Supreme Court Sets Date for High-stakes Abortion Pill Oral Arguments*, POLITICO (Jan. 29, 2024, 12:30 PM), <https://www.politico.com/news/2024/01/29/supreme-court-abortion-pill-00138347>; Laura Ungar & Matthew Perrone, *Studies Cited in Case over Abortion Pill Retracted Due to Flaws And Conflicts of Interest*, ASSOCIATED PRESS (Feb. 7, 2024, 4:05 PM), <https://apnews.com/article/abortion-pill-mifepristone-redacted-studies-supreme-court-ebd60519fd44dc69c5ac213580d1c1ba>.

315. *All. for Hippocratic Med.*, 602 U.S. at 396.

316. *See* Lea Anne Fowler & Michael Ulrich, *Continuous Reproductive Surveillance*, 51 J. LAW MEDICAL ETHICS 570–74 (2023).

317. Dellinger & Pell, *supra* note 311.

318. Bouie, *supra* note 296.

your reproductive health — then that state has rendered you little more than another form of property.”³¹⁹

VI. FREEDOM OF SPEECH

Freedom of speech is the first foundational right that is essential for advocates of reproductive liberty. Freedom of speech is widely recognized as essential to functioning democracy and democratic citizenship.³²⁰ This section considers the extent to which people advocating against slavery in the Antebellum era, and people supporting abortion rights today, rely on freedom of speech to enable their advocacy. Political actors need to express their opinions and communicate with each other to engage in effective collective action.³²¹ During the Antebellum era, anti-slavery activists often exercised their freedom of speech to criticize slavery.³²² Officials in slave states imposed restrictions on their freedom of speech to silence their anti-slavery pleas.³²³ Today, supporters of reproductive rights must rely on freedom of speech to advocate for those rights in the political sphere. In response, anti-abortion activists are seeking restrictions on speech.³²⁴

A. *Disputes over Freedom of Speech in the Antebellum Era*

In the Antebellum era, anti-slavery activists relied on their freedom of speech to advocate forcefully against slavery.³²⁵ Perhaps the most significant divide between free and slave states in the Antebellum era was their respective laws on anti-slavery speech.³²⁶ Anti-slavery activists believed that if they had the freedom to speak, they would vanquish their pro-slavery foes.³²⁷ Former slave and noted abolitionist, Frederick Douglass, published an anti-slavery newspaper, *The North Star*, which “became the voice of [B]lack abolitionism.”³²⁸ Activist and

319. *Id.*

320. See BHAGWHAT, *supra* note 164, at 9.

321. *Id.* at 5.

322. See William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 TEX. L. REV. 1065, 1072 n.26 (2021).

323. *Id.* at 1072, 1084.

324. See *infra*, notes 347–50.

325. See Carter, *supra* note 322 at 1107.

326. *Id.*

327. *Id.*

328. SINHA, *supra* note 82, at 426.

former slave, Henry Bibb, moved to Canada and published his paper, *The Voice of the Fugitive*, in which he encouraged other enslaved people to follow in his footsteps.³²⁹ Douglass and other formerly enslaved people also published narratives of the lives of enslaved people, which were widely read and appreciated, serving as “the movement literature of abolitionism.”³³⁰ Some of the most powerful narratives were written by women, including anti-slavery activists Sojourner Truth and Harriet Jacobs.³³¹ According to historian Manisha Sinha, “[f]ugitive slaves created an authentic, original and independent critique of slaveholding, one which made their narratives potent anti-slavery material.”³³² As former slave William Brown explained, his narrative was part of the battle of ideas regarding slavery.³³³ Abolitionist authors also wrote fictionalized accounts of slavery to advocate against the institution, including Harriet Beecher Stowe’s *Uncle Tom’s Cabin*.³³⁴ This published literature of the anti-slavery movement was highly effective at recruiting new adherents to the movement.³³⁵

State and local laws in slave states often prohibited anti-slavery speech.³³⁶ Laws in slave states prohibited enslaved people from learning to read and write, and enslaved people’s ability to communicate with each other was greatly restricted.³³⁷ Southern states criminalized anti-slavery speech and banned the importation of abolitionist literature.³³⁸ In Congress, representatives from slave states sought to suppress anti-slavery speech.³³⁹ Notably, South Carolina Representative Preston Brooks attacked Massachusetts Senator Charles Sumner on the Senate floor and beat Sumner “nearly to death” after Sumner’s fiery 1856 anti-slavery speech “Crime Against Kansas.”³⁴⁰ Brooks and other pro-slavery

329. *Id.* at 431; FONER, GATEWAY, *supra* note 62, at 24, 136–37.

330. SINHA, *supra* note 82, at 421. *See, e.g.*, NORMAN R. YETMAN, WHEN I WAS A SLAVE: MEMOIRS FROM THE SLAVE NARRATIVE COLLECTION (2002); FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE (1849).

331. *See* SINHA, *supra* note 82, at 433–34, 456.

332. *Id.* at 421.

333. Carter, *supra* note 322, at 1107.

334. *See* SINHA, *supra* note 82, at 441.

335. *Id.*

336. *See* Carter, *supra* note 327, at 1072 (“One incident of the Slave Power was the denial of freedom of speech. . .”).

337. *See id.* at 1093–94.

338. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 30 (1986).

339. *See* Carter, *supra* note 327, at 1086–87.

340. *Id.* at 1087.

members of Congress expressly sought to limit speech in order to preserve slavery.³⁴¹

Gathering anti-slavery petitions was another important form of activism.³⁴² Northern abolitionists organized a widespread campaign to petition Congress as Southerners doubled down on their pro-slavery views.³⁴³ In 1836, the South Carolina Senator John C. Calhoun led an effort to ban petitions in the United States Senate, arguing that criticizing slavery dishonored Southerners.³⁴⁴ This provoked a firestorm of opposition, led by John Quincy Adams.³⁴⁵ But Calhoun succeeded.³⁴⁶ In 1836, the House of Representatives adopted a resolution requiring the automatic tabling of any petition about slavery, and in 1840, the House banned such petitions. In 1844 the House repealed the ban but precedent for ignoring petitions had been set.³⁴⁷

Abolitionists chafed against these restrictions and championed their right to freedom of expression. In his groundbreaking anti-slavery treatise, *Walker's Appeal*, activist David Walker discussed the cost and danger of speaking out against slavery. The essay discusses how enslaved people were kept in “abject ignorance and wretchedness.”³⁴⁸ In his speeches, Frederick Douglass objected to the fact that the master would tell enslaved people “when and to whom he should speak.”³⁴⁹ Republicans included freedom of speech as one of their central principles in their early party platforms.³⁵⁰

B. *Freedom of Speech after Dobbs*

Today, the *Dobbs* decision has sparked a new, heated debate over the right to abortion and reproductive liberty.³⁵¹ Without a constitutional

341. *Id.* at 1087–88.

342. BHAGWAT, *supra* note 164, at 77.

343. *Id.*

344. *Id.* at 77–78.

345. *Id.* at 78.

346. *Id.*

347. *Id.*

348. Carter, *supra* note 327, at 1094.

349. *Id.* (citing Frederick Douglass, *Slavery and America's Bastard Republicanism*, in *THE FREDERICK DOUGLASS PAPERS: SPEECHES, DEBATES, AND INTERVIEWS VOLUME 1: 1841–1846* (1979)).

350. See CURTIS, *supra* note 338, at 32.

351. See, e.g., Dessie Otachliska, *Free Speech Post-Dobbs: The Constitutionality of State and Federal Restrictions on the Dissemination of Abortion-Related Information*, N.Y.U. J. LEGIS. & PUB. POL'Y (Feb. 5, 2023), <https://nyujlpp.org/quorum/otachliska-free-speech->

right to an abortion, the matter is left up to the democratic political process, which requires free and open debate to function. However, like the right to reproductive liberty itself, freedom of speech is under attack from anti-abortion advocates.³⁵² As mentioned, Model National Right to Life Committee legislation would subject people to criminal and civil penalties for “[a]iding and abetting” an abortion, including “hosting or maintaining a website, or providing internet service, that encourages or facilitates efforts to obtain an illegal abortion.”³⁵³ As discussed in the previous section, Idaho and Tennessee have enacted laws criminalizing aiding and abetting minors to obtain abortions without their parents consent.³⁵⁴ State officials, like the Attorney General of Alabama, threaten prosecution of those aiding and abetting interstate travel to obtain abortions.³⁵⁵ All of these examples discourage speech about abortion. As Richard Fallon predicted in 2007, there is a danger that overruling *Roe* has “inaugurate[d] a regime in which First Amendment rights to engage in abortion-related speech would vary from state to state” – just as in the Antebellum era.³⁵⁶

In *Yellowhammer Fund v. Attorney General of Alabama*, plaintiffs argued that the attorney general’s threat to prosecute those aiding people to cross state borders in search of abortions violated their rights to freedom of speech under the First Amendment.³⁵⁷ The court agreed that prosecuting plaintiffs for providing information counseling and material support would violate the First Amendment.³⁵⁸ In *Matsumoto v. Labrador*, Idaho abortion access groups sued the Idaho attorney general, arguing that the Idaho statute made it a crime for them

post-dobbs/; Raymond Shih & Ray Ku, *Free Speech & Abortion: The First Amendment Case Against Compelled Motherhood*, 43 CARDOZO L. REV. 2105 (2022).

352. See Rose Mackenzie, *Abortion is Our Right, and We Won’t Be Silenced*, ACLU NEWS & COMMENT. (Apr. 3, 2023), <https://www.aclu.org/news/reproductive-freedom/abortion-is-our-right-and-we-wont-be-silenced>.

353. NAT’L RIGHT TO LIFE COMM., *supra* note 297, at 6.

354. See *Matsumoto v. Labrador*, 701 F. Supp. 3d 1032, 1042 (D. Idaho Nov. 8, 2023), *aff’d in part, rev’d in part and remanded*, 122 F.4th 787 (9th Cir. 2024) (order granting preliminary injunction) (discussing the Idaho law); *Welty v. Dunaway*, No. 3:24-CV-00768, 2024 WL 3245612 (M.D. Tenn. June 28, 2024) (denying the preliminary injunction) (discussing the Tennessee law).

355. See *Yellowhammer Fund v. Marshall*, 733 F. Supp. 3d 1167, 1177–78 (M.D. Ala. May 6, 2024).

356. Fallon, *supra* note 249, at 640.

357. *Yellowhammer Fund*, 733 F. Supp. 3d. at 1193–95.

358. *Id.* at 1196.

to advise their clients who were seeking abortions.³⁵⁹ The court agreed and issued a preliminary injunction restraining the state from enforcing the law because to do so would likely violate the First Amendment.³⁶⁰ The Tennessee state legislature enacted a similar law, which is also being challenged in court.³⁶¹ Litigation is likely to continue over the constitutionality of restrictions on speech of those who seek to aid others in obtaining abortions.

The attack on freedom of speech over abortion has reached the academy, despite the strong tradition of academic freedom in that realm. As mentioned previously, in 2020 the Idaho state legislature enacted a law that banned abortion and prohibiting the aiding and abetting of abortions.³⁶² The Idaho “trigger law” went into effect after the Court issued the Dobbs opinion.³⁶³ In the fall of 2022, the University of Idaho released a legal memorandum requiring all university employees to be “neutral” in any discussions of abortion rights or face possible felony prosecution.³⁶⁴ Surprisingly, and chillingly, the university administration did not mention the First Amendment or principles of academic freedom.³⁶⁵ All of these laws contribute to a greater chilling effect on pro-abortion rights speech.

CONCLUSION: COURTS, CONSTITUTIONAL ALLIES, AND THE CONSTITUTION OF LIBERTY

Like fugitives from slavery in the Antebellum era, people today are once again crossing state borders to exercise fundamental rights.

359. *Matsumoto*, 701 F. Supp. 3d at 1050 (“[p]laintiffs’ activities aimed at providing information, support, and assistance about reproductive health options, including legal abortion services, to pregnant individuals constitute protected speech.”).

360. *See id.* at 1062.

361. *See Welty v. Dunaway*, No. 3:24-CV-00768, 2024 WL 3245612 (M.D. Tenn. June 28, 2024), at *1 (denying the preliminary injunction).

362. Andrew Baertlein, *Restrictive Idaho Abortion Law Won’t Be Enacted Following Texas’ Latest Abortion Bill*, KBTB 7 (Sept. 2, 2021, 7:12 PM), <https://www.ktvb.com/article/news/politics/restrictive-idaho-abortion-law-wont-enacted-following-texas-abortion-bill/277-d4ce8b3a-a8bf-4a35-8f37-9206e837ebe0>.

363. IDAHO CODE § 18-622(1)(a) (2022) (stating that the ban will take effect thirty days after “the issuance of the judgment . . . of the United States Supreme Court” which took place on July 28, 2022).

364. Aysha Qamar, *Staff Who Talk About Abortion at University of Idaho Can Be Terminated, Face Up to 5 Years in Jail*, DAILY KOS (Sept. 27, 2022, 12:54 PM), <https://www.dailykos.com/stories/2022/9/27/2124400/-University-of-Idaho-warns-staff-to-stop-providing-birth-control-and-reproductive-health-services>.

365. *See id.*

People seeking abortions today, like fugitives from slavery before them, are engaging in transgressive constitutionalism, provoking constitutional conflict over interstate comity, federalism, and the scope of their reproductive rights. Abortion seekers and activists are asserting their right to travel and their right to free speech.

In the Antebellum era conflict over slavery strained our country's constitution and our democracy.³⁶⁶ On the eve of the Civil War, in its *Dred Scott* decision, the Supreme Court struck down the Missouri Compromise because the law restricted slavery in federal territories.³⁶⁷ The Court held that the law violated the fundamental right of slaveholders to own slaves.³⁶⁸ The Court's decision in *Dred Scott* precluded any political resolution of the conflict over slavery.³⁶⁹ Today, a similar absolutist cloud hangs over the debate over abortion rights – the possibility that the Court could hold that a fetus is a person with constitutional rights. As legal historian Mary Ziegler has observed, the next step in the anti-abortion movement is an all-out fight for fetal personhood.³⁷⁰ For example, in 2022, the state of Georgia enacted a law defining a “natural person” as “any human being including an unborn child,” and authorizing tax exemptions for pregnancies after only 6 weeks of gestation.³⁷¹ Similarly, the Arizona state legislature attempted to enact a law recognizing “personhood” at fertilization.³⁷² These laws could result in murder charges being filed against anyone in these states who receives an abortion.

If a fetus is recognized as a person, any person who obtained an abortion could be charged with murder.³⁷³ If nationalized, this absolutist measure could end legal abortion anywhere in the country. The ultimate success of “abortion abolitionists” would be to convince the Supreme Court to hold that a fetus is a person.³⁷⁴ By doing so, the Court might be attempting to end the political debate over abortion once and for all – just

366. See FINKELMAN, *supra* note 72, at 4.

367. *Dred Scott v. Sandford*, 60 U.S. 393, 455 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

368. *Id.* at 451.

369. See FINKELMAN, *supra* note 72, at 283.

370. Ziegler, *supra* note 38.

371. H.B. 481, 115th Gen. Assemb., Reg. Sess. (Ga. 2020).

372. *Judge Blocks Arizona Law Recognizing 'Personhood' at Fertilization*, REUTERS (July 12, 2022, 12:18 PM), <https://www.reuters.com/world/us/judge-blocks-arizona-law-recognizing-personhood-fertilization-2022-07-12/>.

373. Ziegler, *supra* note 38.

374. *Id.*

as Justice Taney thought when he wrote the *Dred Scott* opinion. However, the opposite would likely be true. Just as *Dred Scott* inflamed anti-slavery sentiment in the Antebellum era, a Supreme Court ruling recognizing fetal personhood would not end the debate over abortion. Instead, it would inspire more people to go underground in support of reproductive liberty, giving strength and motivation to abortion rights activists. *Dobbs* did not end the involvement of federal courts in abortion rights disputes,³⁷⁵ but the ruling certainly has sparked increased political activism in favor of reproductive liberty.³⁷⁶ Like fugitives from slavery and their anti-slavery allies before them, people seeking abortions and their allies today will serve at the forefront of enforcing a constitution of liberty.

375. See Cohen, Donley, & Rebouché, *supra* note 9, at 24–25, 32, 82, 87.

376. See *supra* notes 213–14, 223–32 and accompanying text.