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States as Shields

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Article

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State laws that aim to shield providers of reproductive health and gender-affirming care from the punitive actions of out-of-state officials raise thorny questions. Can the federal courts, Congress, or the Trump Administration require New York officials to enforce a Texas ban on abortion or gender-affirming care against a New York doctor who prescribed medication to a patient in Texas via telehealth? If so, how might New Yorkers' access to health care be affected? If not, will interstate commerce and travel preserve some degree of access for Texans?

Disputes over reproductive health and gender-affirming care are putting new pressure on doctrines that define the scope, limits, and purposes of the sovereignty of each state in relation to the federal government, to its sister states, and to the populace it is responsible for protecting. Judges called on to resolve these disputes will need to engage in careful line drawing with respect to doctrines that empower states to protect public rights, obligate states to give full faith and credit to certain acts and judgments of other states, and limit federal power to regulate states as states.

This Article contributes to discourse on horizontal federalism, state powers and duties, and the public-private divide by developing principled and complementary interpretations of full faith and credit requirements for states and anticommandeering and anticoercion limits on federal power that share a foundation in the doctrine of parens patriae. It argues that judges,

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advocates, and legal scholars should understand parens patriae as a broad doctrine recognizing the coequal sovereignty of states, in relation to each other, as protectors of distinctively public, collectively held rights within their borders, rather than being confined to its best-known application as a doctrine giving states Article III standing to sue in federal courts. This Article proposes the following definition of parens patriae as it has been used by the Supreme Court in relation to constitutional federalism, divided into numbered elements for the purposes of explaining and substantiating this Article's claims: A (1) state government, (2) acting through any of its three branches, performs a constitutionally significant role as parens patriae when it (3) asserts or defends its interest as a sovereign government co-equal to its sister states (4) in protecting its populace at large from harms that are widespread and not exclusively traceable to identifiable individuals who have capacity to vindicate their own interests (5) against private parties or sister states, but not against the federal government to protect the state's populace from the operation of federal law. When read in this broader context, the Court's parens patriae precedents offer an untapped source of guidance for understanding the role states play in shielding their residents from harm, including, but not exclusively, with respect to reproductive health and gender-affirming care.

TABLE OF CONTENTS

INTRODUCTION

What is state sovereignty for? What are its legitimating purposes? How should courts incorporate the legitimating purposes of state sovereignty into a principled approach to defining its scope and limits? These questions are coming to the fore in high-profile clashes between Democrat-led states and the second Trump Administration, which have resulted in a flood of lawsuits calling on the federal courts to delineate roles, powers, and responsibilities.[1] These questions are also raised by emerging conflicts between states over reproductive health and gender-affirming care. More than half of states have criminalized or otherwise banned the provision of abortion and gender-affirming care in the name of protecting fetuses and minors and upholding a particular vision of moral order.[2] Many other states have adopted shield laws that protect providers of such care regardless of where the individuals they care for are located.[3] Emerging

1. *E.g.*, Newsom v. Trump, 141 F.4th 1032, 1056 (9th Cir. 2025) (staying a district court's temporary restraining order enjoining the federalization and deployment of members of the California National Guard to Los Angeles in response to protests against federal immigration enforcement actions); California v. Trump, No. 25-CV-10810-DJC, 2025 WL 1667949, at *1, *22 (D. Mass. June 13, 2025) (granting preliminary injunction of a federal Executive Order directing state officials to take and refrain from various actions relating to the administration of elections); Am. Pub. Health Ass'n v. Nat'l Insts. of Health, No. CV 25-10787-WGY, 2025 WL 1745899, at *1–2 (D. Mass. June 24, 2025) (denying stay of order invalidating termination of federal grants to state institutions); Complaint at 3–5, United States v. New York, No. 1:25-cv-00744-MAD (N.D.N.Y. June 12, 2025) (challenging a New York law prohibiting federal immigration enforcement activities in or near state courts and other state facilities); Complaint at 6–13, United States v. Beshear, 3:25-cv-00028-GFVT (E.D. Ky. June 17, 2025) (challenging a Kentucky regulation that provides undocumented immigrants residing in Kentucky with access to in-state tuition at public colleges and universities).

2. *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST. (last updated Aug. 19, 2025), https://states.guttmacher.org/policies [https://perma.cc/3W7F-9KDD]; Lindsey Dawson & Jennifer Kates, *Policy Tracker: Youth Access to Gender Affirming Care and State Policy Restrictions*, KFF (last updated Aug. 12, 2025), https://www.kff.org/other/dashboard/gender-affirming-care-policy-tracker [https://perma.cc/K43H-Z72A].

3. *Shield Laws for Reproductive and Gender-Affirming Health Care: A State Law Guide*, UCLA CTR. ON REPROD. HEALTH, L., & POL'Y (last updated July 2025) [hereinafter CRHLP, *Shield Laws*], https://law.ucla.edu/academics/centers/center-reproductive-health-law-and-policy/shield-laws-reproductive-and-gender-affirming-health-care-state-law-guide [https://perma.cc/97CC7 7VA] (describing shield law protections against civil liability adopted in twenty-two states and the District of Columbia, all of which protect reproductive care,

conflicts between these two groups of constitutionally coequal states may be even more challenging for courts to resolve than federal-state disputes.

Policy advocates and litigants often flip-flop on matters of state sovereignty depending on whether their goals align or conflict with those of the current federal government.[4] This dynamic is readily apparent in disputes between states and the federal government (the basic, vertical form of federalism). In the Jim Crow era, "[s]tates' rights" was often "code for efforts by the southern states to disenfranchise minority voters and to evade responsibility to provide equal opportunity in education, jobs and housing" under federal civil rights laws.[5] In the aftermath of the 2001 terror attacks, Professor Ernest Young welcomed liberals "to the Dark Side," in an article describing how privacy advocates had come "to embrace 'states' rights'—even if they often cannot bear to use the term," as a strategy for resisting intrusive federal surveillance programs.[6] During the Obama Administration, Republican-led states attempted to nullify federal laws supporting universal health insurance coverage and gun control.[7] During the first Trump Administration, Professor Ilya Somin argued that the conflicts between the President and immigrant sanctuary jurisdictions "helped make federalism great again . . . . by leading many on the political left to take a more

nineteen of which also apply to gender-affirming care, and eight of which explicitly protect providers regardless of the location of the patient).

4. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1256 (2009).

5. Meryl Justin Chertoff, *Riding to the Rescue: The Conditional Spending and Commandeering Jurisprudence of Sandra Day O'Connor in an Era of Federal Overreach*, 83 ALB. L. REV. 1245, 1246 (2020).

6. Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1311 (2004).

7. *See* John Dinan, *Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism*, 74 ALB. L. REV. 1637, 1651–65 (2011) (noting that from 2009 to 2010, eight states enacted "firearms freedom acts" seeking to exempt intrastate firearms and ammunition from federal regulation); Lauren Moxley Beatty, *The Resurrection of State Nullification—And the Degradation of Constitutional Rights: SB8 and the Blueprint for State Copycat Laws*, 111 GEO. L.J. ONLINE 18, 21 (2022), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2022/08/Beatty-State-Nullification.pdf [https://perma.cc/78XM-32GF].

favorable view of judicial enforcement of constitutional limits on federal power."[8]

Horizontal federalism—which concerns the scope of state sovereignty in relation to sister states and the principle that states may not legislate extraterritorially[9]—might receive less attention than vertical federalism,[10] but conflicts between states are as foundational to our nation's history as federal-state disputes. The Founders left the question of chattel slavery to the states, but they also included a provision in the Constitution expressly requiring free states to cooperate with the enforcement activities of enslaver states.[11] In the aftermath of the resulting Civil War, Reconstruction altered interstate relations in addition to changing the federal-state relationship.[12] Throughout the twentieth century, states sued each other to enjoin interstate pollution.[13] During the same time period, states also clashed over differing visions of the moral order they wished to uphold, with states that restricted lotteries and sports betting attempting (unsuccessfully) to avoid enforcing sister state judgments

8. Ilya Somin, *Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247, 1247–48 (2019).

9. *See, e.g.*, Elizabeth Earle Beske, *Horizontal Federalism & the Big State "Problem,"* 65 B.C. L. REV. 2685, 2691–92 (2024); Katherine Florey, *The New Landscape of State Extraterritoriality*, 102 TEX. L. REV. 1135, 1137–38 (2024) [hereinafter Florey, *New Landscape*]; Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1060 (2009); Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 503 (2008); Donald H. Regan, Essay, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1884–85 (1987).

10. Erbsen, *supra* note 9, at 502.

11. Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 U. KAN. L. REV. 1015, 1025 (1997).

12. Congress repealed the Fugitive Slave Acts during the Civil War. The Thirteenth Amendment subsequently nullified the Fugitive Slave Clause of the Constitution, thereby terminating states' obligations to cooperate in enforcing the property rights in persons recognized by other states. Robert J. Kaczorowski, *Popular Constitutionalism Versus Justice in Plainclothes: Reflections from History*, 73 FORDHAM L. REV. 1415, 1428–29 (2005).

13. Missouri v. Illinois, 200 U.S. 496, 518 (1906) (reasoning that the Court's jurisdiction, authority, and competence to resolve a conflict "between the States of the Union . . . which, if it arose between independent sovereignties, might lead to war . . . . is not open to doubt"); Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717, 718–47, 755–66 (2004) (discussing cases from 1901 to 1981).

arising out of gambling debts.[14] In the 1990s, Congress intervened in a new round of interstate culture wars by declaring that states prohibiting same-sex marriage could refuse to recognize marriage certificates issued by permissive states, even though most scholars agreed that restrictive states already had the right to refuse.[15] In the 2000s, the federal courts relied on the Full Faith and Credit Clause to require restrictive states to respect sister-state orders recognizing same-sex couples' adoption of children,[16] before the Supreme Court took the question off the table for states by recognizing the constitutional right to same-sex marriage.[17]

Now, in the midst of Supreme Court decisions rejecting constitutional protections for individual rights and relegating questions of abortion, gender-affirming care, sexual freedom, and sex equality to majority rule,[18] states are again asserting conflicting claims of authority to protect their residents from harm at the

14. Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal-Federal Cooperation*, 36 ARIZ. ST. L.J. 1, 16 n.42 (collecting cases where states with anti-gambling policies were nonetheless required—often under full faith and credit principles—to enforce sister-state judgments on gambling debts).

15. Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 449–50 (2005) (describing how members of Congress invoked full faith and credit concerns to justify the Defense of Marriage Act's provision allowing states to deny recognition of same-sex marriages from Hawaii). Use of the term "culture war" to describe conflicts over gay rights and abortion was popularized by James Davison Hunter, a sociologist, in CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991).

16. Joanna L. Grossman, *Parentage Without Gender*, 17 CARDOZO J. CONFLICT RESOL. 717, 730–31 n.70 (2016) (collecting cases in which federal and state courts invoked the Full Faith and Credit Clause to require recognition of sister state's same-sex adoption orders).

17. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

18. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022) (holding that a state law restricting abortion does not conflict with the right to liberty because "[i]t is time to heed the Constitution and return the issue of abortion to the people's elected representatives. 'The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.'" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in judgment in part and dissenting in part))); United States v. Skrmetti, 145 S. Ct. 1816, 1836 (2025) (holding that a state law prohibiting the provision of many forms of gender-affirming care for minors does not deny equal protection on the basis of sex because "[w]e afford States 'wide discretion to pass legislation in areas where there is medical and scientific uncertainty'" (quoting Gonzales v. Carhart, 550 U.S. 124, 163 (2007)).

hands of out-of-state actors.[19] The Attorney General of Texas, a state that has led the way in heavily restricting abortion and gender-affirming care, has taken legal action against a Washington hospital and a New York doctor for allegedly providing prohibited services and medications to Texas residents.[20] These cross-border legal actions tee up constitutional challenges to the shield laws Washington, New York, and several other states have adopted to protect providers of reproductive health and gender-affirming care[21] from out-of-state civil penalties.[22] At some point, Congress or the Trump Administration could intervene to support restrictive states and penalize shield states—

19. David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 2–3 (2023); Paul Schiff Berman, Roey Goldstein & Sophie Leff, *Conflicts of Law and the Abortion War Between the States*, 172 U. PA. L. REV. 399, 401–02 (2024); Kellen Browning, *Democrats' Wary Response to Transgender Ruling Shows the Party's Retreat*, N.Y. TIMES (June 18, 2025), https://www.nytimes.com/2025/06/18/us/politics/democrats-supreme-court-transgender-ruling.html [https://perma.cc/BFE8-Q6QQ] (quoting Illinois Governor J.B. Pritzker's statement, made in response to the *Skrmetti* decision, that "Illinois has enshrined protections to meet this very moment," apparently referring to H.B. 4664, 102nd Gen. Assemb. (Ill. 2023) and H.B. 5239, 103rd Gen. Assemb. (Ill. 2024)).

20. Plaintiff Seattle Children's Hospitals Special Appearance and Subject Thereto, Original Petition to Set Aside Civil Investigative Demands or in the Alternative, Request for Extension of Time to Respond and Request to Modify Demands at 1, Seattle Children's Hosp. v. Off. of the Att'y Gen. of Tex., No. D-1-GN-23-008855, 2023 WL 8652987 (Tex. Dist. Ct. Dec. 7, 2023); Petition and Application for Temporary and Permanent Injunctive Relief at 4–6, State v. Carpenter, No. 471-08943-2024 (Tex. Dist. Ct. Dec. 12, 2023).

21. I follow the drafters of state shield laws by defining "care" to include social and financial support, in addition to medications and health care services. When I refer to "care providers," I include individuals and organizations who provide social and financial support in addition to clinicians and health care institutions who provide health care services and goods. When I refer to "reproductive health care," I include care relating to contraception, assisted reproduction (also known as infertility treatment), pregnancy, termination of pregnancy, and miscarriage management. When I refer to gender-affirming care, I include social interventions, counseling, medical treatment with puberty blockers, hormones, or other medications, and surgical treatment to support and affirm an individual's gender identity. *See, e.g.*, N.Y. EXEC. LAW § 837-x (McKinney 2025) (defining "legally protected health activity" to include "supportive" services for "reproductive health," including "all services, care and products relating to pregnancy, assisted reproduction, contraception, miscarriage management, or the termination of a pregnancy, and self-managed terminations") (quoting N.Y. CRIM. PROC. LAW § 570.17(1)(b) (McKinney 2025)); WASH. REV. CODE ANN. § 7.115.010(3)–(4) (West 2025) (defining "[p]rotected health care services" to include "services or products that support and affirm an individual's gender identity, including social . . . interventions").

22. CRHLP, *Shield Laws*, *supra* note 3.

either in addition to or in place of establishing a new federal floor of restrictions.[23]

These disputes raise important questions about horizontal federalism and the role of states as sovereigns within a constitutional system that structures the terms on which they engage in conflict and cooperation with each other and with the federal government. Can the federal courts, Congress, or the Trump Administration require a state that protects access to reproductive health and gender-affirming care to enforce another state's ban on these services? If so, health care providers in shield states would be exposed to substantial penalties, which could affect shield states' efforts to protect their residents' access to health care.[24] If not, interstate commerce and travel will probably preserve some degree of access for residents of ban states, frustrating restrictive states' efforts to uphold a particular moral order and protect their residents as they see fit.[25] A wide range of

23. Tierney Sneed, *Trump Says He'll Leave Abortion to the States. It Won't Be So Simple*, CNN (Nov. 25, 2024), https://www.cnn.com/2024/11/25/politics/abortion-trump-leave-to-states [https://perma.cc/4RJR-A46V] ("Trump will . . . face calls from anti-abortion activists . . . to undermine the efforts by blue states to respond to *Roe*'s reversal.").

24. Access to abortion is hindered by limited availability of providers willing to render these services, even in shield states. *See* Rachel K. Jones et al., *The Number of Brick-and-Mortar Abortion Clinics Drops, as US Abortion Rate Rises: New Data Underscore the Need for Policies that Support Providers*, GUTTMACHER INST. (June 2024), https://www.guttmacher.org/report/abortion-clinics-united-states-2020-2024 [https://perma.cc/5DMK-KY24] (noting that post-*Dobbs* clinic closures and provider shortages have strained the capacity of remaining providers, even in states protecting abortion access). Data is more limited with respect to gender-affirming care, but media reports suggest patients and their parents are finding it increasingly difficult to obtain gender-affirming care for minors, even in jurisdictions where it remains legal. *See* Jim Salter & Geoff Mulvihill, *Some Providers are Dropping Gender-Affirming Care for Kids Even in Cases Where It's Legal*, ASSOCIATED PRESS (Sept. 23, 2023), https://apnews.com/article/genderaffirming-care-providers-treatment-parents-liability-45012ee33f078eeea7871e622a5eee1d [https://perma.cc/MC6W-A44S]. In shield states, some providers of gender-affirming care for minors have paused in response to a 2025 Executive Order threatening to strip their federal funding. Carla K. Johnson et al., *Some Hospitals Pause Gender-Affirming Care to Evaluate Trump's Executive Orde*r, ASSOCIATED PRESS (Jan. 30, 2025), https://apnews.com/article/transgender-trump-executive-order-hormones-hospitals-8d9e6b94b34d2e6f890c06ebeba0fe1d [https://perma.cc/WB6X-UTT5].

25. *See* Karen Diep et al., *Abortion Trends Before and After* Dobbs, KFF (last updated July 15, 2025), https://www.kff.org/womens-health-policy/issue-brief/abortion-trends-before-and-after-dobbs [https://perma.cc/ZXP2-TCF8] (observing that despite new bans, overall U.S. abortions have slightly increased post-*Dobbs* and attributing that trend in part to higher rates of interstate travel

doctrines will be relevant—including those relating to personal jurisdiction and conflict of laws,[26] and to criminal prosecution and extradition.[27] In this Article, I set aside other issues to focus on the application of full faith and credit requirements, public nuisance law, the anticommandeering principle, the anticoercion principle, and the antiextraterritoriality principle as they relate to civil enforcement actions and liability in the context of cross-border provision of reproductive health and gender-affirming care. Civil enforcement actions are a potentially powerful tool for restrictive states because, unlike criminal proceedings, civil proceedings may result in default judgments against out-of-state defendants who decline to appear in a restrictive state's

from restrictive states); *Guttmacher Institute Releases Data on State of Residence of US Abortion Patients Traveling for Care in 2024*, GUTTMACHER INST. (June 24, 2025), https://www.guttmacher.org/news-release/2025/guttmacher-institute-releases-data-state-residence-us-abortion-patients-traveling [https://perma.cc/86XX GF5D] (reporting that in 2024 more than 155,000 patients traveled out of state for abortion care—including tens of thousands from Texas to distant states—demonstrating how interstate mobility preserves access despite bans). The constitutional right to interstate travel is, of course, critical to the legality of this phenomenon. *See* Yellowhammer Fund v. Marshall, 776 F. Supp. 3d 1071, 1098 (M.D. Ala. 2025) (holding that the Alabama Attorney General's threats to prosecute health professionals and organizations that assist women in traveling out of state for abortion care violated constitutional rights to travel and to freedom of expression and association, and noting that "Justice Kavanaugh, while voting in *Dobbs* to overturn *Roe v. Wade*, reaffirmed this principle with confidence when he explained that the question whether a State may 'bar a resident of that State from traveling to another State to obtain an abortion' was 'not especially difficult as a constitutional matter' because 'the constitutional right to interstate travel' would prohibit such state action." (quoting Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 346 (2022) (Kavanaugh, J., concurring))). The Dormant Commerce Clause doctrine may not protect the ability of providers to send medications across state lines. *See* GenBioPro, Inc. v. Sorsaia, No. CV 3:23-0058, 2023 WL 5490179, at *14 (S.D. W. Va. Aug. 24, 2023) (holding that the Commerce Clause does not bar West Virginia from banning mifepristone), *aff'd*, 144 F.4th 258 (4th Cir. 2025). Nonetheless, interstate commerce makes it difficult for states to enforce abortion bans without federal and sister state support, and even if the right to interstate travel is ultimately rejected by the Supreme Court, care seekers will continue to travel. Most importantly for my purposes, interstate travel and commerce will only help residents of restrictive states access care if out-of-state providers are willing to render it to them. Thus, shield laws, which remove disincentives that might otherwise cause providers to stop offering reproductive or gender-affirming care, are an important component of this approach.

26. Florey, *New Landscape*, *supra* note 9, at 1145–48; Berman et al., *supra* note 19, at 402.

27. Cohen et al., *supra* note 19, at 47–48.

courts.[28] If default judgments rendered by a restrictive state's courts can be enforced extraterritorially using mechanical recognition rules, they will be a highly effective tool that obviates the need for more complex legal maneuvers. Accordingly, the enforceability of these judgments in shield states' courts is an important first question for scholars to address.

More subtly, these disputes also raise questions about what makes some kinds of harm distinctively *public* as opposed to private.[29] How should the courts weigh evidence regarding effects on a state's residents in determining the rights of the state to assert its sovereignty? The outcome of some disputes could turn on whether these effects are experienced exclusively by identifiable individuals who have capacity to vindicate their own interests, including through private remedial judgments that a sister state's courts may be bound to recognize, as opposed to affecting the rights of the undifferentiated public at large, which states bear special responsibility to protect within their borders, but have less power to protect extraterritorially.[30]

Interstate disputes over reproductive health and gender-affirming care will put new pressure on litigants and judges to articulate the scope, limits, and purposes of the sovereignty of each state in relation to the federal government, to its sister states,

28. *See infra* Part I.A.

29. Lindsay F. Wiley, *Rethinking the New Public Health*, 69 WASH. & LEE L. REV. 207, 261–62 (2012) (discussing the difficulty of "defining what special quality marks an interest as sufficiently collective or communal, beyond the large number of people affected," to justify designation of that interest as distinctively public and proposing that an epidemiological concept of harm at the population level that is not necessarily traceable to any particular individual is key to the designation). The distinction between public and private harms, rights, and interests that I focus on in this Article is different from the distinction between public and private conduct the Court has relied on in cases like *Lawrence v. Texas*, "under which regulations targeting private conduct are deemed more intrusive and hence more difficult to sustain." Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional:* Lawrence*, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 921 (2006) (discussing the persistence of the Court's distinction between public and private conduct in spite of criticism from commentators).

30. *See* Florey, *New Landscape*, *supra* note 9, at 1137–39 (discussing the constitutional doctrines that limit states' ability to extend their regulatory authority extraterritorially); Missouri v. Illinois, 180 U.S. 208, 240 (1901) (recognizing limits on a state's ability to protect interests extraterritorially where only private rights are implicated).

and to the populace it is responsible for protecting.[31] But as Professors Rose Cuison Villazor and Pratheepan Gulasekaram have noted with respect to federal-state disputes over immigrant sanctuary laws, "[state] sovereignty can be a double-edged sword."[32] Stopping the current federal government from interfering with state laws protecting reproductive health and gender-affirming care could stymie a future federal government whose priorities shield states endorse. The "restrictive" and "shield" positions of states in these disputes could easily be reversed when it comes to other types of politicized health care. For example, a state that wishes to shield providers of reproductive health and gender-affirming care may wish to restrict health care intended to convert a minor's sexual orientation or gender identity, whereas a state that supports this practice may seek to shield providers who render it.[33] Rather than relying on consequentialist analysis, judges called on to resolve these disputes will need to engage in principled line-drawing with respect to doctrines that limit states' extraterritorial reach and federal power to regulate states as states.

Directly on-point authorities provide limited guidance. As Professor Allan Erbsen has noted, "[t]here is no transsubstantive preference rule for resolving state-state conflicts" the way that the Supremacy Clause and associated federal preemption doctrines resolve most vertical federal-state conflicts.[34] As Erbsen explains, two structural features of the Constitution make horizontal delineation of power between states challenging: "First,

31. *See* Mary Ziegler, *Texas Suit Against New York Doctor Ushers in New Era of Abortion Litigation*, STATE CT. REP. (last updated July 16, 2025), https://statecourtreport.org/our-work/analysis-opinion/texas-suit-against-new-york-doctor-ushers-new-era-abortion-litigation [https://perma.cc/E5BQ-XGP9] (explaining that Texas's suit against a New York doctor and similar cases will require courts to decide questions of personal jurisdiction, conflicts of law, and the application of shield laws, with many disputes also implicating federal constitutional provisions).

32. Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1273 (2019).

33. Interstate disputes over conversion therapy may soon be foreclosed by the Supreme Court, which could hold that bans on conversion therapy violate the First Amendment. *See* Chiles v. Salazar, 145 S. Ct. 1328 (2025) (granting certiorari to Chiles v. Salazar, 116 F. 4th 1178 (10th Cir. 2024), in which the Tenth Circuit upheld Colorado's ban on conversion therapy for minors over a First Amendment challenge). Nevertheless, imagining how such disputes might have played out provides a useful counterexample for my analysis.

34. Erbsen, *supra* note 9, at 506.

states are equal in status, which complicates prioritizing competing interests. Second, the Constitution defines state power in the aggregate rather than individually, which complicates efforts to define limits on state authority."[35] Thus, Erbsen concludes, when coequal states "share power provided in the aggregate to regulate activities that span physical boundaries, there is no simple way to define the powers of each while respecting the prerogatives of the others."[36]

This Article suggests that courts should look to an untapped source of precedents to resolve interstate disputes over reproductive health and gender-affirming care: the parens patriae doctrine. Parens patriae, which translates to "parent of the country"[37] or "guardian of [the] people,"[38] is "the principle that political authority carries with it the responsibility for [ ] protection" of citizens.[39] Parens patriae precedents articulate a division between private rights that are individually held and distinctively public interests (including public rights recognized in the common law of nuisance), which states bear special responsibility to secure.[40] Parens patriae precedents also build on the

35. *Id.* at 506–07.

36. *Id.* at 528.

37. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982).

38. JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVE OF THE CROWN 155 (1820) (describing parens patriae as an expression of the king's prerogative and duty as "the guardian of his people").

39. *Parens patriae*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/parens-patriae_n [https://perma.cc/3HH9-A9PD]; *see also Parens patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves.").

40. *See, e.g.*, Beatty v. Kurtz, 27 U.S. 566, 584 (1829) (construing a deceased property owner's charitable bequest to an insufficiently organized group of Lutherans "as a dedication of [property] to public and pious uses," subject to enforcement by "the government as parens patriae, by its attorney general or other law officer," in the absence of a "specific grantee or trustee," based in part on the use of the property as a burial ground "not exclusively by the Lutherans, but the public generally"); *In re* Estate of Pruner, 136 A.2d 107, 109 (Pa. 1957) ("[B]ecause the public is the object of the settlors' benefactions, private parties have insufficient financial interest in charitable trusts to oversee their enforcement. Consequently, the Commonwealth itself must perform this function if charitable trusts are to be properly supervised"). For a discussion of these charity-supervision cases in relation to the public-private divide, see *infra* Part II.A.2; see also United States v. Am. Bell Tel. Co., 159 U.S. 548, 554 (1895) ("In instituting this suit the government appeared on behalf of the public, and, as it were, in the exercise of the beneficent function of superintending authority over

public-private divide to create a classification of the distinctive sovereign and quasi-sovereign functions—in contrast to private and proprietary functions—that states perform in our federalist system.[41] These distinctions provide a principled basis for adjudicating at least some of the legal questions that are triggered by conflicting state claims of authority to protect their residents from harm at the hands of out-of-state actors. The relative depth of the Supreme Court's analysis of state responsibilities and functions in parens patriae cases is particularly useful given the paucity of precedents directly addressing other doctrines that govern horizontal federalism.[42]

I develop principled and complementary interpretations of full faith and credit requirements for states and anticommandeering limits on federal power over states that share a foundation in the doctrine of parens patriae. I argue that parens patriae should be understood as a broad doctrine recognizing the coequal sovereignty of states, in relation to each other, as protectors of

the public interests."); Louisiana v. Texas, 176 U.S. 1, 19 (1900) ("[The] gravamen [of the bill before us] is not a special and peculiar injury such as would sustain an action by a private person, but the state of Louisiana presents herself in the attitude of parens patrioe [sic], trustee, guardian, or representative of all her citizens."); Missouri v. Illinois, 180 U.S. at 241 ("[I]it must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. . . . That suits brought by individuals, each for personal injuries threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."); *Snapp*, 458 U.S. at 607 ("In order to bring [a parens patriae] action, the State must articulate an interest apart from the interests of particular private parties."). For further discussion of these state standing cases in relation to the public-private divide, see *infra* Part II.A.3.

41. *See, e.g.*, Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907) ("This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. . . . The alleged damage to the state as a private owner is merely a makeweight."); *Snapp*, 458 U.S. at 602 ("Quasi-sovereign interests stand apart from [a state's other recognized interests]: They are not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party. They consist of a set of interests that the State has in the well-being of its populace."). For further discussion of these categories, see *infra* Part II.A.3.

42. *See, e.g.*, ROBERT H. JACKSON, FULL FAITH AND CREDIT—THE LAWYER'S CLAUSE OF THE CONSTITUTION 30 (1945) ("Generosity in applying foreign [state] law no doubt has forestalled pursuit of many questions as constitutional ones under the full faith and credit clause."); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1493 (2007) (noting the lack of full faith and credit precedents persists); *accord* Grossman, *supra* note 15, at 454.

distinctively public, collectively held rights within their borders, rather than being confined to its best-known application as a doctrine giving states Article III standing to sue in federal courts. I propose a broad but clear definition of parens patriae as it has been used by the Supreme Court in relation to constitutional federalism, which I divide into numbered elements for the purposes of explaining and substantiating my claims:

A (1) state government, (2) acting through any of its three branches, performs a constitutionally significant function as parens patriae when it (3) asserts or defends its interest as a sovereign government co-equal to its sister states (4) in protecting its populace at large from harms that are widespread and not exclusively traceable to identifiable individuals who have capacity to vindicate their own interests (5) against private parties or sister states, but not against the federal government to protect the state's populace from the operation of federal law.

When read in this context, the Supreme Court's parens patriae precedents offer an underappreciated source of guidance for delineating the sovereign function states perform when they shield their populace at large from harm at the hands of out-of-state actors.

In Part I, I describe current and potential conflicts that are likely to embroil multiple state and federal courts and officials in legal battles over the scope of state autonomy with respect to civil enforcement of restrictions on reproductive health and gender-affirming care. I identify several open questions relating to legal mechanisms and limits implicated by these disputes relating to federal full faith and credit requirements, the Tenth Amendment, and the common law of interstate public nuisances. I also compare and contrast these disputes with clashes between the first Trump Administration and immigrant sanctuary jurisdictions.

In Part II, I argue for a reconceptualization of the parens patriae doctrine. I survey applications of parens patriae in three distinct but interrelated areas: state authority over juveniles and others deemed legally incapacitated, state authority over charities whose beneficiaries are not in a position to advocate for themselves because they are contingent and unidentifiable, and state standing to vindicate quasi-sovereign interests in

protecting the health and wellbeing of a state's populace as a whole through lawsuits in federal courts (including, but not limited to, those involving interstate nuisances). I draw on these precedents to develop a definition of the parens patriae doctrine as it has been understood in relation to states' "status as coequal sovereigns in a federal system"[43] that bear responsibilities as the guardians of distinctively public interests for which "suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies."[44]

In Part III, I demonstrate the descriptive and normative power of the parens patriae doctrine I developed in Part II by applying it to the open questions I identified in Part I. By interweaving precedents that span all three of the Court's previous applications of parens patriae, I craft arguments that federal judges could use to uphold state health care shield laws and arguments that state judges could use to defend their authority to decline to recognize out-of-state judgments that arise out of bans on reproductive health and gender-affirming care. I apply this approach in the context of three types of disputes relating to reproductive health or gender-affirming care.

Because it involves the narrowest stretch from the most widely recognized application of parens patriae as a doctrine of state standing, I begin my analysis in Part III with public nuisance claims. States have not yet invoked nuisance law in the interstate disputes I focus on in this Article. But analyzing the claims that restrictive states could bring against providers of cross-border health care, and those that shield states could bring against parties whose threats and harassment interfere with health care access within their borders, helps me to characterize the public rights states are seeking to secure in disputes over reproductive health and gender-affirming care. I conclude that, under their own state nuisance laws, restrictive-state officials could rely on collectively held, common-law rights to public morals or public health to establish that abortion, destruction of embryos by a fertility care provider, contraception, or gender-

43. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (justifying constitutional limits on the personal jurisdiction of state courts in terms of the horizontal aspects of constitutional federalism in addition to individual due process rights).

44. Missouri v. Illinois, 180 U.S. at 241 (explaining why "the State is the proper party to represent and defend" these distinctively public interests).

affirming care constitutes a nuisance. Conversely, a shield state might be able to bring a state-law nuisance claim based on interference with residents' access to health care. But I argue that similar claims brought by either type of state for "'a substantial and unreasonable interference with public rights,' in violation of the *federal* common law of *interstate* nuisance"[45] would be far more challenging because of the limited scope of applicable precedents.

Next, relying on the foundation of my nuisance analysis, I stretch the application of parens patriae doctrine a little further, arguing that it lends much-needed content to the distinction between "a wrong to the public" versus "a wrong to the individual" that undergirds a key exception to the full faith and credit obligations of states called the penal judgment rule.[46] I conclude that shield states are not obligated by federal full faith and credit requirements to enforce a restrictive state's civil judgment based on a health care ban, a licensing violation, or a public nuisance claim precisely because these types of judgments represent a

45. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 418 (2011) (emphasis added).

46. Huntington v. Attrill, 146 U.S. 657, 668 (1892); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 286 (1888), *overruled as to its holding that tax laws are penal by* Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268 (1935); *Milwaukee Cnty.*, 296 U.S. at 271 ("Even if the judgment is deemed to be colored by the nature of the obligation whose validity it establishes, and we are free to re-examine it, and, if we find it to be based on an obligation penal in character, to refuse to enforce it outside the state where rendered, see Wisconsin v. Pelican Insurance Co., 127 U.S. 265, 292, . . . compare Fauntleroy v. Lum, 210 U.S. 230 . . ., still the obligation to pay taxes is not penal. It is a statutory liability, quasi contractual in nature, enforceable, if there is no exclusive statutory remedy, in the civil courts by the common-law action of debt or indebitatus assumpsit." (subsequent citations omitted)); Missouri v. Illinois, 180 U.S. 208, 232 (1901) ("The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties." (quoting Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 286 (1888)); Testa v. Katt, 330 U.S. 386, 398 (1947) (holding that a state court is bound by the Supremacy Clause to apply a federal law, even if it is penal, but distinguishing obligations between sister states: "It cannot be assumed, the supremacy clause considered, that the responsibilities of a state to enforce the laws of a sister state are identical with its responsibilities to enforce federal laws."); Nelson v. George, 399 U.S. 224, 229 (1970) ("[T]he Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment."); *see also* Rosen, *supra* note 29, at 946–47 (discussing the penal judgment exception recognized in these cases and linking it to the principle of antiextraterritoriality).

restrictive state's efforts to protect its populace at large, rather than affording a private remedy. In contrast, shield states would be obligated to enforce a malpractice or wrongful death claim that arises from the provision of reproductive or gender-affirming care, at least so long as the standard of care applied by the restrictive state's court did not rely on the state's law penalizing reproductive health or gender-affirming care.

Then, I take a bigger swing, arguing that my relational, role-based approach to the parens patriae doctrine provides useful concepts for clarifying the anticommandeering and anticoercion principles that prohibit federal commands that "require states in their sovereign capacity to regulate their own citizens."[47] I argue that these principles should be understood in light of the sovereign and quasi-sovereign functions that parens patriae precedents describe in detail. Read in conjunction with the principle of antiextraterritoriality reflected in the penal judgment rule, the anticommandeering and anticoercion principles might even prohibit the federal government from requiring states to recognize the penal judgments of sister states. On this reading, new federal requirements forcing shield states to cooperate with restrictive states would impermissibly enable the extraterritorial reach of states the federal government favors at the expense of those it disfavors, violating the principle of coequal sovereignty among states. If New York resists federal interference aimed at forcing it to cooperate with Texas's ban, its parens patriae role as protector of health care access within its borders could strengthen its state sovereignty argument.

Finally, I clarify what parens patriae cannot do in this context by explaining that it probably does not empower a state to invoke its role as sovereign guardian of the populace to challenge direct federal regulation of its residents. This is because "the United States, and not the State" acts as parens patriae in the "field" of residents' "relations with the Federal Government."[48] Thus, parens-patriae-as-horizontal-federalism would not, by itself, provide a basis for a state to nullify a federal law's preemptive effect.[49] I draw a distinction between the use of parens

47. Reno v. Condon, 528 U.S. 141, 151 (2000).

48. Massachusetts v. Mellon, 262 U.S. 447, 486 (1923).

49. Federal preemption of state laws, including those that purport to nullify federal law, is grounded in the Supremacy Clause. U.S. CONST., art. VI, cl. 2; Dinan, *supra* note 7, at 1638.

patriae to nullify federal law and the use of parens patriae to defend a state's right, as a sovereign coequal to its sister states, to refuse a command by the federal government to recognize the penal judgments of a sister state.

Under *Dobbs* and *Skrmetti*, restrictions on abortion and gender-affirming care fall within each state's police power "to regulate private interests for the public good."[50] My analysis takes seriously restrictive states' arguments that their bans are intended to protect their populations. I also accept that states have a parens patriae interest in protecting the health and well-being of current and future fetuses within their borders.[51] Perhaps counterintuitively, I argue that the parens patriae purposes asserted on both sides of interstate conflicts over reproductive health and gender-affirming care *weaken* each state's enforcement authority *beyond* its borders. At the same time, I argue that parens patriae purposes should *strengthen* a state's efforts to resist federal interference in interstate disputes over how each state sees fit to protect those *within* its borders. The federal government may have power to protect or restrict reproductive health or gender-affirming care directly,[52] but may nonetheless lack power to do so *indirectly* by commanding one

50. LINDSAY F. WILEY & LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW AND ETHICS: POWER, DUTY RESTRAINT 166 (2025).

51. This interest does not depend on a determination that fetuses are persons within the meaning of the U.S. Constitution. States have a legitimate interest in protecting the health of fetuses from toxic exposures or infectious disease, for example. Some environmental protection advocates have argued that the federal common law of interstate nuisance could be read to protect "future generations" from harms associated with climate change. Bradford C. Mank, *Standing and Future Generations: Does* Massachusetts v. EPA *Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 1, 80 (2009). There is no reason that recognizing an interest in protecting future generations from exposure to an unhealthy environment would require recognition that fetuses are persons.

52. Among other approaches to prohibiting reproductive health care as a matter of federal law, the Supreme Court could rule that fetuses are persons within the meaning of the Fourteenth Amendment. *See* Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 805 (2024) ("[S]ome of the most prominent pro-life groups in the nation have indicated they are not content to let the citizens of the several states make their own decisions about abortion within their respective jurisdictions. . . . [T]heir desired outcome is the recognition of fetal personhood [under the U.S. Constitution]."). A Supreme Court ruling that fetuses are persons could affect my analysis on some points, as specified below. But in that scenario, shield states would have bigger problems than threats to providers who have supported patients in restrictive states.

group of states to submit to the parens patriae judgments of another. A state's sovereign and quasi-sovereign functions as the parens patriae vindicator of the public rights of its populace are constitutionally protected when used as an internally focused shield, but they do not equip states with an extraterritorial sword.

I. INTERSTATE DISPUTES OVER ABORTION AND GENDER-AFFIRMING CARE

Reproductive health and gender-affirming care sometimes involve procedures that require in-person interactions. When a ban-state resident travels to a shield state to obtain care, the ban state's laws do not apply to activities that occur wholly within the shield-state's borders.[53] But in many cases, prescriptions, medication, and counseling can be provided remotely.[54] Abortion pills, puberty blockers, hormones, and fertility drugs may be prescribed by a clinician located in one state following communication with a patient in a second. These medications may be shipped by or picked up from a pharmacy in one state but may be consumed and take effect in another.[55] To achieve their

53. Nielsen v. Oregon, 212 U.S. 315, 321 (1909) ("Can the state of Oregon, by virtue of its concurrent jurisdiction, disregard [Washington's] authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that state had specially authorized him to do? We are of the opinion that it cannot."); Bigelow v. Virginia, 421 U.S. 809, 824–25 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State."); Matsumoto v. Labrador, 122 F.4th 787, 813 (9th Cir. 2024) ("Idaho's asserted police powers do not properly extend to abortions legally performed outside of Idaho.").

54. *See* Anna E. Fiastro et al., *Remote Delivery in Reproductive Health Care: Operation of Direct-to-Patient Telehealth Medication Abortion Services in Diverse Settings*, 20 ANNALS FAM. MED. 336, 336–37 (2022); Arielle C. Mora Hurtado et al., *Telehealth Contraceptive Care in 2018: A Quality Improvement Study of Barriers to Access and Patient Satisfaction*, 112 CONTRACEPTION 81, 82–84 (2022); Gina M. Sequeira et al., *Gender-Diverse Youth's Experiences and Satisfaction with Telemedicine for Gender-Affirming Care During the COVID-19 Pandemic*, 7 TRANSGENDER HEALTH 127, 129–33 (2022).

55. *See* David S. Cohen et al., *Abortion Pills*, 76 STAN. L. REV. 317, 348–49 (2024) (describing up to four distinct locations in which a single abortion might be completed).

extraterritorial goals,[56] restrictive states require cooperation from sister states or the federal government.[57]

In this Part, I map some of the legal issues raised by interstate disputes over reproductive health and gender-affirming care and identify several open questions of law. This mapping exercise lays the groundwork for Part III's application of the parens patriae doctrine I reconceptualize in Part II to the questions I identify in Part I. Section I.A. describes how interstate disputes are unfolding, anticipates the moves states might make next, and considers the possibility of federal intervention. Section I.B identifies key questions implicated in these disputes, including with respect to the scope of the penal judgment rule as an exception to full faith and credit requirements, the scope of public rights that states could protect through public nuisance suits, the scope of the anticommandeering principle's prohibition on federal regulation of states as states, and the limits of the anticoercion principle states might use to resist federal intrusion into interstate disputes.

A. INTERSTATE POLITICAL DISPUTES BECOME INTERSTATE LEGAL DISPUTES

Shortly before the *Dobbs* decision leaked in 2022, state legislatures began passing shield laws directing their executive and judicial officers to not cooperate with the implementation of out-of-state laws that restrict reproductive health and gender-affirming care to a degree the shield state has determined is unwarranted by health and safety concerns.[58] Most, but not all, of these laws specifically shield providers from civil judgments of sister states.[59] Even in the absence of a statute directing them

56. As Professor Katherine Florey has argued, "[v]alue-laden [state] legislation," like abortion bans, "raises the stakes and . . . potentially invites conflict with other states, in order both to fully achieve its purposes and to express the depth of the enacting state's commitment to the underlying principle." Florey, *New Landscape*, *supra* note 9, at 1153.

57. *Cf.* Erbsen, *supra* note 9, at 516 (discussing how "an outlier permissive state can frustrate a restrictive majority, a permissive majority can frustrate a restrictive outlier, and restrictive states can in rare instances frustrate permissive states" in relation to "havens" created by states that permit activities other states wish to restrict).

58. Cohen et al., *supra* note 19, at 13.

59. CRHLP, *Shield Laws*, *supra* note 3.

to do so, state judges may have power and discretion to adjudicate cases in ways that shield state residents.[60]

In 2023, Texas Attorney General Ken Paxton opened a civil investigation into Seattle Children's Hospital in Washington, demanding records identifying Texas residents who had been prescribed puberty blockers or cross-sex hormones.[61] The hospital responded by filing suit in a Texas district court to set aside the state's investigative demands.[62] Several months later, Paxton settled for the hospital's agreement to surrender its Texas business license,[63] but only after the hospital's Chief Medical Operations Officer provided a sworn affidavit stating that the hospital "does not employ any clinical staff in the State of Texas to provide" the disputed services and that its "providers have not provided telemedicine services to Texas residents" for these purposes.[64]

In 2024, similar conflicts over abortion came to a boil. Sixteen attorneys general representing restrictive states signed a letter transmitted from Tennessee Attorney General Jonathan Skrmetti to various officials in Maine, decrying the "unique constitutional transgressions" of a shield bill that was pending in

60. *See infra* Part I.C.1.b.

61. Karen Brooks Harber, *Seattle Children's Hospital Won't Have to Provide Trans Patient Records to Texas Under New Settlement*, TEX. TRIB. (Apr. 22, 2024), https://www.texastribune.org/2024/04/22/texas-trans-health-care-investigation-seattle [https://perma.cc/GU8Z-R2YE].

62. Press Release, Ken Paxton, Att'y Gen. of Tex., Medical Provider Agrees to Withdraw from Texas Instead of Complying with Investigation into "Gender Transition" Treatments for Minors (Apr. 22, 2024), https://www.texasattorneygeneral.gov/news/releases/medical-provider-agrees-withdraw-texas-instead-complying-investigation-gender-transition-treatments [https://perma.cc/DSS4EWZV].

63. Seattle Children's Hospital has explained that it previously maintained a Texas business license "for limited clerical and nonclinical purposes" such as managing employees who work remotely for the hospital in an administrative, nonclinical capacity while they were physically located in Texas. *See* Plaintiff Seattle Children's Hospitals Special Appearance and Subject Thereto, Original Petition to Set Aside Civil Investigative Demands or in the Alternative, Request for Extension of Time to Respond and Request to Modify Demands, *supra* note 20, at 6.

64. Affidavit of Ruth A. Macdonald, M.D. In Support of Seattle Children's Hospital's Special Appearance and Petition to Set Aside Civil Investigative Demand and Request for Sworn Written Statement ¶ 10, Seattle Children's Hosp. v. Off. of the Att'y Gen. of Tex., No. D-1-GN-23-008855, 2023 WL 8652987 (Tex. Dist. Ct. Dec. 7, 2023).

the state's legislature.[65] The Maine shield law was signed into law a few weeks later. It includes a provision authorizing in-state providers to file suit for "tortious interference with legally protected health care activity" in Maine courts to claw back damages, attorneys fees, and costs from out-of-state officials who engage in "hostile litigation" arising out of activities that would not result in liability under Maine law.[66] As of September 2024, thirteen states and the District of Columbia have adopted similar claw back lawsuit provisions.[67]

The same year, a Texas resident sought to depose his ex-girlfriend to investigate whether she had travelled to Colorado to obtain an abortion, relying on a Texas civil procedure mechanism that facilitates investigation prior to filing suit.[68] In a petition filed in a local Texas court on his behalf by an attorney who is known as the architect of the state's "bounty" law empowering private persons to sue providers of abortion assistance,[69] the ex-boyfriend said depositions were warranted because he was "considering whether to sue individuals and organizations that participated in the murder of his unborn child," under the bounty law or under Texas's general wrongful death statute.[70] It is unclear whether the contemplated suits would have included claims against Colorado residents.

In late 2024, Paxton filed a civil action against Dr. Maggie Carpenter, a resident of New York. In *Texas v. Carpenter*, the state alleged that by providing abortion drugs to a twenty-year-old Texas resident, Carpenter violated Texas statutes prohibiting abortion[71] and the practice of medicine in Texas without a

65. Press Release, Jonathan Skrmetti, Att'y Gen. of Tenn., TN AG Skrmetti Issues Statement Raising Concerns Over Maine's Proposed Legislative Assault on Federalism (Mar. 11, 2024), https://www.tn.gov/attorneygeneral/news/2024/3/11/pr24-26.html [https://perma.cc/K8PC-HW9N].

66. ME. REV. STAT. ANN. tit. 14, § 9003 (2025).

67. CRHLP, *Shield Laws*, *supra* note 3.

68. Sonia M. Suter, *Reproductive Care — "Right" Here and "Wrong" There*, 28 J. HEALTH CARE L. & POL'Y 24, 35-36 (2025).

69. TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2025) (providing statutory damages of $10,000 for each abortion that the defendant performed, induced, or aided or abetted).

70. Caroline Kitchener, *Texas Man Files Legal Action to Probe Ex-Partner's Out-of-State Abortion*, WASH. POST (May 3, 2024), https://www.washingtonpost.com/investigations/2024/05/03/texas-abortion-investigations [https://perma.cc/2Y6G-9EX6] (quoting letter without providing a link to it).

71. TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2025).

Texas medical license.[72] Texas sought an injunction ordering her to cease providing abortion drugs to Texas residents, in addition to a civil penalty of $100,000 for violating the abortion ban.[73] If Carpenter were violating a *federal* law, Paxton could have sued her in federal court, relying on federal question jurisdiction.[74] Texas is not a "citizen" for the purposes of federal diversity jurisdiction, so Paxton does not have the option of suing Carpenter in a federal court on a state-law claim to leverage the reach of its enforcement mechanisms.[75] Thus, Texas's best option is to bring suit against Carpenter in its own courts.

Unlike a criminal case,[76] a civil case can result in a default judgment against a defendant who refuses to cooperate.[77] Following a default judgment, if Carpenter were present in Texas, she could eventually be charged with contempt of court if she

72. Petition and Application for Temporary and Permanent Injunctive Relief, *supra* note 20, at 6, 8 (citing TEX. OCC. CODE ANN. § 155.001 (West 2025)).

73. *Id.* at 8 (citing TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2025)).

74. *See* 28 U.S.C. § 1331 (establishing federal question jurisdiction). Some federal statutes expressly authorize state attorneys general to sue in federal court. *See, e.g.*, 15 U.S.C. § 6504 (authorizing state attorneys general to bring parens patriae actions for violations of the Children's Online Privacy Protection Act). State attorneys general may also rely on federal common law claims to bring suit in federal court. *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011) (recognizing the federal common law of interstate nuisance but holding that plaintiff states' federal common law claims were preempted by the Clean Air Act).

75. *See* Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894); 1 FEDERAL PROCEDURE § 1:163 (lawyers ed. West 2025).

76. In January 2025, a grand jury in Louisiana indicted Dr. Carpenter on felony abortion charges for prescribing abortion pills to a Louisiana patient via telehealth. New York's governor responded by promising to shield Dr. Carpenter from extradition. *See* Brendan Pierson, *New York Doctor Indicted in Louisiana for Prescribing Abortion Pill Taken by Teen*, REUTERS (Jan. 31, 2025), https://www.reuters.com/legal/new-york-doctor-indicted-louisiana-prescribing-abortion-pill-teen-reports-say-2025-01-31 [https://perma.cc/YS37-9DK2]. Laws governing criminal prosecutions and extradition are outside the scope of this Article, which focuses on civil liability.

77. David S. Cohen et al., *Understanding Shield Laws*, 51 J.L. MED. & ETHICS 584, 588 (2023); TEX. R. CIV. P. 508.3 (stating Texas' procedure for default judgments). Although the Fourteenth Amendment to the U.S. Constitution requires state courts to respect due process guarantees, and article I, section 13 of the Texas Constitution guarantees a right of access to the courts, default judgments generally do not violate due process so long as the defendant was given adequate notice. *See*, *e.g.*, Peralta v. Heights Med. Ctr., 485 U.S. 80, 86 (1988); *see also* TEX. CONST. art. I, § 13 (providing a form of due process protection).

continued to practice in violation of a civil injunction.[78] If she had assets in Texas, they could be seized to pay damages to the state.[79] But given that Carpenter is a cofounder of an organization that helps doctors in shield states navigate abortion bans, she is probably very careful about where she travels and where she keeps her assets.[80] Thus, the next step following a default judgment for Texas in its own court was for Paxton to file an action in New York seeking to domesticate the Texas judgment against Carpenter.[81]

The day after Paxton filed the *Texas v. Carpenter* complaint in a Texas district court, New York Governor Kathy Hochul issued a statement promising to defend New York's shield law.[82] Two weeks after Hochul's statement, the Heritage Foundation released a report suggesting that shield laws may be unconstitutional.[83] In February 2025, the Texas court issued a default judgment against Carpenter for a $100,000 civil penalty and permanently enjoined her "from prescribing abortion-inducing drugs to Texas residents."[84] In March, Paxton attempted to file the Texas court's judgment in a New York county court, seeking a summary judgment from the New York court that would allow Texas to use New York's judicial and executive officials to

78. *See* TEX. GOV'T. CODE ANN. § 21.002 (West 2025) (stating Texas law with respect to courts' ability to punish for contempt).

79. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 31.002 (West 2025) (providing for conveyance of real property or delivery of personal property); *Id.* § 63.001 (providing for garnishment of bank accounts).

80. *Who We Are: Our Story*, ABORTION COALITION FOR TELEMEDICINE, https://www.theactgroup.org/who-we-are [https://perma.cc/R42C-TZFY] (stating that Abortion Coalition for Telemedicine was founded in 2022 by Dr. Maggie Carpenter and two other "leaders in the reproductive freedom movement" who share the goal of supporting health care providers that are willing to provide abortion care to individuals in restrictive states via telemedicine).

81. *See* Cohen et al., *supra* note 19, at 97–98.

82. Statement, Governor Kathy Hochul, Off. of the Governor of the State of New York (Dec. 13, 2024), https://www.governor.ny.gov/news/statement-governor-kathy-hochul-42 [https://perma.cc/3RWG-5EKX] (addressing the passage of New York's shield law following the Supreme Court decision in *Dobbs*).

83. Thomas Jipping, *Legal Memorandum: Abortion "Shield" Laws Undermine Interstate Comity and Medical Practice and Raise Constitutional Questions*, THE HERITAGE FOUND. 12 (Dec. 30, 2024), https://www.heritage.org/life/report/abortion-shield-laws-undermine-interstate-comity-and-medical-practice-and-raise [https://perma.cc/P5MA-8WAY].

84. Final Judgment and Order Granting Permanent Injunction, Texas v. Carpenter, No. 471-008943-2024 (Tex. Dist. Ct. Feb. 13, 2025), https://www.texasattorneygeneral.gov/sites/default/files/images/press/Carpenter%20Final%20Judgment%20Signed.pdf [https://perma.cc/9UV2-VYDV].

enforce the injunction and collect statutory damages against Carpenter.[85] Acting Ulster County Clerk Taylor Bruck issued a press release stating "I have refused [Texas's] filing and will refuse any similar filings that may come to our office," citing New York's shield law.[86] In July, Bruck responded to Paxton's request for reconsideration: "The rejection stands."[87] In August, Paxton filed a mandamus petition in the New York county court seeking a judgment compelling Bruck to accept its filing.[88] In September 2025, the office of New York Attorney General Letitia James notified the court that she was exercising her statutory right to intervene in the suit to defend the constitutionality of the shield law.[89] As of this writing, the suit is pending in the New York Supreme Court for Ulster County. Texas argues that New York's shield law violates the Full Faith and Credit Clause.[90] More specifically, Texas asserts that the default judgment it is attempting to domesticate does not fall within the penal judgment exception to New York's full faith and credit obligations.[91]

If the New York courts refuse to enforce the default judgment from Texas against Carpenter, Texas could sue New York in federal court to enforce New York's obligations under federal law to give full faith and credit to a sister state's judgment. Texas could file similar civil actions against other out-of-state abortion and gender-affirming care providers who provide prescriptions remotely. Other restrictive states could follow Texas's lead. If so, shield-state defendants could use claw back provisions to file suit in their own states' courts against restrictive-state officials.[92]

85. Press Release, Taylor Bruck, Acting Ulster Cnty. Clerk, Ulster Cnty. Clerk's Off. (Mar. 27, 2025), https://clerk.ulstercountyny.gov/news/countyclerk/327-clerk-rejects-filing-texas-attorney [https://perma.cc/HLG4-EENW].

86. *Id.*

87. Letter from Taylor Bruck, Acting Ulster Cnty. Clerk, Ulster Cnty. Clerk's Off. to Mr. Ogle, (July 14, 2025), https://clerk.ulstercountyny.gov/sites/default/files/Bruck%20Texas%20Response.pdf [https://perma.cc/9B3Z-GPEN].

88. Petitioner's Memorandum of Law in Support of Petition Pursuant to Article 78 of the CPLR, Index No. EF 2025-2536 (Jul. 28, 2025) (on file with author).

89. Letter from Ester Mudukhayeva, Deputy Solicitor General, to Hon. David M. Gandin, Ulster Cnty. Supreme Court (Sept. 8, 2025), https://ag.ny.gov/sites/default/files/letters/state-of-texas-et-al-v-taylor-bruck-et-al-letter-2025.pdf [https://perma.cc/J7XV-KRSX].

90. Petitioner's Memorandum of Law, *supra* note 88, at 6.

91. *Id.* at 7.

92. CRHLP, *Shield Laws*, *supra* note 3.

Similar issues could arise in private lawsuits pursuing wrongful death or other tort claims against out-of-state defendants. These disputes will put pressure on litigants and judges to flesh out poorly defined limits on extraterritorial state legislation and on federal interference in state governance in ways that could have lasting effects on the role of states as protectors of the populace within their borders.

Could the federal government intervene in these interstate disputes? The extent to which the second Trump Administration will implement federal restrictions on abortion and gender-affirming care is not yet clear. The 119th Congress could adopt a new federal floor of restrictions on reproductive health and gender-affirming care, but the margin of Republican control is extremely thin.[93] The President has issued Executive Orders that reverse Biden-era policies and threaten to strip federal funding from providers of reproductive health and gender-affirming care.[94] Health and Human Services Secretary Robert F. Kennedy has directed the Food and Drug Administration to review

93. Clare Foran & Annette Choi, *What Speaker Johnson's Historically Small Majority Looks Like After Arizona's Special Election*, CNN (Sept. 23, 2025), https://www.cnn.com/politics/narrow-house-majority-congress-dg [https://perma.cc/9CQP-BBYE]. The House version of the One Big Beautiful Bill Act included a provision prohibiting federal payment under Medicaid or Children's Health Insurance Program for gender-affirming care (including for adults). *See* H.R. 1, 119th Cong. § 44124 (2025). But this provision was ultimately dropped from the Senate version, in part due to a ruling from the Senate Parliamentarian that it exceeded the scope of what Congress could pass through the budget reconciliation process and thus would have required a filibuster-proof supermajority to pass. Christopher Kane, *Senate Parliamentarian Orders Removal of Gender-Affirming Care Ban from GOP Reconciliation Bill*, WASH. BLADE (June 26, 2025), https://www.washingtonblade.com/2025/06/26/senate-parliamentarian-orders-removal-of-gender-affirming-care-ban-from-gop-reconciliation-bill [https://perma.cc/69P9GY5X].

94. *See, e.g.*, Exec. Order No. 14182, 90 Fed. Reg. 8751, § 2 (Jan. 24, 2025) (rescinding Biden-era executive orders directing federal agencies to improve protection of confidentiality for health information relating to and Medicaid enrollees' access to reproductive and sexual health care); Exec. Order No. 14168, 90 Fed. Reg. 8615, § 3(g) (Jan. 20, 2025) (directing federal agencies to "assess grant conditions [to] ensure grant funds do not promote gender ideology"); Exec. Order No. 14187, 90 Fed. Reg. 8771, § 4 (Jan. 28, 2025) (directing federal agencies to "ensure that institutions receiving Federal research or education grants end [the provision of medical and surgical gender-affirming care for minors]"); *see also* PFLAG, Inc. v. Trump, 769 F. Supp. 3d 405, 455 (D. Md. 2025) (issuing a preliminary injunction barring the Department of Health and Human Services from withholding, conditioning, or terminating federal funding pursuant to Executive Order No. 14168 and Executive Order No. 14187 based on a health care entity's provision of gender-affirming care).

its regulations relating to mifepristone, a pill used for medication abortions.[95] But the Trump Administration has not yet responded to anti-abortion advocates' calls to use the Comstock Act to criminalize the shipment of abortion pills across state lines.[96]

Federal intervention in interstate disputes might be an easier political lift than new federal restrictions that regulate reproductive health and gender-affirming care directly. The administration could intervene in a lawsuit by a restrictive state against a shield state seeking to domesticate a default judgment against its providers or seeking an injunction invalidating the state's shield law.[97] Congress could pass legislation to expand the full faith and credit obligations of states to recognize sister-state court judgments beyond what the Constitution requires—either as a direct command or as a condition attached to federal funding. In the absence of legislation, the President could issue an Executive Order directing federal officials to attach new conditions to existing federal funding that require shield states to recognize out-of-state judgments against abortion and gender-affirming care providers, similar to the actions he has already taken based on similar grievances.[98]

95. Carrie N. Baker, *FDA Review of Abortion Pill Signals First Step Toward Nationwide Ban*, MS. MAG. (May 16, 2025), https://msmagazine.com/2025/05/15/fda-abortion-pill-nationwide-ban-rfk-kennedy [https://perma.cc/5L3R-YSYF].

96. *See* Mary Ziegler, *Anti-Abortion Strategies Center on 19th Century Federal Law*, STATE CT. REP. (Feb. 26, 2025), https://statecourtreport.org/our-work/analysis-opinion/anti-abortion-strategies-center-19th-century-federal-law [https://perma.cc/6QNP-DD28].

97. FED. R. CIV. P. 24.

98. *See e.g.*, Exec. Order No. 14168, 90 Fed. Reg. 8615, § 3(g) (Jan. 20, 2025) (directing federal agencies to "assess grant conditions [to] ensure grant funds do not promote gender ideology"); Exec. Order No. 14173, 90 Fed. Reg. 8633, § 3(b)(iv) (Jan. 21, 2025) (directing federal agencies to include terms in every federal contract or grant award that require the recipient "to certify that it does not operate any programs promoting [diversity, equity, and inclusion] that violate any applicable Federal anti-discrimination laws"); Exec. Order No. 14187, 90 Fed. Reg. 8771, § 4 (Jan. 28, 2025) (directing federal agencies to "ensure that institutions receiving Federal research or education grants end the provision of medical and surgical gender-affirming care for minors").

B. Open Questions Relating to Legal Mechanisms and Limits

The Constitution is the product of compromise between state autonomy and centralized federal power. Multiple provisions interact to shape the terms on which states engage with each other and with the federal government, including the Full Faith and Credit Clause, the Supremacy Clause, and the Tenth Amendment. These provisions and others mandate some degree of respect among states as coequal sovereigns and between the federal government and each state.[99] But because these relationships are, for the most part, remarkably cooperative, there are few Supreme Court precedents that would provide direct guidance on the issues raised by interstate disputes over reproductive health and gender-affirming care.

1. States in Relation to Sister States

Restrictive states assert the right to protect their populace from out-of-state providers of abortion and gender-affirming care. Shield states assert the right to protect the individuals and organizations who reside and provide reproductive health and gender-affirming care within their borders and, by extension, their residents who need such care now or may need it in the future. The Constitution and the federal common law provide legal mechanisms for resolving these disputes. Here, I focus on the full faith and credit obligations of restrictive states and the law of public nuisance.

a. The Scope of the Penal Judgment Rule as an Exception to Full Faith and Credit Requirements

When plaintiffs seek to domesticate civil judgments against shield state providers issued by restrictive-state courts, the tribunal court must determine whether it is *prohibited* from recognizing the judgment under its home state's shield law or *required* to recognize it under the Full Faith and Credit Clause.

99. For an originalist argument supporting state sovereignty, see Anthony J. Bellia Jr. & Bradford R. Clark, *Constitutional Federalism and the Nature of the Union*, 66 WM. & MARY L. REV. 281, 282 (2024) ("From this perspective, the Court's leading federalism doctrines have a firm basis in the original meaning of the constitutional text—understood in its full legal and historical context."). For a textualist argument, see Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819 (1999).

Article IV, Section 1 of the Constitution states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." If it is applicable, this federal constitutional obligation preempts a state's shield law.

On the one hand, the Supreme Court has reasoned that the

> purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.[100]

But on the other hand, the Court has reasoned that "full faith and credit does not . . . enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it."[101] The Court has attempted to balance a presumption of respect for state sovereignty and the principle of antiextraterritoriality against the Constitution's command for interstate cooperation, but it has struggled to articulate clear boundaries, leaving key questions of law open for potential resolution in disputes over abortion and gender-affirming care.

These issues are already coming to the fore. Restrictive states' advisors and allies argue that shield states are constitutionally obligated to enforce at least some types of judgments against abortion and gender-affirming care providers. Noting that when a state seeks to enforce its laws against out-of-state defendants, it "necessarily rel[ies] upon the cooperation of another state" because of territorial limits on its own enforcement authority, the December 2024 Heritage Foundation report described above argues that "[t]he Constitution requires such cooperation in some cases."[102] Shield states' advisors and allies rely on exceptions to full faith and credit requirements.[103]

100. Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268, 276–77 (1935).

101. Pac. Emps. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 504–05 (1939).

102. Jipping, *supra* note 83, at 7.

103. *See* Cohen et al., *supra* note 77, at 588; Diego A. Zambrano et al., *The Full Faith and Credit Clause and the Puzzle of Abortion Laws*, 98 N.Y.U. L. REV. ONLINE 382, 408 (2023), https://nyulawreview.org/wp-content/uploads/2023/10/98-NYU-L-Rev-Online-382.pdf [https://perma.cc/7Y2D-X3F3]; Haley

Among other arguments,[104] they defend states' rights to decline to enforce sister-state judgments on causes of action "that regulate or punish on behalf of the public."[105]

A key open question on the full faith and credit front is the scope of the penal judgment rule as applied to civil judgments. Under the penal judgment rule, when a party asks a tribunal state to enforce a judgment issued by a sister state, the tribunal state's courts are permitted "to examine the cause of action merged in the judgment," meaning the state law on which the sister state's judgment was based, "and, if it was based on a penalty, to refuse enforcement."[106] In setting forth this rule, the Supreme Court explained that "[t]he test whether a law is penal, in the strict and primary sense" depends on "whether the wrong sought to be redressed" is "a breach and violation of public rights and duties, which affect the whole community, considered as a community . . . ."[107] In this context, the Supreme Court has clarified that state laws penalizing "public wrongs"[108] are not confined to a state's criminal code;[109] rather, penal laws also include civil laws with a penal purpose.[110] But because the application

Amster, Essay, *Abortion, Blocking Laws, and the Full Faith and Credit Clause*, 76 STAN. L. REV. ONLINE 110, 111 (2024), https://review.law.stanford.edu/wp-content/uploads/sites/3/2024/01/Amster-76-Stan.-L.-Rev.-Online-110.pdf [https://perma.cc/YBA2-TEPT].

104. States vary in the extent to which their shield laws include language relating to the public policy, personal jurisdiction, and penal judgment exceptions to full faith and credit requirements. CRHLP, *Shield Laws*, *supra* note 3.

105. Walker McKusick, *The Penal Judgment Exception to Full Faith and Credit: How to Bind the Bounty Laws*, 99 WASH. L. REV. 649, 664 (2024). Shield laws in Colorado, Hawaii, Vermont, and other states include language that invokes the penal judgment exception. CRHLP, *Shield Laws*, *supra* note 3. Nothing in the Supreme Court's precedents on the exception requires the tribunal court to rely on a state statute in rendering its judgment as to whether an out-of-state judgment is penal in nature.

106. JACKSON, *supra* note 42, at 16 (citing Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 291 (1888), *overruled as to its holding that tax laws are penal by* Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268 (1935)).

107. Huntington v. Attrill, 146 U.S. 657, 668 (1892) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1768)).

108. *Id.*

109. *Id.* at 683 ("The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person.").

110. *See id.* at 666 (examining at length whether the civil judgment at issue in the case fell within the penal judgment rule before ultimately concluding that

of the penal judgment rule to exclude civil judgments from a tribunal state's constitutional full faith and credit obligations is rare, the meaning of "penal" judgments involving "public rights and duties"[111] is not well defined.

In theory, the application of the penal judgment rule to civil causes of action that have punitive purposes could create a broad exception to full faith and credit obligations. But the potential breadth of the penal judgment exception should be understood as limited by the Court's insistence that there is "no roving 'public policy exception' to the full faith and credit due judgments."[112] Although there are instances where "a judgment of one State has been denied full faith and credit in another State, because its enforcement would contravene the latter's policy,"[113] the Court has cabined this exception, reasoning that the Full Faith and Credit Clause "ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."[114] For example, in *Fauntleroy v. Lum*, the Court reversed a judgment of the Mississippi Supreme Court denying recovery to a plaintiff seeking to domesticate a Missouri judgment arising out of a gambling debt, over the defendant's objection that the transaction took place in Mississippi and was illegal under Mississippi's gambling ban.[115] Thus, while the penal judgment exception has significant breadth, it should not be interpreted to allow states to ignore sister state judgments simply because honoring them would conflict with the tribunal state's public policy choices.

To understand the line between penal judgments and those that are merely in conflict with a state's public policy it is helpful

the corporate liability statute on which it was based was "in no sense a criminal *or quasi criminal* law" because "it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, [and thus,] it is as to him clearly remedial" (emphasis added)).

111. *Huntington*, 146 U.S. at 668.

112. Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998) (emphasis omitted) (citing Estin v. Estin, 334 U.S. 541, 546 (1948)).

113. Estin v. Estin, 334 U.S. 541, 545 (1948).

114. *Id.* at 546.

115. 210 U.S. 230, 233, 238 (1908). Notably for my purposes, the Missouri judgment was based on a private contract, not on a law authorizing or prohibiting gambling for the good of the public. Mississippi's objection was that enforcing the private contract was against its public policy of prohibiting gambling, not that Missouri's judgment was penal.

to look to the rule's origins in the principle of antiextraterritoriality. The penal judgment rule's foundation is the presumption against extraterritoriality in international law, which the Supreme Court has described as the "incontrovertible maxim"[116] that "the penal laws of a country do not reach beyond its own territory, except when extended by express treaty or statute to offenses committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country."[117] To resolve questions about the Supreme Court's original jurisdiction over controversies between states, the Court borrowed the presumption against extraterritoriality from the law of nations.[118] Eventually, the Court imported the same antiextraterritoriality principle and "penal law" designation into its interpretation of federal full faith and credit requirements for states.[119]

Importantly for my purposes, early Supreme Court cases on the penal judgment rule also relied on the public-private divide to draw a distinction between punitive and remedial purposes. For example, in *Huntington v. Attrill*, an interstate dispute between two private parties, the Court reasoned:

> The question whether a statute of one State, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offense against the *public justice* of the State, or to afford a *private remedy* to a person injured by the wrongful act.[120]

The plaintiff in *Huntington* was a creditor who was owed money by a defunct New York corporation. He had obtained a New York court judgment that the defendant, a former officer of the corporation, was liable to him for the corporation's debt under a New York statute making corporate officers personally liable for such debts if they are found to have made a fraudulent certification.[121] The defendant was a resident of Canada, who apparently lacked any property remaining in New York, but he

116. Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 290 (1888), *overruled as to its holding that tax laws are penal by* Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268 (1935).

117. *Id.* at 289–90 (citing HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW §§ 113, 121 (Richard Henry Dana, Jr. ed., 8th ed. 1866)).

118. *Id.* at 289–91.

119. Huntington v. Attrill, 146 U.S. 657, 682–83 (1892).

120. *Id.* at 673–74 (emphasis added).

121. *Id.* at 660 n.1.

owned stock in a Maryland corporation.[122] The plaintiff eventually filed suit in a Maryland court seeking to have the debt on the New York court judgment paid out of a pending transfer of stock in the Maryland corporation from the defendant to his wife and daughters.[123]

In *Huntington*, the Supreme Court assumed that a state statute imposing civil liability could be among the "quasi criminal"[124] laws that "cannot be enforced in a foreign state or country"[125] if maintenance of a lawsuit under such a law amounts to "administer[ing] a punishment imposed upon an offender against the state."[126] The Court recognized that New York courts had held that the statute in question was "penal" for the purposes of a state-law doctrine requiring strict construction of statutes that are penal in nature,[127] but the Supreme Court found that those holdings did not align with the meaning of "penal" laws under the Full Faith and Credit Clause.[128] Ultimately, the Court reasoned that, because the New York law in question afforded "a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial."[129] The joint and several liability statute that was the basis for the New York judgment was intended to provide a remedy for "a wrong to the individual," rather than providing justice for "a wrong to the public."[130] Thus, the Court held that the Full Faith and Credit Clause required Maryland's courts to recognize and enforce the New York judgment.[131]

State courts have occasionally relied on the penal judgment rule to decline to enforce a sister state's statutes or civil causes

122. *Id.* at 660.
123. *Id.*
124. *Id.* at 676.
125. *Id.* at 677.
126. *Id.* at 676–77.
127. *Id.* at 677.
128. *Id.*
129. *Id.* at 676. Importantly for my purposes, the plaintiff's fraudulent certification appears to have been tortious under common law principles. He lied about the availability of the corporation's capital stock. *Id.* at 661. The New York statute at issue was predicated on tortious fraud by a corporate officer, but its purpose was not to render such an act unlawful (it already was). Rather, the statute's purpose was to ensure the availability of a remedy for the corporation's creditors by setting forth joint and several liability of officers for corporate debts under the conditions it specified. *See id.* at 660 n.1.
130. *Id.* at 668.
131. *Id.* at 686.

of action.[132] But the rarity of these occurrences may be cause for concern among shield state's advisors and allies.[133] Moreover, even if shield states are successful in declining to recognize and enforce restrictive states' judgments, restrictive states may still place significant burdens on out-of-state health care providers by virtue of remedies granted within their borders. Care providers must manage their travel and financial affairs carefully, avoiding restrictive states where judgments stand against them as well as cooperative states whose authorities are willing to enforce those judgments.[134] Nonetheless, clarifying the scope of the penal judgment rule could lessen the chilling effect of restrictive-state officials' threats of cross-border enforcement and clarify the nature of coequal sovereignty among sister states.

b. The Scope of Public Rights Protected by Public Nuisance Doctrine

In addition to enforcing their bans and licensing laws directly, restrictive states could theoretically file civil tort suits against shield-state providers—and perhaps against shield states themselves—for contributing to a public nuisance. Similarly, shield states could file such suits against private parties or restrictive-state officials who threaten and harass health care providers.

Public nuisance is a common law cause of action that assigns liability to defendants who contribute to a substantial and unreasonable interference with a collectively held public right, including "rights to 'the public health, the public safety, the public

132. Zambrano et al., *supra* note 103, at 401 n.119 (first citing City of Oakland v. Desert Outdoor Advertisement, Inc., 267 P.3d 48, 54 (Nev. 2011) (declining to enforce a California judgment for civil statutory penalties arising out of a business's violation of California's civil unfair competition law regulating billboard advertising); then citing McGrath v. Tobin, 103 A.2d 795, 800 (R.I. 1954) (declining to enforce a Massachusetts wrongful death statute); and then citing Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 142 N.W. 305 (Minn. 1913) (declining to enforce a Washington civil statute barring businesses that owe state licensure taxes from filing suit)).

133. Zambrano et al., *supra* note 103, at 408.

134. Cohen et al., *supra* note 19, at 97. At least one state has added a reciprocity provision to its shield law, clarifying that state officials and judicial officers are prohibited from enforcing out-of-state judgments against persons who engage in protected health care activities while located in another shield jurisdiction. VT. STAT. ANN. tit. 1 § 150(b)(1)(4) (2025).

peace, the public comfort[,] or the public convenience.'"[135] Private plaintiffs may occasionally bring public nuisance suits under some circumstances,[136] but most nuisance suits alleging interference with a public right are brought by state and local government plaintiffs, such as state attorneys general, acting in their parens patriae role.[137] These suits are typically brought in the plaintiff jurisdiction's own state courts, relying on state law; but they are occasionally brought in federal court under the "specialized federal common law" of interstate nuisance.[138]

Occasionally, multiple states have banded together as plaintiffs in nuisance suits to address the harmful conduct of private parties. *American Electric Power Co. v. Connecticut* provides a potential model: Eight states and New York City joined together as plaintiffs to bring nuisance claims under state law as well as the federal common law against several fossil fuel companies in federal district court, alleging that the defendants contributed to

135. RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979); *see also* 58 AM. JUR. 2d. NUISANCES § 25 (2025) ("[A] public nuisance is a condition that amounts to an unreasonable interference with a right common to the general public. . . . Cases in this realm typically involve conduct offending public morals, interfering with use by public of public place or endangering or injuring property, health, safety or comfort of considerable number of persons.").

136. *See id.* § 821C(1) ("In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference."). In theory, a private party could bring a nuisance claim against a state. In practice, however, such suits are generally barred by sovereign immunity. *See* Alden v. Maine, 527 U.S. 706, 712 (1999) (recognizing state sovereign immunity from private suits, which a state may waive by consenting to allow such suits); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019) (holding that states are immune from private suits in other states' courts).

137. Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 12–13 (2011) [hereinafter Merrill, *Public Nuisance*]; Wiley, *supra* note 29, at 210; Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENV'T. L. 293, 302 (2005) [hereinafter Merrill, *Global Warming*] ("[A]s a matter of historical practice, nearly all public nuisance actions brought by state officials like AGs have been brought in state court.").

138. *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 421 (2011) (quoting Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964)); Merrill, *Global Warming*, *supra* note 137, at 319 (anticipating that the state plaintiffs in the *American Electric Power Company* case would be left to file their nuisance action against fossil fuel industry defendants "in one or more state courts under state public nuisance law . . . of the source state—not their own . . . nuisance laws" after a Supreme Court ruling that their federal common law claim was preempted by the Clean Air Act).

the public nuisance of global warming.[139] The Supreme Court ultimately held that the states' federal common law public nuisance claim was preempted by the Clean Air Act but left open the question of whether public nuisance claims could proceed under the law of states where the defendants operate.[140]

States may also sue *each other* for public nuisance in federal court, relying on the federal common law of interstate nuisance.[141] In *New York v. New Jersey*, for example, New York alleged that New Jersey's sewage disposal practices contributed to a public nuisance affecting the populace of New York.[142] The Court ultimately rejected the suit for insufficient evidence of harm to the populace of New York, but only after noting that "the right of the state to maintain such a suit . . . is very clear," based on the state's allegations that "[t]he health, comfort and prosperity of the people of the state and the value of their property [was] gravely menaced."[143] Although the plaintiffs lost, the Court was insistent that "the State is the proper party to represent and defend [public rights] by resort to the remedy of an original suit" under the Supreme Court's jurisdiction over cases between states.[144]

Similar to the penal judgment rule discussed above, important aspects of public nuisance law turn on the divide between public and private harms. A key open question in public nuisance law is how to determine whether the alleged harm is

139. *Am. Elec. Power Co.*, 564 U.S. at 418.

140. *Id.* at 429.

141. As was explained in *supra* note 136, states are immune from suit in the courts of another state unless they have waived this immunity. A state could attempt to sue another state in federal court based on state nuisance law (its own, or that of the other state), but the Supreme Court has suggested that application of state law may be inappropriate in at least some such cases. *See, e.g.*, *Am. Elec. Power Co.*, 564 U.S. at 422 (referring to the application of federal law "where, as here, borrowing the law of a particular State would be inappropriate"); Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 NW. U. L. REV. 551, 563 (2008) (explaining that, in disputes where states are aware of their interests in relation to each other when they adopt substantive law, such as whether they are upstream or downstream in a water pollution dispute, "state statutory law could easily show a tilt in one direction or another, as the veil of ignorance largely has been lifted" and thus the Supreme Court may understandably decide that an interstate dispute is "too explosive to trust the courts—and more importantly, the laws—of either state").

142. New York v. New Jersey, 256 U.S. 296, 296 (1921).

143. *Id.* at 301–02.

144. *Id.* at 302 (first citing Missouri v. Illinois, 180 U.S. 208, 241, 243 (1901); and then citing Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907)).

sufficiently public in nature to establish an invasion of public rights.[145] Nuisance precedents involving interference with public rights do not typically focus on any particular threshold for how *large* a group must be for harm to it to be considered public.[146] As the Connecticut Supreme Court explained in a nuisance case targeting firearm marketing practices, "[t]he test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights."[147] But explanations of what makes these harms public are often circular: public nuisances are those that "constitute an obstruction to public rights, that is, the rights enjoyed by citizens as part of the public."[148]

A related question is which *types* of public interests are cognizable as public rights protected by nuisance doctrine and, in particular, whether nuisance law recognizes a public right to public *morals* alongside collective rights to public health, safety, and comfort. Restrictive states view abortion and gender-affirming care as physically harmful to life and health, but they rely on moral judgments to prioritize the life of a fetus over the health of a pregnant patient or the immediate physical condition of a patient diagnosed with gender dysphoria over the care that patient believes will preserve their mental health.[149] At least some

145. Wiley, *supra* note 29, at 247–48.

146. For example, one federal district court described public nuisances as including conduct that affects "the property health, safety, or comfort of a *considerable* number of persons," but framed this category of nuisance as being in addition to those that affect "the public in the exercise of rights common to all," suggesting there may not be a numerosity requirement for public rights nuisances. City of New York v. A-1 Jewelry & Pawn, Inc., 247 F.R.D. 296, 343 (E.D.N.Y. 2007) (emphasis added). The Arizona Supreme Court has contrasted public nuisances with private nuisances affecting "a *definite* number of persons," suggesting the number of persons affected by a public nuisance is, by nature, indefinite. City of Phoenix v. Johnson, 75 P.2d 30, 34 (Ariz. 1938) (emphasis added).

147. Ganim v. Smith & Wesson Corp., 780 A.2d 98, 131–32 (Conn. 2001).

148. *Id.*

149. *See, e.g.*, Press Release, Ken Paxton, Att'y Gen. of Tex., Attorney General Ken Paxton Stops Radical Abortionist from Unlawfully Supplying Dangerous Drugs to Kill Unborn Babies (Feb. 14, 2025), https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-stops-radical-abortionist-unlawfully-supplying-dangerous-drugs-kill [https://perma.cc/UU77-CV2C] (announcing local court judgment against Dr. Carpenter and stating that "we will always protect innocent life"); *Report to the President on Protecting Children from Surgical and Chemical Mutilation Executive Summary*, THE WHITE HOUSE (Apr. 28, 2025), https://www.whitehouse.gov/fact-sheets/2025/04/report-to-the-president-on-protecting-children-from-surgical-

Supreme Court Justices endorse the characterization of abortion bans as reflecting the moral judgment of a restrictive state's electorate. In *Moyle v. United States*, Justice Alito, in a portion of his dissent joined by Justice Thomas, wrote that the Court should have continued its stay of a preliminary injunction of Idaho's abortion ban in part because the district court's ruling "thwarts the will of the people of Idaho" by enjoining a law that "reflects Idaho's judgment about a difficult and important moral question."[150]

Some state nuisance laws recognize interference with a collectively held right to public morals as an actionable nuisance.[151] State courts have deemed places where people engage in sex work,[152] gambling,[153] or drug dealing[154] nuisances at least in part on the ground that they interfere with public morals and social order. There are at least a few instances in which state courts, relying exclusively on interference with public morals, upheld convictions of abortion providers for the crime of nuisance in the pre-*Roe* era.[155] An unsigned commentary in the

and-chemical-mutilation-executive-summary [https://perma.cc/K87U-NRSF] (describing "puberty blockers and cross-sex hormones" and "sex-trait modification surgical interventions" as "immoral").

150. 603 U.S. 324, 366 (2024) (Alito, J., dissenting).

151. *See* William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999 (1966) (describing public nuisance as it is understood in state common law as "a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the blocking of a highway to a gaming-house or indecent exposure"); *cf.* WILLIAM NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA 149 (Thomas A. Green & Hendrick Hartog eds., 1996) ("By the standards of late twentieth-century law, the public regulation of morality is increasingly suspect. . . . The relationship between law and morals in the nineteenth century could not have been more different.").

152. *E.g.*, 5826 Ints., Ltd. v. City of Houston, No. 14-21-00682-CV, 2022 WL 16645503, at *1 (Tex. App. Nov. 3, 2022) (deciding a nuisance action by the city for maintaining a sexually oriented business close to schools and churches).

153. *E.g.*, State v. Jay's Charity Bingo, 402 So. 3d 826, 829–31 (Ala. 2024) (deciding public nuisance actions by the state against businesses, nonprofit organizations, and municipalities for maintaining illegal gambling facilities).

154. *E.g.*, Moreland v. Cheney, 479 S.E.2d 745, 745–46 (Ga. 1997) (deciding a nuisance action by the state against a business for illegal sale of alcohol to minors and illegal dealing of drugs).

155. *E.g.*, People v. Hoffman, 103 N.Y.S. 1000, 1000, 1002 (N.Y. App. Div. 1907) (citing offense to public decency and inducement to "moral laxity" and referring to "health" only in the context of stating the prima facie case of the crime of nuisance); State v. Atwood, 102 P. 295, 296, 299 (Or. 1909) (noting the defendants "were conducting a business that openly outraged the public decency and was injurious to public morals" and referring to "health" only in the context

Journal of the American Medical Association praised the first such case as a novel approach to overcoming the challenges associated with proving that defendants had actually performed an unlawful abortion.[156] Prosecutors may have struggled to provide "direct evidence" that an abortion performed on a specific individual occurred after quickening or that it did not fall within an allowed exception.[157] But proving that a defendant held themselves out as offering abortion services—posing a threat to the morals of unidentifiable members of the public at large—was easier to prove. Noting that the availability of abortion at any stage of pregnancy encourages "loose morals and habits among the unmarried,"[158] the Oregon Supreme Court held that abortions "openly outrage public decency and are injurious to public morals, and such is the effect of the acts charged, even though not done in a public place, or in view of the public."[159] Some cases—and the commentary by the medical association—emphasized the advertisement of services as much as the performance of them.[160] Courts described the offense as harming distinctively public interests in peace and order, but not health: "The offense of abortion is one thing. That of maintaining premises open to the public for the purpose of consummating that crime is another and separate offense against the peace and good order of the state. It is an inducement to moral laxity and to crime."[161]

Early Supreme Court cases recognized protection of public morals as a legitimate purpose for which a state may exercise its police powers, and at least some members of the current Court view this principle as having relevance to modern disputes.[162] In

of stating the prima facie case of the crime of nuisance); *accord* People v. Curtis, 136 N.Y.S. 582, 583 (N.Y. App. Div. 1912); State v. Dewey, 292 P.2d 799, 799–800 (Or. 1956).

156. *Places Maintained by Abortionists are Nuisances*, 48 J. AM. MED. ASS'N 1605, 1605 (1907) [hereinafter *Abortionists are Nuisances*].

157. *Id.*

158. *Atwood*, 102 P. at 298.

159. *Id.*

160. *See e.g.*, *Abortionists are Nuisances*, *supra* note 156, at 1605 (arguing that "it ought to be easy hereafter to put down illegal and immoral advertising offenders in New York"); *Hoffman*, 103 N.Y.S. at 1000 ("[T]he defendant advertised in the public newspapers of the city of New York to the effect that she cured 'irregularities, or no charge; longest cases; ladies boarded; 213 East 78th street.'").

161. *Hoffman*, 103 N.Y.S. at 1002–03.

162. In *National Pork Producers Council v. Ross*, Justice Gorsuch noted "that States may enact laws to 'promote . . . public morals,'" 143 S. Ct. 1142,

at least one early case, the Supreme Court analogized an interstate nuisance involving water pollution to state-law nuisance claims involving a broader range of threats to the "health, *morals*, or safety of the community."[163] In another interstate water-pollution nuisance claim applying federal common law, the Court referred to "[t]he health, comfort and prosperity of the people of the state and the value of their property."[164] But the Supreme Court has only actually found defendants liable for interstate nuisances under federal common law in cases involving air or water pollution, flooding, or obstruction of navigable waters—in other words, cases relating to "air and water in their ambient or interstate aspects."[165] Many states only recognize a subset of the sweeping list of public interests that fall within their police

1160 (2023) (citing Western Union Tel. Co. v. James, 162 U.S. 650, 653 (1896)), as part of his rationale for upholding California's statute "banning from the State all whole pork products derived from practices its voters consider 'cruel.'" *Id.* Only Justices Thomas and Barrett joined that portion of the opinion. *See id.* Justice Kavanaugh, concurring in part and dissenting in part, offered this caution:

> If upheld . . . California's law . . . may foreshadow a new era where States shutter their markets to goods produced in a way that offends their moral or policy preferences—and in doing so, effectively force other States to regulate in accordance with those idiosyncratic state demands. That is not the Constitution the Framers adopted in Philadelphia in 1787.

Id. at 1174 (Kavanaugh, J., concurring in part and dissenting in part). Neither the portions of the opinion joined by a majority of the Court, nor the separate concurrence filed by Chief Justice Roberts, characterized the California statute as having the purpose of protecting public morals. *Cf.* Florey, *New Landscape*, *supra* note 9, at 1177 (noting that the concern Justice Barrett expressed in her separate concurrence in *National Pork Producers*, "that it is beyond judicial competence to weigh intangible costs and benefits[,] . . . would seem to apply with far stronger force to . . . high-stakes conflicts between states").

163. Missouri v. Illinois, 180 U.S. 208, 245 (1901) (emphasis added) (quoting Mugler v. Kansas, 123 U.S. 623, 673 (1887)) (holding that an interstate pollution-based nuisance claim failed on the merits).

164. New York v. New Jersey, 256 U.S. 296, 301–02 (1921).

165. Illinois v. City of Milwaukee, 406 U.S. 91, 103 (1972), *superseded by statute*, Clean Air Act, Pub. L. No. 88–206, 69 Stat. 322 (1963), *as recognized by* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 419–20 (2011). More recently, the Court has described federal common law nuisance precedents in somewhat narrower terms as involving "suits brought by one State to abate pollution emanating from another State." *Am. Elec. Power Co.*, 564 U.S. at 421. But earlier cases have involved obstruction of navigable waters, Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518 (1851), and interstate flooding caused by drainage practices, North Dakota v. Minnesota, 263 U.S. 365 (1923). There is no reason to think the Court intended to cast doubt on these precedents by focusing more narrowly on pollution in *American Electric Power*.

power as public rights protected by nuisance doctrine; it appears that the federal common law of interstate nuisance recognizes an even smaller subset.

Although commentators have explored the connections between the capacious concept of nuisance and abortion laws,[166] to date, there is no indication that restrictive states will pursue nuisance actions against shield states or their residents. In 2024, health officials in Florida made headlines and prompted a First Amendment challenge by sending a letter threatening action against at least one local television station alleging that advertisements the station was airing criticizing the state's abortion restrictions constituted a public health nuisance.[167] The Florida Health Department's analysis relied on public health harms that could be caused by information about the state's restrictions on abortion. But the harms the department alleged arose out of the possibility that pregnant individuals might avoid seeking care to terminate a pregnancy in a situation where their lives are at risk because advertisements implied that there was not an applicable exception to the state's ban.[168]

166. *See, e.g.*, Scott W. Stern, *Moral Nuisance Abatement Statutes*, 117 NW. U. L. REV. 613, 619 (2022) (analogizing Texas S.B. 8's bounty provision to historical moral nuisance abatement statutes); Laura Hermer, *Municipal Abortion Bans: When Local Control Clashes with State Power*, 32 AM. U. J. GENDER, SOC. POL'Y & L. 279, 296 (2024) (arguing that municipal ordinances restricting abortion exceed the scope of the police powers delegated from a state to local governments because "[a]bortion can be considered neither public indecency nor public nuisance . . . . Rather, the medical procedure is a private, individual matter that rarely comes to public attention"); Hope Silberstein, *Taking on TRAP Laws: Protecting Abortion Rights through Property Rights*, 2017 U. CHI. LEGAL F. 737, 748 n.64 (2018) (discussing whether state targeted regulation of abortion providers (TRAP) laws regulate a nuisance).

167. Gabrielle Russon, *Department of Health Sends Cease and Desist Letter to TV Station Over Abortion Ad*, FLA. POLITICS (Oct. 7, 2024), https://floridapolitics.com/archives/700182-department-of-health-sends-cease-and-desist-letter-to-tv-station-over-abortion-ad [https://perma.cc/BV94-EMGS]; *see also* Letter from Ezra Reese et al., Couns. to Floridians Protecting Freedom, to Alan Chatman & Mike Jones, WCJB-TV (Oct. 4, 2024) [https://perma.cc/8EY86ZUL].

168. Russon, *supra* note 167 ("Women faced with pregnancy complications posing a serious risk of death or substantial and irreversible physical impairment may and should seek medical treatment in Florida. . . . However, if they are led to believe that such treatment is unavailable under Florida law, such women could foreseeably travel out of state to seek emergency medical care, seek emergency medical care from unlicensed providers in Florida, or not seek emergency medical care at all. . . . [Such actions] would likely have a detrimental effect on the lives and health of pregnant women in Florida.").

States may or may not find public nuisance law useful in their conflicts over reproductive health and gender-affirming care. But because public nuisance law provides a legal mechanism for resolving interstate disputes that shares common law roots with the parens patriae doctrine,[169] it will provide a conceptual stepping-stone from my analysis of parens patriae in Part II to my application of it as a doctrine of constitutional federalism in Part III. In Part III, analogizing from the arguments Texas and New York are currently making to the types of arguments they could advance in nuisance suits will help me characterize the interests states are seeking to secure in disputes over reproductive health and gender-affirming care.[170]

2. States in Relation to the Federal Government

Interstate disputes often trigger federal-state disputes.[171] What happens if the federal administration chooses to support implementation of state-level restrictions on abortion and gender-affirming care—either in addition to federal restrictions or as an alternative if federal restrictions fail? The Supreme Court has held that the federal government lacks power to enforce penalties for violations of state law.[172] But could the federal government compel one state to enforce the policies and judgments of another? From a federalism standpoint, the answer will depend on the specifics of the federal intervention and the application of doctrines that are poorly defined and rarely deployed. Here I focus on the anticommandeering principle, the Full Faith and Credit Clause as it relates to Congress's power to require more than the Clause itself does, and the anticoercion principle.

a. The Scope of the Prohibition on Federal Regulation of States Under the Anticommandeering Principle

Could shield states rely on the anticommandeering doctrine to resist federal regulations that require them to cooperate with

169. *See* Merrill, *Public Nuisance*, supra note 137, at 12 ("[Public nuisance] is an aspect of the police power—one which employs the judiciary as an instrument of social control."); Margaret S. Thomas, *Parens Patriae and the States' Historic Police Power*, 69 SMU L. REV. 759, 790 (2016) (arguing the parens patriae doctrine should be understood as an aspect of states' police power).

170. *Cf.* Stern, *supra* note 166, at 619 (analogizing Texas S.B. 8's bounty provision to historical moral nuisance abatement statutes).

171. Erbsen, *supra* note 9, at 505.

172. United States v. Constantine, 296 U.S. 287, 294 (1935).

the enforcement efforts of restrictive states? The federal government may directly prohibit activities it disfavors (by preempting state and local law and enacting, administering, and enforcing restrictions under federal law using federal resources),[173] but under the anticommandeering doctrine, it may not require states to prohibit those activities under their own laws (by requiring states to enact, administer, or enforce federal policy using state resources).[174] If the federal government is going to regulate, it must "grasp the preemption nettle, and do it directly," as Professor Meryl Chertoff has put it.[175]

A trio of precedents delineates the scope of the anticommandeering principle. In *New York v. United States*, the Supreme Court limited the federal government's authority to "use the States as implements of regulation" by "direct[ing] . . . the States to regulate in a particular field or a particular way."[176] The Court reasoned that the Framers' decision to empower the federal government to regulate individuals directly was motivated by a concern that otherwise, the federal government would have to rely on problematic coercion of "states, in their political capacity," as "sovereign bodies,"[177]—or as the Court would later describe it—regulation of "States as States."[178] Under *Murphy v. National College Athletic Association*, the anticommandeering principle limits federal intervention to prohibit states from *authorizing* an activity in the same way that it limits federal intervention to command states to regulate that activity.[179] The Court reasoned that there was no meaningful distinction between these two applications: "The basic principle—that Congress cannot issue direct orders to state legislatures—applies in

173. *See id.* ("The only color for the assertion of congressional power to ordain a penalty for violation of state liquor laws is the Eighteenth Amendment, which gave to the federal government power to enforce nation-wide prohibition.").

174. *See id.* at 296 ("[T]he suggestion has never been made . . . that the United States may impose cumulative penalties above and beyond those specified by State law for infractions of the State's criminal code by its own citizens. . . . The regulation of the conduct of its own citizens belong to the State, not to the United States.").

175. Chertoff, *supra* note 5, at 1257.

176. 505 U.S. 144, 161 (1992).

177. *Id.* at 165 (quoting 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 197 (2d ed. 1863)).

178. Nat'l League of Cities v. Usery, 426 U.S. 833, 842 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

179. 584 U.S. 453, 474 (2018).

either event."[180] Under *Printz*, the anticommandeering principle also extends to federal actions that commandeer a state's officers to administer or enforce a federal program.[181]

An important issue on the anticommandeering front is what kinds of federal interference constitute regulation of states as sovereign bodies. The federal government is permitted to regulate states when they engage in roles similar to those performed by private individuals or businesses, but it may not regulate states as states.[182] The Court parsed these distinctions in *Reno v. Condon*.[183] In a series of flip-flopping holdings, the Court had previously upheld the federal government's authority to regulate states as employers (a role also performed by private parties) under generally applicable laws governing labor and employment practices.[184] But the law upheld in *Reno* was different. It was not a law of general applicability that governed private parties as well as states; rather, it exclusively regulated states and the records maintained by their departments of motor vehicles.[185] The Court ultimately upheld the federal privacy law in *Reno* because it "does not require the States in their sovereign capacity to regulate their own citizens; rather, it regulates the States as the owners of data bases."[186] Federal law regulates states as states when it requires them to exercise their sovereign power to regulate their own citizens, but not when it regulates their performance of functions that private parties also perform.[187] Interstate conflicts over reproductive health and gender-affirming care do not raise the question of states' proprietary functions, but the *Reno* Court's emphasis on protecting the exercise of a state's sovereign power over its populace from federal intrusion could certainly be relevant to these disputes.

An important open question on the anticommandeering front is the extent to which the anticommandeering principle applies to federal commands that are directed to the judicial branch of state government. It is possible that the Court will treat the federal government's relationship with the state judiciary

180. *Id.*
181. Printz v. United States, 521 U.S. 898, 933 (1997).
182. *Id.* at 930–31.
183. 528 U.S. 141, 148–51 (2000).
184. New York v. United States, 505 U.S. 144, 160 (1992).
185. *Reno*, 528 U.S. at 142.
186. *Id.*
187. *Id.*

differently from its relationship with the legislative and executive branches of state government. Referencing the first federal Fugitive Slave Act,[188] among other laws, Justice Scalia's opinion for the majority in *Printz* suggested a possible exception for federal laws that "impos[e] . . . an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power."[189] The Fugitive Slave Act of 1793 and other laws cited in *Printz* might appear to indicate that the federal government has constitutional power to compel state courts to enforce federal prerogatives even if it lacks that power with respect to the legislative and executive branches of state governments.

Could there be a basis for distinguishing a federal command requiring shield states' courts to enforce restrictive states' judgments against abortion and gender-affirming care providers from the examples cited in dicta in *Printz*? The answer may lie in what *Printz* refers to as "a particularized constitutional authorization."[190] With regard to federal commandeering of state law enforcement officers, Scalia distinguished the Extradition Act of 1793 based on its direct implementation of the Extradition Clause of the Constitution.[191] The Fugitive Slave Act might be distinguished on similar grounds because it directly implemented the Fugitive Slave Clause of the Constitution.[192] Other examples of early federal laws commandeering the state judicial branch similarly relate to matters that the Constitution expressly designates as areas of federal power: immigration[193] and admiralty law.[194] The analysis may be different when applied to an issue on which the Constitution is silent, such as health care regulation.

A question would remain about whether power granted to the Congress by the Full Faith and Credit Clause might authorize federal requirements to recognize penal judgments, including in the context of reproductive health and gender-affirming care. The Supreme Court's penal judgment rule has construed the "public Acts, Records, and judicial Proceedings" described in the

188. Printz v. United States, 521 U.S. 898, 906 (1997).
189. *Id.* at 907.
190. *Id.* at 909.
191. *Id.* at 908–09.
192. U.S. CONST. art. IV, § 2, cl. 3.
193. *Id.* art. I, § 9, cl. 1.
194. *Id.* art. III, § 2, cl. 1.

text of the first sentence of the Full Faith and Credit Clause[195] to exclude penal judgments—on the grounds that an alternative approach would be inconsistent with the sovereignty states retain within the structure and historical understanding of constitutional federalism.[196] The second sentence of the Full Faith and Credit Clause (referred to as the Effects Clause) expressly empowers Congress to "by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[197] This text gives Congress power over the means of proof of a sister state's judgment that a tribunal state must use and the effects that the tribunal state must give to such a judgment, and Congress has exercised this power in a series of full faith and credit acts,[198] but the text of the Constitution does not clearly confer power on Congress to define the *scope* of the judgments that are the object of the first sentence. The text of the Effects Clause is ambiguous,[199] Congress has done little to apply it,[200] and the Supreme Court has had few opportunities to interpret it, in part because states are usually quite generous in their recognition of sister-state judgments as a matter of comity.[201]

In the years leading up to the Civil War, the Supreme Court construed the ambiguous text of the Fugitive Slave Clause[202] broadly to empower Congress to enact Fugitive Slave Acts that provided federal mechanisms and remedies for enslavers to force free states to cooperate with the enforcement of chattel

195. *Id.* art. IV, § 1.

196. *See supra* Part I.B.1.a.

197. U.S. CONST. art. IV, § 1.

198. *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 293–95 (1992).

199. *See* Metzger, *supra* note 42, at 1494.

200. *See id.* at 1493 ("Not surprisingly, given the dearth of Effects Clause legislation, little precedent exists on the scope of Congress's power under that clause.").

201. *See* JACKSON, *supra* note 42, at 30 ("Generosity in applying foreign law no doubt has forestalled pursuit of many questions as constitutional ones under the full faith and credit clause."); Grossman, *supra* note 15, at 454 (discussing JACKSON's analysis as applied in the context of out-of-state marriage recognition).

202. Kaczorowski, *supra* note 12, at 1427 ("The Fugitive Slave Clause did not expressly delegate to Congress the power to enforce it.").

slavery.[203] The Court could take a different course with respect to the Full Faith and Credit Clause by holding, based on constitutional federalism and the coequal sovereignty of states in their relations with each other, that Congress lacks power to command states to recognize the penal judgments of sister states, including those relating to reproductive health and gender-affirming care. "[T]he ordering of the relations among the States of the Union" may be "a uniquely federal function,"[204] but the antiextraterritoriality principle of structural federalism may nonetheless bar Congress from requiring recognition of penal judgments in the absence of an express Constitutional requirement like the Fugitive Slave Clause.

To the extent that it is grounded in state sovereignty, the penal judgment rule may be interpreted as more than an exception to the Full Faith and Credit Clause that *permits* states to decline to recognize sister state judgments that arise from penal-law violations. Indeed, there's nothing in the text of the Full Faith and Credit Clause itself that would be the basis of such an exception. Rather, the penal judgment rule might be better understood as being rooted in the structure of the Constitution. As such, it might be read in conjunction with the anticommandeering principle to *entitle* states to decline to recognize such judgments, because any requirement to do so would violate the constitutional status of states as coequal sovereigns. The latter interpretation could impose limits on federal intervention that requires states to recognize the penal judgments of sister states that the Full Faith and Credit Clause does not require them to recognize. This argument would understand the penal judgment rule as rooted in the principle against extraterritoriality, which is derived from the structure of the Constitution, rather than relying on the Full Faith and Credit Clause alone.[205] This Article

203. Prigg v. Pennsylvania, 41 U.S. 539, 542 (1842) (upholding the Fugitive Slave Act of 1793 as an exercise of "powers which were necessary and proper, as a means to carry into effect" the rights of individual slaveholders that the Court read as being secured by the Fugitive Slave Clause); Ableman v. Booth, 62 U.S. 506, 526 (1958) (upholding the Fugitive Slave Act of 1850).

204. PETER HAY ET AL., CONFLICT OF LAWS 205 (5th ed. 2010).

205. The Clause itself may provide some support for state sovereignty. Notably, in *Huntington v. Attrill*, the Court frames its analysis as an interpretation of the Full Faith and Credit Clause and the Full Faith and Credit Act without referencing any other constitutional provisions. 146 U.S. 657, 684 (1892); *see also* Rosen, *supra* note 29, at 935–37 ("Case law makes clear . . . that the [Full Faith and Credit] Clause aims not only at unifying the states, but also at

is not intended to provide a comprehensive argument for this interpretation.[206] Rather, I assume that this interpretation *may* be valid for the purposes of my argument that, *if* it is valid, parens patriae doctrine would provide useful guidance for distinguishing between the judgments the Full Faith and Credit Clause requires states to recognize and those it has a constitutional right to refuse based on the competing principle of extraterritoriality.

b. Anticoercion and the Limits of Spending Conditions as an End-Run Around Anticommandeering

Even if the federal government is barred from commanding shield states to cooperate with restrictive states, could it encourage them to do so by threatening to strip federal funding from those who do not? The Supreme Court's anticommandeering precedents acknowledge that the spending power allows the federal government to achieve indirectly through encouragement what it cannot achieve directly by command.[207] But a spending condition may be invalid if it is so coercive as to leave the state with "no real choice" but to comply.[208] The first Trump Administration tested the limits of the anticoercion principle in its

ensuring that the states remain meaningfully empowered, distinct polities."). But most modern advocates of the antiextraterritoriality principle tend to rely on structural arguments. Regan, *supra* note 9, at 1894 ("The full faith and credit clause presupposes the extraterritoriality principle. It cannot be regarded as the basis of the principle."); *id.* at 1887 (arguing that "the extraterritoriality principle should . . . be regarded as an inference from the structure of our system as a whole," rather than "as grounded in any particular clause of the Constitution"); *cf.* Richard H. Fallon, Jr., *Federalism as a Constitutional Concept*, 49 ARIZ. ST. L.J. 961, 963–65 (2017) (mapping the diverse provisions of the Constitution that provide the textual basis for constitutional federalism).

206. For a thorough discussion of arguments about the scope of Congress's power under the Effects Clause, see Metzger, *supra* note 42, at 1493–98 (arguing that the text of the Full Faith and Credit Clause "supports reading the Effects Clause in a parallel fashion to Congress's power under the Commerce Clause, resulting in Congress having authority to enact recognition requirements that might be broader or narrower than those imposed by the courts").

207. *See* New York v. United States, 505 U.S. 144, 166 (1992) ("Congress may urge a State to adopt a legislative program consistent with federal interests."); Printz v. United States, 521 U.S. 898, 917–18 (1996) ("Some [statutes] are connected to federal funding measures, and can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States.").

208. Nat'l Fed. Ind. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 587 (2012).

disputes with immigrant sanctuary jurisdictions.[209] The second Trump Administration is "flood[ing] the zone"[210] with new spending conditions designed to force compliance with the President's priorities, triggering dozens of lawsuits by state governments and private parties.[211] It remains to be seen whether the Supreme Court will beef up its anticoercion doctrine in response to these unprecedented moves.

In a pair of precedents, the Supreme Court has outlined a multi-factor approach to the anticoercion principle. In *South Dakota v. Dole*, the Court upheld a federal condition requiring states to set the legal drinking age at twenty-one or lose five percent of their federal highway funding[212] after considering five factors, including whether the condition is sufficiently germane or related to the federal government's interest in a particular federal program or project,[213] and whether the condition is unconstitutionally coercive.[214] *National Federation of Independent Business v. Sebelius* (*NFIB*), as Justice Ginsberg pointed out, was "*the first time ever*" that the Court held that a condition on federal spending violated the Constitution because it was impermissibly coercive.[215] *NFIB* rendered the Affordable Care Act's expansion of Medicaid eligibility optional rather than allowing it to stand as a mandatory condition attached to the entirety of a

209. *See, e.g.*, Cnty. of Santa Clara v. Trump (*Santa Clara I*), 250 F. Supp. 3d 497, 532–33 (N.D. Cal. 2017); Cnty. of Santa Clara v. Trump (*Santa Clara II*), 275 F. Supp. 3d 1196, 1219 (N.D. Cal. 2017), *aff'd sub nom.* City of San Francisco v. Trump, 897 F.3d 1225, 1245 (9th Cir. 2018); City of Seattle v. Trump, No. 17-497-RAJ, 2017 WL 4700144, at *4–10 (W.D. Wash. Oct. 19, 2017).

210. President Trump's former advisor Steve Bannon is credited with coining the phrase "flood the zone," which refers to the strategy of overwhelming the opposition by undertaking a high volume of new actions simultaneously. Brian Stetler, *This Infamous Steve Bannon Quote is Key to Understanding America's Crazy Politics*, CNN BUS. (Nov. 16, 2021), https://www.cnn.com/2021/11/16/media/steve-bannon-reliable-sources [https://perma.cc/4KQ2-NMR2].

211. See *Litigation Tracker: Legal Challenges to Trump Administrative Actions*, JUST SEC. (last updated Aug. 19, 2025), https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration [https://perma.cc/ZES3-3S9B] for updated information regarding ongoing challenges to the Trump administration's actions related to federal grants, loans, and assistance.

212. South Dakota v. Dole, 483 U.S. 203, 211 (1987).

213. *Id.* at 207–08.

214. *Id.* at 211.

215. Nat'l Fed. Indep. Bus. v. Sebelius, 567 U.S. 519, 625 (2012) (Ginsberg, J., dissenting).

state's Medicaid funding.[216] But the vision of state sovereignty endorsed by Chief Justice Roberts in his *NFIB* opinion still accommodates "appropriate conditions" attached to federal spending programs.[217]

Under *NFIB*, the amount of federal funding at stake appears to be the key criterion for judging when a condition crosses the line from encouragement to coercion, though a large amount of funding may not be sufficient by itself to invalidate a condition.[218] Professor Samuel Bagenstos has argued that *NFIB* should be read narrowly to mean that a spending condition is unconstitutional if a large amount of funding that is part of an entrenched program is put at stake to implement a new condition that is so unrelated to the original purpose of the funding as to require the state's participation in "a separate and independent program."[219]

As a potential model for a new assault on health care shield states, it is worth examining the first Trump Administration's efforts to strip funding from immigrant sanctuary jurisdictions. The resulting lawsuits were rendered moot by the 2020 election before the Supreme Court weighed in, and lower court responses were mixed, but the decisions strengthened federalism constraints in some federal circuits in ways that may provide guidance for the current wave of efforts to ensure state compliance with federal policy. The Court of Appeals for the Ninth Circuit held that California's sanctuary law was protected from federal preemption by the Tenth Amendment.[220] A district court judge held that an Executive Order making all federal funding conditional on compliance with a federal requirement to cooperate with federal immigration enforcement activities was unconstitutionally coercive because the amount was too high and there was an insufficient relationship between the condition and the

216. *Id.* at 586.

217. *Id.* at 579.

218. *See* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 866–67 (2013).

219. *Id.* at 866.

220. United States v. California, 921 F.3d 865, 890 (9th Cir. 2019) (reasoning that invalidating California's law under the Supremacy Clause and conflict preemption doctrine would be inconsistent with the Supreme Court's anticommandeering precedents, especially Murphy v. NCAA, 138 S. Ct. 1461 (2018), "because it would imply that a state's otherwise lawful decision not to assist federal authorities is made unlawful when it is codified as state law").

funding's purpose.[221] The judge affirmed this reasoning in a subsequent decision, which was in turn affirmed by the Ninth Circuit, but without significant discussion of the federalism issues it raised.[222]

In contrast, a more limited policy conditioning certain law enforcement grants on cooperation with federal immigration authorities fared better on the federalism front. The Third and Seventh Circuits ruled against the policy on statutory interpretation and separation of powers grounds, rather than relying on federalism constraints.[223] The Second Circuit expressly held that the conditions on the more limited grant program did not violate the anticommandeering principle because the amount of the conditional grants as a proportion of the jurisdictions' overall budget was not high enough to "cross the line from pressure to coercion."[224]

There are some similarities between immigrant sanctuary laws and health care shield laws. First, similar to state and local sanctuary laws, health care shield laws can and should be understood as codifying the state's constitutional right to opt out of enforcing the policies of another jurisdiction. Second, if the second Trump Administration attempts to strip funds from shield states without new full faith and credit legislation from Congress, it will be vulnerable to arguments that the funds it puts at stake are insufficiently related to the new conditions[225] (in addition to arguments that its new conditions exceed its statutory authority). But if the funds at issue are not large, the courts may separate the anticommandeering analysis from the anticoercion analysis and uphold a relatively modest penalty for noncompliance with the Administration's policy, as the Second Circuit did in the case of the immigration enforcement cooperation requirements attached to the more limited federal grant.

221. Cnty. of Santa Clara v. Trump (*Santa Clara I*), 250 F. Supp. 3d 497, 532–33 (N.D. Cal. 2017).

222. Cnty. of Santa Clara v. Trump (*Santa Clara II*), 275 F. Supp. 3d 1196, 1219 (N.D. Cal. 2017), *aff'd sub nom.* City of San Francisco v. Trump, 897 F.3d 1225, 1245 (9th Cir. 2018); *accord* City of Seattle v. Trump, No. 17-497-RAJ, 2017 WL 4700144, at *4–10 (W.D. Wash. Oct. 19, 2017).

223. City of Chicago v. Sessions, 888 F.3d 272 (7th Cir. 2018); City of Philadelphia v. Sessions, 916 F.3d 276, 279 (3d Cir. 2019).

224. State v. U.S. Dep't of Just., 951 F.3d 84, 116 (2d Cir. 2018).

225. *See* South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

In addition, both immigrant sanctuary and health care shield laws protect the public at large while also protecting identifiable individuals. Sanctuary jurisdictions have "made a policy judgment that their own public safety interests lie in a cooperative and transparent relationship with its undocumented residents and their documented family members."[226] Just as cooperation with states to implement their bans on abortion and gender-affirming care could interfere with access to health care for the public at large, cooperation with federal authorities to enforce immigration law could interfere with public safety.

But there are also important differences between the immigrant sanctuary cases and the federal-state conflicts I anticipate over abortion and gender-affirming care.

First, the first Trump Administration's efforts to strip funding from immigrant sanctuary jurisdictions and the federal statute on which it relied related to an area where the federal government has asserted plenary authority.[227] In contrast, regulation of and criminalization of health care services falls more squarely within the traditional purview of the states. This might matter. At times, the Court has relied on the classification of a matter as falling within an area traditionally regulated by the states as part of its rationale for invalidating federal interference, though the Court's use of this approach has been controversial and inconsistent.[228]

Second, in these cases, sanctuary jurisdictions were not engaged in legal disputes with sister states over the validity of their sanctuary laws.[229] Although the federal government surely

226. Chertoff, *supra* note 5, at 1270.

227. City of New York v. United States, 179 F.3d 29, 34 (2d Cir. 1999) (upholding 8 U.S.C. § 1373 because "the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that federal policy in this area always takes precedence over state policy").

228. *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 851–52 (1976) (citing "fire prevention, police protection, sanitation, public health, and parks and recreation" as examples), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). For further discussion of this line of cases, see *infra* Part III.C.1.

229. New York City filed suit against private charter bus companies that contracted with Texas officials to transport migrants to the city, but the suit did not concern the validity of the city's sanctuary law. Comm'r of N.Y.C. Dept. of Soc. Servs. v Buckeye Coach LLC, 239 N.Y.S.3d 760, 763–64 (N.Y. Sup. Ct. 2024). Instead, the city relied on a New York state anti-pauper law that criminalized the act of transporting an impoverished person into the state "for the purpose of making him a public charge." *Id.* at 762. A New York state court

had the support of several state leaders who favored deportation, the only direct legal conflict in these cases was between sanctuary jurisdictions and the federal government. Thus, the anticommandeering issue involved comparatively straightforward questions about whether the federal government can require or encourage states to implement federal laws and policies. Conflicts over abortion and gender-affirming care are more complex in that the federal government's intervention—in the scenario this Article anticipates—would take the form of a directive that would subordinate one group of states to another.

Spending conditions announced by the second Trump Administration might put real pressure on the Supreme Court's anticoercion precedents, particularly with respect to the apparent weakness of *Dole*'s requirement of an adequate relationship between the new condition and the original purpose of the funding. Justice O'Connor's *Dole* dissent would have imposed a much stronger relatedness requirement, to guard against federal power "to invade the states' jurisdiction."[230] Similarly, Scalia's *NFIB* dissent, joined by Kennedy, Thomas, and Alito, would have imposed tighter limits on spending conditions, possibly relying on the designation of certain matters as "sensitive areas of traditional state concern."[231] Regulating the practice of medicine might qualify as such an area, but Justices Thomas and Alito may feel differently if new spending conditions—such as requirements to enforce out-of-state restrictions on abortion—align with their policy preferences. In any case, efforts to designate certain substantive areas of "traditional" state concern as off-limits for federal intervention have been criticized by commentators and rejected by the Court as "unworkable."[232] A different approach to line-drawing could be helpful if a majority of the current Court is sincere about leaving abortion and gender-affirming care to the states.

judge dismissed the lawsuit after holding the anti-pauper law was unconstitutional. *Id.* at 763–64.

230. South Dakota v. Dole, 483 U.S. 203, 217 (1987) (O'Connor, J., dissenting).

231. Nat'l Fed. Ind. Bus. v. Sebelius, 567 U.S. 519, 676 (2012) (Scalia, J., dissenting) (quoting Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 654–55 (1999) (Kennedy, J., dissenting)).

232. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985).

II. THE PARENS PATRIAE DOCTRINE

Judges and advocates typically treat parens patriae as a narrow doctrine—or more accurately, as three separate narrow doctrines that have little to do with each other. Only a few scholars[233] and some older Supreme Court precedents[234] have pointed to the connections among these applications. The result is that the potential of parens patriae—understood as "the principle that political authority carries with it the responsibility for protection of citizens"[235]—to answer open questions and delineate principled distinctions with respect to state sovereignty has largely been untapped.

In this Part, I reconceptualize parens patriae as a doctrine of constitutional federalism that is well suited for addressing the open questions I identified in Part I. I propose a broad but clear definition that is rooted in precedents and persuasive dicta, which I will apply to interjurisdictional disputes over abortion and gender-affirming care in Part III. Section II.A surveys the development of three narrow applications of the parens patriae doctrine in Supreme Court precedents. Section II.B discusses conflicting accounts of the origins of the doctrine and endorses the view that the federal common law parens patriae doctrine is best understood as a distinctively American doctrine of structural federalism. In Section III.C, I break down the distinct elements of my definition of parens-patriae-as-horizontal-federalism and support each of them by reference to precedents surveyed in Section II.A.

233. *See, e.g.*, George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 907–08 (1976) (describing the standing application as an expansion of the guardianship application); Thomas, *supra* note 169, at 803 (discussing the foundation of "parens patriae, in all its manifestations, and [the state's historic] police powers in our constitutional system"); WILEY & GOSTIN, *supra* note 50, at 167–70 (discussing the guardianship and standing applications of parens patriae as related manifestations of a single doctrine and relating that doctrine to the police power).

234. *See, e.g.*, Vidal v. Girard's Ex'rs, 43 U.S. 127, 144 (1844); Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57–58 (1890). *See also* Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257–58 (1972) (tracing the expansion of parens patriae from its guardianship application in England to its standing application in the United States); Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982) (quoting a charity supervision precedent, Mormon Church v. United States, 136, U.S. 1, 57 (1890), in a standing decision).

235. *Parens patriae*, OXFORD ENGLISH DICTIONARY, *supra* note 39.

A. NARROW APPLICATIONS

The common law doctrine of parens patriae has three distinct applications that have been widely recognized by federal and state courts. The first relates to the government's responsibility for the care of individuals who lack legal capacity to protect themselves. The second relates to a sovereign government's right and duty to supervise charitable institutions. The third application relates to government's standing to bring suit for the protection of the populace as a whole, regardless of any given individual's capacity for personal responsibility. By bringing the precedents on these three distinct applications into conversation with each other, I reveal a broader conceptualization of the parens patriae role as a legitimating purpose for state sovereignty[236]—one that helps to define state sovereignty's scope, purposes, and limits, as I will demonstrate in Part III.

1. Guardianship Powers Over Individuals Who Are Legally Incapacitated

The oldest application of parens patriae, dating to the Middle Ages,[237] has little to do with federalism or the public-private divide, but because its concept of sovereign guardianship remains central to the courts' expansion of parens patriae doctrine to the charity and standing applications, it merits attention here. This application concerns family law, criminal law, and civil commitment law. American courts' reliance on the doctrine of parens patriae in this context began with *Ex parte Crouse*, a Pennsylvania Supreme Court decision from 1839 denying a writ of habeas corpus filed by a father on behalf of his teenage daughter, who had been committed to a reformatory by her mother for "incorrigible" behavior.[238] *Crouse* described the state courts as acting in their parens patriae role as the "common guardian of the community," a rationale the Pennsylvania Supreme Court

236. For an early articulation of this conceptualization, drawing on two of the applications of parens patriae, see WILEY & GOSTIN, *supra* note 50, at 167–70.

237. Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195, 195 (1978); Eduardo R. Ferrer, *Razing & Rebuilding Delinquency Courts: Demolishing the Flawed Philosophical Foundation of Parens Patriae*, 54 LOY. U. CHI. L. REV. 885, 892–93 (2023).

238. *Ex parte* Crouse, 4 Whart. 9, 10 (Pa. 1839); Ferrer, *supra* note 237, at 903–08.

used to justify limiting due process protections for minors.[239] As parens patriae, the state has responsibility for, and power over, individuals who are legally incapacitated—"those who [cannot] fend for themselves"[240]—including minors,[241] adults who are comatose,[242] and those who are conscious but determined by the state to lack mental capacity to make their own decisions.[243]

The guardianship powers of the state as parens patriae are understood as an inherent aspect of sovereignty, providing a foundation from which the Supreme Court would later expand the doctrine to other applications. This exercise of sovereign power is highly controversial. While one commentator might describe parens patriae as a "sovereign duty to protect society's most vulnerable members" in the context of policies that limit parental rights,[244] another might critique it as a "philosophy of political power" in light of the limited due process rights afforded to juveniles accused of crimes.[245] In its application to guardianship, the protection and power of the state as parens patriae are imposed on identifiable individuals in the name of the public's interest, as well as the interests of the individual ward.[246] Asserting this parens patriae role typically requires a state to engage in an individualized assessment of capacity, parental fitness, or (in the case of juvenile criminal defendants) culpability—but with far more limited due process protections than would be provided in a typical criminal proceeding.[247]

239. *Crouse*, 4 Whart. at 11.

240. Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1850 (2000).

241. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

242. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 315–16 (1990) (Brennan, J., dissenting).

243. *See* Addington v. Texas, 441 U.S. 418, 426 (1979); Heller v. Doe, 509 U.S. 312, 332 (1993); Washington v. Harper, 494 U.S. 210, 244–45 (1990) (Stevens, J., concurring in part and dissenting in part).

244. J.C. Blokhuis, *Whose Custody Is It, Anyway?: 'Homeschooling' from a Parens Patriae Perspective*, 8 THEORY & RSCH. IN EDUC. 199, 201 (2010).

245. Ferrer, *supra* note 237, at 892, 907.

246. *See Ex parte* Crouse, 4 Whart. 9, 11 (Pa. 1839) (reasoning that "the public has a paramount interest in the virtue and knowledge of its members" while also considering "an infant's welfare").

247. *See, e.g.*, Donald Stone, *There Are Cracks in the Civil Commitment Process: A Practitioner's Recommendations to Patch the System*, 43 FORDHAM URB. L.J. 789, 793 (2016) (describing how criminal defendants are granted greater due process rights than those facing involuntary civil commitment); Esther K. Hong, *A Reexamination of the Parens Patriae Power*, 88 TENN. L. REV. 277, 301

2. Supervision of Charitable Trusts

In expanding the parens patriae doctrine to supervision of charities and standing to sue, the courts continued to focus on protection, while strengthening the doctrine's foundation in sovereign power. But these cases departed from the guardianship precedents by replacing individualized assessments of a particular individual's capacity with the notion that the state bears power over and responsibility for protecting the populace at large because the public as a whole lacks capacity to protect its distinctively collective interests.

The second application of the common law doctrine of parens patriae relates to the law of charitable trusts and nonprofit corporations. Although state courts had used it earlier, the first appearance of the term parens patriae in an opinion of the United States Supreme Court appears to be in 1819 in reference to the right of a state government, "as parens patrioe [sic]" to dispose of a charitable bequest.[248] In its modern form, this application of the parens patriae doctrine "imposes an exclusive duty upon the state to oversee charitable trusts."[249] Thus, despite its eighteenth-century roots,[250] state and local officials today continue to use the charity-supervision application of parens patriae to supervise nonprofit hospital systems and health insurers, among other entities.[251]

In the charity supervision context, the courts continue to emphasize the state's sovereign power as protector while simultaneously articulating a new conception of a public-private divide. Courts describe the charity supervision function of the state as parens patriae in terms of the state's "guardianship" and "protectorship" responsibilities[252] with respect to resources used

(2021) (detailing how the courts use parens patriae doctrine to diminish protections for juvenile defendants' rights to due process).

248. Trs. of Phila. Baptist Ass'n v. Hart's Ex'rs, 17 U.S. 1, 12–13 (1819) (emphasis omitted), *overruled by* Vidal v. Girard's Ex'rs, 43 U.S. 127 (1844).

249. Craig Kaufman, *Sympathy for the Devil's Advocate: Assisting the Attorney General When Charitable Matters Reach the Courtroom*, 40 REAL PROP., PROB. & TR. J. 705, 717–18 (2006).

250. *In re* Estate of Pruner, 136 A.2d 107, 109 (Pa. 1957) (first citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 47 (1768); and then citing Fontain v. Ravenel, 58 U.S. 369 (1855)).

251. Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 939 (2004).

252. *Pruner*, 136 A.2d at 109.

by "the public generally."[253] States are the guardians of charity beneficiaries, but not because they are individually incapacitated (the doctrine is not limited to charities that serve children or people with disabilities). Rather, states are the guardians of charity beneficiaries because they are "indefinite"[254] or "contingent" and therefore not individually identifiable.[255]

3. State Standing to Bring Suit as Guardians of the Populace at Large

Federal and state courts also apply the parens patriae doctrine to recognize the standing of government plaintiffs to bring lawsuits to vindicate certain kinds of distinctively public interests—those that affect the jurisdiction's populace at large.[256] In these lawsuits, state and local governments invoke their status as parens patriae to establish standing against either private parties or sister states.[257] The substantive basis for parens patriae suits varies. Some parens patriae suits rely on public nuisance doctrine, as discussed above.[258] Other types of parens patriae suits may involve one jurisdiction alleging that private parties in another jurisdiction have violated a federal statute that protects the economic interests of the plaintiff-jurisdiction's residents, such as a labor or antitrust statute.[259] States also use parens patriae standing to challenge another state's statute, such as a quarantine or in-state preference law, that interferes with the plaintiff-state residents' economic interests.[260] In these

253. Beatty v. Kurtz, 27 U.S. 566, 568 (1829).

254. Brody, *supra* note 251, at 938.

255. United States v. Union Pac. R.R. Co., 98 U.S. 569, 596 (1879).

256. Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 446–47 (1995).

257. *Id.* at 475–76.

258. *See supra* Part I.B.1.b.

259. *See, e.g.*, Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 609 (1982) (recognizing Puerto Rico's standing to sue Virginia corporations for violating a federal statute requiring preference for domestic workers over foreign workers); *see also* Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 261 (1972) (recognizing Hawaii's standing to sue a California corporation for injunctive relief on an antitrust claim, but not for damages).

260. *See, e.g.*, Louisiana v. Texas, 176 U.S. 1, 19 (1900) (recognizing Louisiana's standing to challenge a state-law quarantine barring freight or passengers from the City of New Orleans from entering Texas); Pennsylvania v. West Virginia, 262 U.S. 553, 554 (1923) (recognizing Pennsylvania's and Ohio's standing to challenge a West Virginia statute requiring natural gas companies to give preference to in-state purchasers).

cases, the Supreme Court has reasoned that "if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them."[261]

In the standing context, the Supreme Court has further developed the public-private divide borrowed from the charity cases, while continuing to emphasize notions of protection and sovereignty that date back to the guardianship context. In the earliest Supreme Court cases using the term "parens patriae" to describe a government plaintiff's distinctive role, the Supreme Court designated the government as the "universal trustee"[262] (hinting at the guardianship and charity supervision applications) and described government plaintiffs as bringing suit "on behalf of the public, and, as it were, in the exercise of the beneficent function of superintending authority over the public interests."[263] At the beginning of the twentieth century, the Court applied parens patriae to formally recognize a state's Article III standing to sue on behalf of its populace at large, reasoning that a state, as parens patriae, is the "trustee, guardian or representative of all her citizens."[264] Early cases on parens patriae standing frequently involved public nuisance claims, such as a suit by Missouri to enjoin sewage discharges condoned by Illinois. The Court noted that the sewage threatened not only "[t]he health and comfort of the large communities inhabiting those parts of the state situated on the Mississippi River," but also the health of the entire state due to the potential for communicable disease outbreaks.[265] "Moreover," the Court noted, "substantial impairment of the health and prosperity of the towns and cities of the state situated on the Mississippi river, including its commercial metropolis, would injuriously affect the entire state."[266] The Court concluded that it was self-evident "[t]hat suits brought by individuals, each for personal injuries threatened or received, would be wholly inadequate and disproportionate

261. Missouri v. Illinois, 180 U.S. 208, 241 (1901).

262. Dollar Sav. Bank v. United States, 86 U.S. 227, 239 (1874).

263. United States v. Am. Bell Tel. Co., 159 U.S. 548, 554 (1895) (using identical phrasing as, but *not* citing to, Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890)).

264. Louisiana v. Texas, 176 U.S. at 19.

265. Missouri v. Illinois, 180 U.S. at 241.

266. *Id.*

remedies" for the interference with public rights that Missouri sought to enjoin.[267]

The Court's parens patriae standing cases also build on the public-private divide developed in the charity supervision cases to clarify the various functions states perform in our federalist system. In early cases, the Court used the term "quasi-sovereign" to describe the distinctively public interests that the parens patriae doctrine gives states and territories standing to assert and defend in court.[268] In *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex. rel Barez*, the leading modern case on parens patriae as a doctrine of Article III standing, the Court clarified that the quasi-sovereign label distinguishes the state's parens patriae role from its roles when it asserts three other types of interests: private interests (which could be adequately asserted by identifiable private individuals), proprietary interests (which concern the state's role as a property owner and market participant), and sovereign interests (which concern the state's right to recognition by other sovereigns of its borders and its power over individuals and entities within its jurisdiction).[269] *Snapp* expressly grounded this analysis in structural federalism by defining quasi-sovereign interests as encompassing a state's interest in "the health and well-being—both physical and economic—of its residents in general,"[270] as well as a state's "interest in securing observance of the terms under which it participates in the federal system, [which] means ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system."[271] With respect to the state's quasi-sovereign interest in protecting the wellbeing of its populace at large, the Court noted that "the indirect effects of the injury must be considered as well [as the direct effects] in determining whether the State has alleged injury to a

267. *Id.*

268. Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907). The Court has also recognized that federal territories have "a claim to represent [their] quasi-sovereign interests in federal court at least as strong as that of any State." Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 608 n.15 (1982).

269. *Id.* at 601–02.

270. *Id.* at 607.

271. *Id.* at 607–08.

sufficiently substantial segment of its population" for parens patriae standing to be appropriate.[272]

B. A Broader Foundation in States' Status as Coequal Sovereigns Within a Federal System

In precedents cutting across the three applications named above, the Court has treated the parens patriae role as "an unquestionable feature of statehood."[273] The Supreme Court has described distinct applications of parens patriae as sharing the same doctrinal footing[274] and the same rationale.[275] The narrow applications of parens patriae described in Section II.A are exactly that—*applications* of a broader principle that the state, as sovereign, exercises powers and responsibilities as a protector. This role takes on constitutional significance as an aspect of states' status as coequal sovereigns within a federal system that structures the terms on which they engage in conflict and cooperation with each other and with the central government.

The state's sovereign interest in "exercis[ing] … power over individuals and entities within [its] . . . jurisdiction"[276] and its quasi-sovereign interest in protecting "the health and well-being—both physical and economic—of its residents in general"[277] are interdependent. A state's parens patriae powers and responsibilities might be understood as a subset of its police powers—those that are exercised to protect the public at large, rather than focusing exclusively on protecting identifiable

272. *Id.* at 593.

273. Thomas, *supra* note 169, at 793.

274. *See* Vidal v. Girard's Ex'rs, 43 U.S. 127, 144 (1844) ("Jurisdiction over the three subjects of lunatics, infants, and charities has always gone together, and been claimed because the king is said to be parens patriae."); Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890) (describing "the right to enforce all charities of a public nature" as derived from the government's "general superintending authority over the public interests").

275. *See Church of Jesus Christ of Latter-Day Saints*, 136 U.S. at 58 (reasoning that, like incapacitated individuals, "the beneficiaries of charities" are also "often incapable of vindicating their rights, and justly look for protection to the sovereign authority, acting as *parens patriae*" and describing the parens patriae role as "ready to be called into exercise whenever required for the purposes of justice and right," and "clearly capable of being exercised in cases of charities as in any other cases whatever").

276. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982).

277. *Id.* at 607.

individuals.[278] A state fulfills its obligations to protect its populace at large by exercising its police power over private individuals, organizations, and activities within its jurisdiction.[279] In turn, the state's duty as the protector of the populace is the legitimating purpose of its power over individuals. The interdependent powers and duties of sovereigns are reflected in the twin common-law maxims: "*salus populi suprema lex est* ('the welfare of the people is the supreme law') and *sic utere tuo ut alienum non laedas* ('use your own so as not to injure another')."[280]

But each state's power to protect its populace at large is limited by its lack of extraterritorial reach into the concerns of its sister states and by the supremacy of federal law over state law. Thus, the state's police power and its parens patriae responsibility are not only interdependent in relation to each other, they are also interdependent in relation to the state's sovereign interest in "securing observance of the terms under which it participates in the federal system."[281] Professor Margaret Thomas has persuasively argued that the roots of the parens patriae doctrine are to be found in the states' historical police powers.[282] She describes how the Supreme Court imported parens patriae—with its mythical origins in the prerogative of the English crown—to develop a distinctively American approach to recognizing "unique powers" of state governments "that were analogs to the powers of sovereign nations, transformed to comport with constitutional limits" inherent in horizontal constitutional federalism.[283]

In a pair of decisions about sewage decided less than four decades after the end of the Civil War, the Court bluntly invoked the horizontal aspects of constitutional federalism as its rationale for recognizing states' standing to sue as parens patriae. When it dismissed Illinois's demurrer in *Missouri v. Illinois*, the Court reasoned that a right to sue in federal court was necessary because Missouri had surrendered "[d]iplomatic powers and the right to make war" against other sovereigns to the federal government.[284] Five years later, in a subsequent decision in the

278. Woolhandler & Collins, *supra* note 256, at 446–47.
279. WILEY & GOSTIN, *supra* note 50, at 16.
280. NOVAK, *supra* note 151, at 42.
281. *Snapp*, 458 U.S. at 607–08.
282. Thomas, *supra* note 169, at 789–90.
283. *Id.*
284. Missouri v. Illinois, 180 U.S. 208, 241 (1901).

same case, the Court dismissed Missouri's claims after rejecting its evidence that an increase in typhoid fever deaths in St. Louis was caused by the increase in sewage discharged from Chicago.[285] But Justice Holmes's opinion reiterated that the Court's jurisdiction, authority, and competence to resolve a conflict "between the [s]tates of the Union, . . . which, if it arose between independent sovereignties, might lead to war. . . . is not open to doubt."[286]

The Supreme Court's parens patriae precedents, its development of a federal common law of public nuisance, and its precedents on the Full Faith and Credit Clause share a common understanding of the scope and purpose of state sovereignty within a federal system. States function as coequal sovereigns in relation to each other as protectors of public interests within their own borders. Protection of "states' rights," both through the division of authority between the federal government and the states and among the states as coequal sovereigns, may protect personal liberty, promote experimentation, and secure a role for governance closer to the people. But it also delineates the responsibilities of the sovereign governments for securing distinctively public interests that cannot be adequately vindicated by private parties asserting their individual rights.

C. DEFINING PARENS PATRIAE AS A DOCTRINE OF STATE SOVEREIGNTY WITHIN CONSTITUTIONAL FEDERALISM

The parens patriae doctrine is widely accepted, but poorly defined.[287] If, as I argue in this Article, parens patriae is to be useful as a common law doctrine for resolving a broader range of interstate and federal-state disputes, it must be defined more clearly, and each element of the definition must be supported by precedent.

I argue for the following definition of parens patriae as it has been used by the Supreme Court in relation to structural federalism, which I divide into numbered elements for the purposes of explaining and substantiating my claims: A (1) state government, (2) acting through any of its three branches, performs a constitutionally significant role as parens patriae when

285. Missouri v. Illinois, 200 U.S. 496, 526 (1906).

286. *Id.* at 518.

287. *In re* Gault, 387 U.S. 1, 16 (1967); Ratliff, *supra* note 240, at 1857; Thomas, *supra* note 169, at 764.

it (3) asserts or defends its interest as a sovereign government co-equal to its sister states (4) in protecting its populace at large from harms that are widespread and not exclusively traceable to identifiable individuals who have capacity to vindicate their own interests (5) against private parties or sister states, but not against the federal government to protect the state's populace from the operation of federal law.

1. States

My focus in this Article is on state governments and their status as coequal sovereigns in relation to each other. The special position of states in American federalism is central to the argument I make for the constitutional significance of their parens patriae role.

Lower federal courts have relied on a federalism rationale to reject the standing of foreign governments to protect their citizens residing within the United States.[288] For example, the Court of Appeals for the First Circuit has held that because "a foreign nation has no cognizable interests in our system of federalism," it has no parens patriae standing in federal courts.[289] To reach this conclusion, the court reasoned that "the primary justification for recognizing parens patriae standing in the States, repeated throughout a century's Supreme Court caselaw, derives from important principles underlying our federal system."[290]

The Supreme Court has apparently rejected the parens patriae standing of local governments to sue in federal court.[291] Lower courts in accord with this reading point to the federalism rationale for parens patriae. For example, in denying the City of Pittsburg standing to assert a takings claim on behalf of its residents, the Court of Appeals for the Ninth Circuit compared the constitutional status of localities to that of states and found that:

288. *See* Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332, 339 (1st Cir. 2000).

289. *Id.*

290. *Id.* at 337.

291. *See, e.g.*, United States v. City of Pittsburg, 661 F.2d 783, 786–87 (9th Cir. 1981) ("Although cities may 'sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants,' only the states and the federal government may sue as parens patriae." (quoting *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir. 1973), *cert. denied sub nom.* Morgan v. Auto. Mfrs. Ass'n, Inc., 414 U.S. 1045 (1973))).

> [T]he federal government and the states, as the twin sovereigns in our constitutional scheme, may in appropriate circumstances sue as *parens patriae*. . . . On the other hand, political subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae*, although they might sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants.[292]

Commentators criticizing these decisions have noted that some district court opinions appear to adopt a contrary view.[293] Additionally, proponents of local autonomy have argued that local governments are representatives and protectors of the populace within their jurisdiction, pointing to a "shadow doctrine" of Supreme Court cases on local government status that treat their role as "worthy of constitutional recognition."[294] But for the most part, the Supreme Court formally treats local governments as "political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the State as may be intrusted [sic] to them."[295]

The status of territories and Tribes as parens patriae is complicated and merits additional scholarly attention—particularly in relation to regulation of reproductive health and gender-

292. *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d at 131 (citations omitted).

293. See, for example, Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 69 n.55 (2014), which states that "federal courts have been fairly consistent in holding that cities cannot sue as *parens patriae*," but notes several exceptions to this trend, including City of New York v. Beretta U.S.A. Corp., 315 F. Supp. 2d 256, 266–74 (E.D.N.Y. 2004) (discussing the law governing relative authority of governmental entities and finding legitimate parens patriae power), *rev'd in part on other grounds*, 524 F.3d 384, 390 (2d Cir. 2008) and City of Philadelphia v. Beretta U.S.A., Corp., 126 F. Supp. 2d 882, 892–93 (E.D. Pa. 2000) ("[The city] has admitted that one of the bases for its negligence suit is its parens patriae power."), *dismissal aff'd*, 277 F.3d 415, 420 n.4 (3d Cir. 2002) (noting that the city's standing was not questioned).

294. Richard C. Schragger, *Reclaiming the Canvassing Board:* Bush v. Gore *and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 408–09 (2002); *see also* David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2243 (2006) (noting that cities "plainly have a 'quasi-sovereign' interest in protecting the well-being of their residents").

295. Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907). *But see* Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 3 (2012) ("The Court has repeatedly departed sub silentio from *Hunter*'s rule of local powerlessness by recognizing and treating localities as legally—and sometimes even constitutionally—independent of their states.").

affirming care.[296] The Supreme Court has recognized that territorial governments exercise the parens patriae role without discussing the federalism rationale. *Snapp*, which features heavily in my analysis as the Court's leading modern case on states' parens patriae standing, was a suit brought by the federal territory and former colony of Puerto Rico.[297] Some lower federal courts have accepted the standing of Tribes to sue in a parens patriae role and advocates have argued the powers and responsibilities of Tribes as protectors of the populace within their jurisdiction should be more widely recognized and deployed.[298] Like states, territories and Tribes lack powers of war and diplomacy in relation to other non-federal jurisdictions within the United States, creating challenges the Constitution attempts to address.[299] But territorial and Tribal governments did not cede these powers as part of forming a union with sister states.[300] Because the sovereignty and autonomy of these governments is complicated by their distinctive relationships with the federal government as a colonizer, I will set these questions aside for now and focus exclusively on states in this Article.

296. For a discussion of the considerations at stake for Tribes as they navigate jurisdictional disputes over abortion, see Lauren Van Schilfgaarde et al., *The Indian Country Abortion Safe Harbor Fallacy*, L. & POL. ECON. PROJECT (June 6, 2022), https://lpeproject.org/blog/the-indian-country-abortion-safe-harbor-fallacy [https://perma.cc/G2TN-6HTN].

297. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 608 n.15 (1982) (holding that the territory had standing to sue as parens patriae because it is "similarly situated to a State" and it has "a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State").

298. *See* Cami Fraser, *Protecting Native Americans: The Tribe as Parens Patriae*, 5 MICH. J. RACE & L. 665, 667–68 n.12 (2000) (citing cases); *see also* Gavin Clarkson & David DeKorte, *Unguarded Indians: The Complete Failure of the Post-*Oliphant *Guardian and the Dual-Edged Nature of* Parens Patriae, 2010 U. ILL. L. REV. 1119, 1126 (2010) (arguing Tribes should use parens patriae standing to protect tribal members from crimes committed in Indian Country by non-Indian offenders, which Tribes lack jurisdiction to prosecute).

299. *Cf.* Natalie Gomez-Velez, *Including the U.S. Territories in the Constitutional Law Course: Imperatives and Challenges*, 54 STETSON L. REV. 391, 427–28 (2025) (describing a pedagogical approach to teaching the Territory Clause and the *Insular Cases* within the broader context of Article IV, which also includes the Full Faith and Credit Clause, the Extradition Clause, and the Fugitive Slave Clause).

300. *Id.* at 391.

2. Acting Through Any Branch of Government

Just as it is up to each state, through its constitution and legislation, to determine the "[t]he mode or manner" by which it will exercise its police powers,[301] it is also up to each state to determine which branches of its government will exercise the state's power and responsibilities as parens patriae.[302] In the charity supervision context, the U.S. Supreme Court described the state's parens patriae powers as residing in the state legislature, unless the state constitution provides otherwise.[303] Some state constitutions designate the courts, rather than the legislature, as bearing primary responsibility for particular parens patriae applications, including supervision over charitable trusts.[304] All states have delegated at least some parens patriae powers to the state attorney general, an executive-branch official.[305] An attorney general's power to bring civil suits, including in federal courts, may be defined in the state's constitution, statutes, or common law traditions.[306] State law, not the U.S. Constitution, determines where parens patriae powers and responsibilities are located among the branches of a state's government.

3. As Sovereigns

The Court has also used parens patriae cases as an opportunity to delineate the various functions states perform in constitutional federalism. In doing so, the Court has described the parens patriae role as involving a state's quasi-sovereign function both in terms of its interest in protecting its populace at large and its "interest in securing observance of the terms under which it participates in the federal system."[307] A state acting as parens patriae does not function as a third-party representative

301. Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

302. Parens patriae doctrine may also give states discretion over whether and how to delegate parens patriae power to local governments, as alluded to above, but that question is beyond the scope of this Article.

303. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 56–57 (1890).

304. Brody, *supra* note 251, at 959 n.87.

305. Kaufman, *supra* note 249, at 707.

306. J. Dillon Pitts, *Constitutional Law—The Powers of State Attorneys General to Determine Public Interest*, 43 U. ARK. LITTLE ROCK L. REV. 109, 109 (2021).

307. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607–08 (1982).

of state residents—who are the real parties in interest—but rather, acts in its capacity as a sovereign that governs in their interest.[308] In a democracy, this distinction is blurred—when a U.S. state governs, it typically does so through officials who act as elected representatives of the people. But parens patriae is not a representative role. It can be exercised by a monarch or by an appointed judge as well as by a democratically accountable elected official.[309]

In precedents applying the parens patriae doctrine to state standing, the Supreme Court has adopted a distinction "between the interests of citizens affected within a state and the state's own public interest in the welfare of its citizens collectively."[310] The Court has sometimes used the language of "representation" to describe the state's parens patriae role,[311] but it has done so in ways that maintain respect for "the principle that the state, when a party to a suit involving a matter of sovereign interest, must be deemed to represent all its citizens."[312]

Indeed, when the state acts in the name of identifiable individuals, it lacks parens patriae standing. As the Supreme Court reasoned in *Snapp*,

> [P]arens patriae standing [as it] has developed in American law .... does not involve the States stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves. In fact, if nothing more than this is involved—i.e., if the State is only a nominal party without a real interest of its own—then it will not have standing under the parens patriae doctrine.[313]

Some have argued that the federal courts should recognize a state's parens patriae standing even in cases where the state acts exclusively on behalf of identifiable individuals, so long as those individuals are numerous enough to justify the assertion

308. *Id.*

309. CHITTY, *supra* note 38, at 155.

310. Thomas, *supra* note 169, at 790.

311. *E.g.*, Haaland v. Brackeen, 143 S. Ct. 1609, 1640 n.11 (2023) (describing Georgia v. McCollum, 505 U.S. 42 (1992), as a case in which the Court "allowed a State to represent jurors struck on the basis of race, because (among other reasons) '[a]s the representative of all its citizens, the State is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial'").

312. New Jersey v. New York, 345 U.S. 369, 372 (1953) (quoting Kentucky v. Indiana, 281 U.S. 163, 173–74 (1930)); *accord* South Carolina v. North Carolina, 558 U.S. 256, 266 (2010).

313. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982) (emphasis omitted).

of a public interest in the aggregate harm they have experienced.[314] Some states have adopted statutes that specifically authorize their attorneys general to bring suit in such a case.[315] But the federal courts have continued to follow *Snapp* by limiting parens patriae standing to cases in which the state is a real party in interest, even if claims by identifiable individuals may also arise out of the same harm.[316]

4. To Protect the Public at Large

The notion of guardianship or protection is central to all three applications of the parens patriae doctrine in American law. Parens patriae precedents document the American expansion of *who* is a legitimate object of state guardianship—from children and incapacitated adults to unidentifiable beneficiaries of charitable organizations to the undifferentiated public as a whole.[317] These precedents also adopt varying approaches to defining the type of harm that the state as parens patriae may legitimately seek to prevent. In cases involving supervision of minors, state courts have sometimes invoked the state's interest in ensuring children's proper moral development.[318] But in cases involving state standing, the Supreme Court has generally omitted references to public morality when describing the public

314. *See* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 494–95 (2012) (arguing that, under *Snapp*, private interests can rise to the level of a quasi-sovereign state interest when sufficiently aggregated); Thomas, *supra* note 169, at 798 (suggesting widespread private interests can implicate a state's interest in the welfare of its citizens).

315. Thomas, *supra* note 169, at 799 (discussing California's Unfair Competition Law as an example).

316. *See, e.g.*, Missouri v. Harris, 58 F. Supp. 3d 1059, 1072 (E.D. Cal 2014) (holding that states did not have parens patriae standing to challenge a California's law regulating egg production because they "have not brought this action on behalf of their interest in the physical or economic well-being of their residents in general, but rather on behalf of a discrete group of egg farmers"); In re: Insulin Pricing Litigation, No. 23-cv-04242, 2025 WL 2573405, at *17 (D. N.J. Sept. 5, 2025) (denying a motion to dismiss a suit brought by Illinois and rejecting the defendants' argument that the state was not a real party in interest because "the State has a substantial stake in the outcome of the suit" even if individuals could also sue).

317. *See* Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257–58 (1972) (tracing the expansion of parens patriae from its guardianship application in England to its standing application in the United States).

318. *E.g.*, *Ex parte* Crouse, 4 Whart. 9, 11 (Pa. 1839).

interests a state may sue as parens patriae to vindicate.[319] Both aspects of what it means to protect the public at large merit extended discussion here because of the role they will play in my analysis of how parens patriae, as a doctrine of state sovereignty, applies to interstate and federal-state disputes over abortion and gender-affirming care.

a. The Public At Large

I argue that harm should be understood to affect the populace of a state "in general,"[320] "at large,"[321] or "as a whole"[322] for the purposes of parens patriae doctrine when it is widespread and not exclusively traceable to identifiable individuals who have capacity to vindicate their own interests.

To be widespread, a harm need not affect a particularly large proportion of a state's population. The Court has described the state's parens patriae responsibilities in relation to harms affecting "a sufficiently substantial segment of its population"[323] or "a considerable portion of its citizens."[324] But, as explained in *Snapp*, "[t]he Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior" for parens patriae standing to be appropriate.[325] The conduct challenged in *Snapp* concerned private corporations' failure to treat Puerto Ricans as U.S. workers for the purposes of giving domestic applicants preference over foreign workers for job openings in Virginia, as required by federal law. The job openings at issue could be filled by, at most, 787 of Puerto Rico's 3,000,000 residents. The Court "granted certiorari to determine whether Puerto Rico could maintain a parens patriae action here, despite the small number of individuals directly involved."[326] The Court answered in the affirmative, reasoning that it was inappropriate to focus parens patriae analysis "too narrowly on those directly involved, [while] ignoring those that were indirectly affected" by the

319. *See infra* Part II.C.4.b.

320. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 593 (1982).

321. Louisiana v. Texas, 176 U.S. 1, 19 (1900).

322. Massachusetts v. EPA, 549 U.S. 497, 520 n.17 (2007).

323. *Snapp*, 458 U.S. at 597.

324. Kansas v. Colorado, 206 U.S. 46, 99 (1907).

325. *Snapp*, 458 U.S. at 607.

326. *Id.* at 599.

consequences of the petitioner-corporations' actions, such as the impacts on "the general condition of [the plaintiff's] economy" and other less tangible effects, like the "universal sting" of what the plaintiff alleged to be "deliberate efforts to stigmatize [its] labor force as inferior."[327]

The dominant focus in parens patriae precedents is on the distinctively public *nature* of the interests the state seeks to advance, rather than on the number of individuals affected. In distinguishing between a state's *representative* standing and its parens patriae standing—for which the state's interests must be distinct from the interests of individuals who could bring suit—the Court has insisted that "[i]nterests of private parties are obviously not in themselves sovereign interests, and they do not become [sovereign interests] simply by virtue of the State's aiding in their achievement."[328] This is true regardless of how numerous those private parties may be. Similarly, the state's parens patriae role in charity supervision rests on the notion that "the state" represents "the public at large" who are "the ultimate beneficiaries of charitable trusts."[329] In this context, the Supreme Court has emphasized lack of particularity and identifiability, rather than sheer numbers.[330]

The Supreme Court's rationale for expanding state parens patriae beyond the guardianship of identifiable and incapacitated individuals provides the key to defining the distinctively public nature of the interests at stake in the charity and standing contexts. In the charity supervision cases, courts typically begin by construing a charitable bequest as a "dedication . . . to public . . . uses."[331] They note that, unlike the shareholders of a private corporation,[332] the public beneficiaries of a charitable bequest lack incentive and capacity to protect their own interests

327. *Id.*

328. *Id.* at 602.

329. Kaufman, *supra* note 249, at 718.

330. *See* United States v. Union Pac. R.R. Co., 98 U.S. 569, 596 (1879); Beatty v. Kurtz, 27 U.S. 566, 583–84 (1829); Brody, *supra* note 251, at 938.

331. *Beatty*, 27 U.S. at 583; *see also* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 59 (1890) (describing property given to the Mormon church as "consecrated to the public use" in the aftermath of federal actions to refuse legal recognition of the church).

332. *See Church of Jesus Christ of Latter-Day Saints*, 136 U.S. at 47 (distinguishing disposition of property owned by a private corporation that has been dissolved from disposition of property owned by a public or charitable corporation).

as individuals.[333] Thus, they reason, the beneficiaries of charitable organizations "justly look for protection to the sovereign authority, acting as *parens patriae*" to vindicate their rights.[334] Similarly, in one of its earliest parens patriae precedents, the Court emphasized "[t]hat suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies" for the interference with public rights that the plaintiff state sought to enjoin.[335] More recently, in *Snapp*, the Court supported this rationale by citing a charity supervision precedent for the proposition that parens patriae powers are "inherent" in state sovereignty and "often necessary to be exercised . . . for the prevention of injury to *those who cannot protect themselves*."[336] *Snapp*'s citation and phrasing implicitly linked the core rationale for parens patriae standing to the expansion of the doctrine from guardianship of the legally incapacitated to protection of charity beneficiaries, and then to standing to sue on behalf of the public at large.

Commentators on parens patriae doctrine have sometimes used "public" as fully synonymous with "widespread"[337] or "affecting large numbers of citizens,"[338] but their reasoning reveals

333. *In re* Estate of Pruner, 136 A.2d 107, 109 (Pa. 1957); *see also Church of Jesus Christ of Latter-Day Saints*, 136 U.S. at 58 (describing parens patriae supervision over "estates[ ] in which persons are interested, who have not capacity to act for themselves, or who cannot be certainly ascertained").

334. *Church of Jesus Christ of Latter-Day Saints*, 136 U.S. at 58.

335. Missouri v. Illinois, 180 U.S. 208, 241 (1901).

336. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982) (emphasis added) (quoting *Church of Jesus Christ of Latter-Day Saints*, 136 U.S. at 57).

337. Thomas, *supra* note 169, at 798.

338. Merrill, *Public Nuisance*, *supra* note 137, at 10–11 n.41; *see also* Epstein, *supra* note 141, at 558 ("Public nuisances . . . impose small harms to each of a large number of individuals . . . . [I]t is unlikely that any individual will agree to shoulder the burden of obtaining an injunction that benefits all members of the public at large."). Commentators point to *Snapp* as requiring states to show "that the claimed injury affects a 'sufficiently substantial segment of [the state's] population'" to establish parens patriae standing. *E.g.*, Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 112 (2018) (quoting *Snapp*, 458 U.S. at 607); *accord* Kaitlin Ainsworth Caruso, *Essay: Who and What Is a City "For"? Municipal Associational Standing Reexamined*, 62 WM. & MARY L. REV. ONLINE 105, 112 (2021), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1025&context=wmlronline [https://perma.cc/L3S4-8E6D]. But, as I argue above, *Snapp* emphasized the public *nature* of the harm the plaintiff sought to redress more than the *number* of affected individuals, holding that parens patriae

that the number of identifiable individuals threatened by a harm is an inadequate basis, by itself, for the public-private divide in parens patriae precedents. For example, Margaret Thomas argues that the "principle" that "a state can sue in its parens patriae capacity to redress private interests that are widespread enough to implicate the state's interest in the welfare of its citizens. . . . has maximum force where the individual harms may otherwise go unredressed."[339] The examples she gives—air and water pollution[340]—cause exactly the kind of harms that are impossible to trace exclusively to identifiable individuals.[341] In another section of the same article, Thomas describes antitrust and consumer deception actions brought by states as parens patriae as being based on "an understanding of the market as a community good."[342] Similarly, Professor Thomas W. Merrill has noted that "patriae actions . . . . can include . . . representational actions advancing the interests of large numbers of citizens."[343] But in another section of the same article, Merrill "borrow[s] an economic concept" to add depth to his conception of the "public."[344] Merrill argues that when judges deciding public nuisance cases "speak of an interference with a right common to the general public, what they mean is that the offending condition is . . . a 'public bad.' That is to say, the condition produces undesirable effects that are nonexcludable and nonrivalrous."[345]

By defining public bads to include harms "for which causation can be established at the population level, but which cannot necessarily be traced to any individual victim,"[346] I supplement this economic analysis with insights from epidemiology. Harms

standing was appropriate although no more than 787 of the plaintiff's 3,000,000 residents were directly affected. *See Snapp*, 458 U.S. at 608–09.

339. Thomas, *supra* note 169, at 798.

340. *Id.* at 788.

341. Wiley, *supra* note 29, at 259.

342. Thomas, *supra* note 169, at 806.

343. Merrill, *Public Nuisance*, *supra* note 137, at 10–11 n.41. Merrill cites *Georgia v. Pennsylvania Railroad Co.* as an example, but in that decision, the Court described Georgia "as a representative of the public . . . complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States." 324 U.S. 439, 451 (1945). These harms affect identifiable individuals, but they also cause harms to the population at large that cannot be traced to any particular individual.

344. Merrill, *Public Nuisance*, *supra* note 137, at 8.

345. *Id.*

346. Wiley, *supra* note 29, at 262.

caused by pollution are a paradigmatic example of harms to the public at large that cannot be traced to identifiable individuals. Many pollutants and accompanying pathogens are recognized as increasing the prevalence of chronic conditions like asthma or the incidence of various cancers or infectious diseases at the population level.[347] But because these conditions have many other causes and are present at some baseline level even in the absence of any given defendant's contribution to pollution, it is difficult for any given individual plaintiff to establish that her asthma, cancer, or typhoid fever would not have occurred but for a particular defendant's conduct.[348]

In the words of Professor Robert Weinstock, "[b]y instructing courts to pay attention to the 'indirect effects' of threats to the citizenry's physical health," *Snapp* "acknowledged the practical reality that threats to health are often difficult to observe and establish as damaging in court for individual litigants."[349] As Weinstock argues, "the Court has implicitly agreed that injuries of unclear concreteness on the individual level may achieve sufficient concreteness when advanced in the aggregate."[350] The indirect effects the *Snapp* Court took into account are measured at the population level using epidemiological methods with results conveyed in statistical, as opposed to identifiable, lives.[351] As Lisa Heinzerling has explained, "a statistical life is a life expected to be lost as a function of probabilities of death applied to a population of persons;" its "salient features . . . are unidentifiability and uncertainty."[352] But this analysis does not necessarily require modern scientific and statistical methods. It is reflected in the Court's analysis in 1901 of whether Missouri could prove that increased incidence of typhoid fever in St. Louis—measured at the *population* level—was attributable to sewage discharged from Chicago.[353] Central to my epidemiological

347. *Cf. id.* at 268 (describing epidemiological harms); WILEY & GOSTIN, supra note 50, at 17 (same).

348. *Cf.* Wiley, *supra* note 29, at 269–70 (describing the prevention paradox).

349. Robert A. Weinstock, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 838 (2009) (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Banez, 458 U.S. 592, 607 (1982)).

350. *Id.*

351. *Snapp*, 458 U.S. at 599.

352. Lisa Heinzerling, *The Rights of Statistical People*, 24 HARV. ENV'T L. REV. 189, 190 (2000).

353. Missouri v. Illinois, 180 U.S. 208, 248 (1901) (holding that an interstate pollution-based nuisance claim failed on the merits).

approach is the idea that "public harms" are not defined solely by the aggregation of harms to numerous individuals; they are also defined by the inability to trace a significant part of those harms to specific and identifiable individuals.

The distinction courts have drawn in parens patriae cases between public and private beneficiaries of the state's protection may have served as a counterargument to concerns about overreaching, paternalistic state power over identifiable individuals with legal capacity. In an early charity supervision case, the Supreme Court lumped the general public in with "infants, idiots, [and] insane persons" as suitable objects for state protection.[354] But the Court took pains to distinguish the "prerogative of parens patriae . . . inherent in the supreme power of every state" from "those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people, and the destruction of their liberties" by describing parens patriae as "a most beneficent function . . . for the prevention of injury to those who cannot protect themselves."[355] By expanding parens patriae doctrine from the guardianship context to its charity and standing applications, the Court transformed it from a doctrine that primarily concerns constraints on individual liberty to one that primarily concerns the function of state sovereignty in our federalist system.

b. Threats to the Public's Health, Economic Wellbeing . . . and Morals?

Having addressed the question of when a threat should be understood to affect "the public at large," now I must turn to the question of which *types* of harm to the public at large are cognizable under parens patriae as a doctrine of federalism. Specifically, does a state act in a constitutionally significant role as parens patriae when it asserts a sovereign interest in protecting the public's morals? Or does the state's role as parens patriae exclusively pertain to harms that affect health and economic wellbeing?

Given my starting point—that the foundation of parens patriae doctrine is located in the historical police powers of the state, retained when they formed the union—I am inclined to

354. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 58 (1890).

355. *Id.* at 57.

rely on the scope of those powers to define the scope of harms cognizable under parens patriae doctrine.[356] In cases that take the scope of the police power as a starting point for assessing federally protected individual rights as limits on the scope of state power, the Supreme Court has sometimes said that state police powers encompass power to protect "the security of social order"[357] and "public morals."[358] The Court's most extensive discussions of public morality appear in its decisions on "the widespread pestilence of lotteries,"[359] but the Court also deferred to state power over public morals in cases involving "lewd women,"[360] "intoxicating liquors,"[361] and "keeping barber[] shops open on Sunday."[362] Prominent commentators have documented widespread use of state police powers to enforce public morals—particularly in the nineteenth and early twentieth

356. *See supra* Part II.B.

357. *See e.g.*, Slaughter-House Cases, 83 U.S. 36, 62 (1873) (affirming the state's police power to protect "the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property" in the context of a decision upholding the efforts of the City of New Orleans to bring slaughterhouse operations under state control and, thus, protect citizens from cholera outbreaks).

358. *See, e.g.*, Gibbons v. Ogden, 22 U.S. 1, 56 (1824) (noting states' authority to maintain the "good order of society and public morals").

359. Phalen v. Virginia, 49 U.S. 163, 168 (1850). The Court has upheld a number of state actions suppressing lotteries on grounds related to public morality. For example, in *Phalen* the Court justified its decision on the ground that "[t]he suppression of nuisances injurious to public health or morality is among the most important duties of government." *Id.* In *Stone*, a decision made a few decades after *Phalen*, the Court similarly recognized that "the police power of a state extends to all matters affecting the public health or the public morals." Stone v. Mississippi, 101 U.S. 814, 818 (1879). Later, in 1903, the Court upheld a federal law prohibiting interstate shipment of lottery tickets. *See* Champion v. Ames (*The Lottery Case*), 188 U.S. 321 (1903). The Court's subsequent distinction between the federal Lottery Act and the law prohibiting interstate shipment of goods produced by firms employing child labor was struck down during the *Lochner* era, leading some commentators to argue that "the Court was more interested in suppressing moral deviants than economic malefactors." Barry Cushman, Carolene Products *and Constitutional Structure*, 2012 SUP. CT. REV. 321, 333 (2012) (quoting LUCAS A. POWE JR., THE SUPREME COURT AND THE AMERICAN ELITE 1189–2008 183 (2009)).

360. L'Hote v. City of New Orleans, 177 U.S. 587, 588 (1900).

361. Leisy v. Hardin, 135 U.S. 100, 130 (1890).

362. Petit v. Minnesota, 177 U.S. 164, 168 (1900).

century—and have noted in particular "the gendered character of public power when issues of sexual morality were at stake."[363]

In 2003, however, the Supreme Court cast some doubt on public morality as a justification for state action that stigmatizes a disfavored group based on private activity. In *Lawrence v. Texa*s, the majority held that a state law criminalizing sexual activity between individuals of the same sex was unconstitutional over the dissent's objection that "[c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation."[364] Since then, the Court's recitations of the scope of state police powers have often omitted express references to public morals, with a few notable exceptions in recent years.[365]

363. NOVAK, *supra* note 151, at 164 (quoting a prosecutor in the 1817 trial of bawdyhouse madam Mary Rothbone, who appealed "almost literally to parens patriae, the notion of the state as parent/father: 'Gentlemen. I speak to you on this occasion as fathers, as brothers, nay, as the guardians of the public morals of this community. Will you, by your verdict, sanction vice and corruption? . . . Will you permit women of this description to seduce and lead astray your daughters, your sisters, your female servants, with impunity?'").

364. Lawrence v. Texas, 539 U.S. 558, 589 (2003) (Scalia, J., dissenting).

365. *Compare* Gonzales v. Oregon, 546 U.S. 243, 270 (2006) (quoting language from the *Slaughterhouse Cases* that, in recent years, the Court has often used to describe states' police powers "to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons[;]" notably, this language omits reference to the state's power to protect public morals), *with id.* at 298 (Scalia, J. dissenting) ("The prohibition or deterrence of assisted suicide . . . is within the realm of public morality (*bonos mores*) traditionally addressed by the so-called police power of the States."). The Court has addressed the idea of "public morality" in recent dormant Commerce Clause cases. In 2019, for example, the Court discussed its Prohibition-Era cases that "staunchly affirmed the 'right of the States,' in exercising their 'police power,' to 'protect the health, morals, and safety of their people' . . . ." Tenn. Wine and Spirits Retailers Ass'n v. Thomas, 588 U.S. 504, 521 (2019) (quoting Mugler v. Kansas, 123 U.S. 623, 659 (1887)). As noted above, in 2023, Justice Gorsuch, joined by Justices Barrett and Thomas, noted in dicta that "[s]tates may enact laws to 'promote . . . public morals,'" Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 381 (2023) (quoting Western Union Telegraph Co. v. James, 162 U.S. 650, 653 (1896)), and acknowledged that a California referendum prohibiting the sale of pork produced using methods that voters deemed inhumane "serves moral and health interests of some (disputable) magnitude for in-state residents." *Nat'l Pork Producers Council*, 598 U.S. at 382. Liberal justices have also quoted early cases endorsing public morality as a legitimate purpose of state police powers. For example, in 2022 Justice Breyer's dissent in *Bruen*—which Justices Sotomayor and Kagan both joined—quoted an 1840 Alabama Supreme Court precedent "recognizing that the constitutional right to bear arms 'necessarily . . . leave[s] with the

Whether or not defense of public morals remains a legitimate government interest sufficient to withstand rational basis review in every application, the Supreme Court has *not* included defense of public morals in its descriptions of the quasi-sovereign interests that justify federal courts' recognition of state Article III standing to sue as parens patriae. In its standing application, parens patriae probably requires a threat of more tangible harm to persons, property, or economic interests. Professor Thomas has argued that the scope of state's parens patriae standing and the scope of the state's police powers "move in tandem, with parens patriae mirroring then-extent views of police powers."[366] But this has not been the case when it comes to public morals. In 1901, when the Supreme Court described the state's parens patriae standing to sue where "the health and comfort of [its] inhabitants . . . are threatened,"[367] the police power was widely understood to encompass public morals.[368] As noted above, this was the same period in which some states began to use criminal nuisance actions to prosecute abortion providers for interference with public morality.[369] Supreme Court cases from the same time period describing the scope of states' police power, such as *Lochner*, specifically included public morals.[370] But the Court did not recognize—and to date has not recognized—parens patriae standing for a state to sue on the basis of a threat to the *morals* of its populace.

Legislature the authority to adopt such regulations of police, as may be dictated by the safety of the people and the advancement of public morals.'" N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 125 (2022) (Breyer, J., dissenting) (quoting State v. Reid, 1 Ala. 612, 616 (Ala. 1840)). These recent references to public morals, however, stand out as exceptions to the apparent trend of the Supreme Court to (at least, more commonly) omit "morals" from the typical list of purposes for which states exercise their police powers.

366. Thomas, *supra* note 169, at 800.

367. Missouri v. Illinois, 180 U.S. 208, 241 (1901).

368. ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 172 (1904) ("The exercise of the police power for the protection of public morals proceeds upon a number of grounds: that vice is intrinsically evil . . . ; that it impairs the strength of the community; that its practice is of evil example and tends to corrupt others; and that its manifestation is offensive to the public and violates the implied conditions of community life whereby each is bound not to outrage in an offensive manner prevailing public sentiment . . . . The practices with which legislation is chiefly concerned are: gambling, drink, and sexual immorality.").

369. *See supra* Part I.B.1.b.

370. Lochner v. New York, 198 U.S. 45, 53 (1905).

The Supreme Court has excluded the degradation of social order and public morals from the harms it considers in its parens patriae standing analysis, but this exclusion is probably a function of Article III requirements, rather than being derived from the parens patriae doctrine itself.[371] The best explanation for the disconnect between the Court's parens patriae standing precedents and its contemporaneous police power precedents is that the Court has incorporated an *analog* to the Article III requirement of injury-in-fact directly into its holdings on the scope of state parens patriae standing, while excusing the state from identifying specific residents who could establish injury-in-fact at the individual level. Whereas private plaintiffs must establish "a physical injury, a monetary injury, an injury to one's property, or an injury to one's constitutional rights" that is "actual or imminent" to satisfy Article III concerns,[372] a state is required to establish that it is asserting an "interest in the health and well-being—[either] physical [or] economic—of its residents in general."[373] The state still has to show a threatened injury, but it is permitted to do so through epidemiological evidence of population-level effects.[374] Requiring a state to show that *identifiable* members of its population face an imminent threat of actual

371. Scholars have debated whether the Court's parens patriae precedents should be understood as exempting states from the injury-in-fact requirement. *See, e.g.*, Merrill, *Global Warming*, *supra* note 137, at 304. Merrill has noted that the Court's caution in *Snapp* that parens patriae suits "must be sufficiently concrete to create an actual controversy between the State and the defendant" and must "survive the standing requirements of Article III," seems to assume that such suits are subject to ordinary rules of standing. *Id.* Other commentators have read the Court's more recent decision in *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007), to mean that "states acting as parens patriae and asserting public rights need only surmount a flaccid version of" the elements a private party must establish, including the injury-in-fact requirement. *E.g.*, Calvin Massey, *State Standing After* Massachusetts v. EPA, 61 FLA. L. REV. 249, 251 (2009).

372. Food & Drug Admin. v. All. for Hippocratic Med., 602 U.S. 367, 381 (2024).

373. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982).

374. *See* Massachusetts v. EPA, 549 U.S. 497, 538 (2007) (Roberts, C.J., dissenting) ("Far from being a substitute for Article III injury, parens patriae actions raise an additional hurdle for a state litigant: the articulation of a 'quasi-sovereign interest' 'apart from the interests of particular private parties.'" (quoting *Snapp*, 458 U.S. at 607)); Massey, *supra* note 371, at 252 ("The most persuasive understanding of *EPA* is that it permits states, as parens patriae, to assert generalized claims of injury suffered in common by all of its citizens that would not be judicially cognizable if asserted by any individual citizen.").

harm to their person or property would be incommensurate with the population-level focus of parens patriae doctrine as it has developed within the federal common law of interstate and federal-state disputes.

5. Against Private Parties and Sister States, but Not Against the Federal Government to Protect Their Populace from the Operation of Federal Law

States regularly bring parens patriae suits to protect their populace against harms caused by private parties[375] and sister states.[376] States regularly rely on their proprietary or sovereign interests to bring suit against the federal government.[377] But a state's standing to sue the federal government in parens patriae is more complicated.

In 1923, the Supreme Court held that Massachusetts failed to present a justiciable controversy, "either in its own behalf or as the representative of its citizens," in its suit against the United States.[378] In *Massachusetts v. Mellon*, the state alleged that a federal spending program that functionally redistributed revenue from industrial states to poorer, more rural states to prevent maternal and infant mortality impermissibly "induc[ed] the states to yield a portion of their sovereign rights"[379] and represented a "taking" of citizens' "property under the guise of taxation, without due process of law."[380] To support its rejection of

375. *E.g.,* Georgia v. Tenn. Copper Co., 206 U.S. 230 (1906) (suit by Georgia against private copper companies located in Tennessee alleging that their smelting operations contributed to air pollution in Georgia); Georgia v. Pa. R.R. Co., 324 U.S. 439 (1945) (suit by Georgia against private railroad companies alleging anticompetitive rate-fixing that discriminated against Georgia ports).

376. *See, e.g.*, Louisiana v. Texas, 176 U.S. 1 (1900); Missouri v. Illinois, 180 U.S. 208 (1901); Kansas v. Colorado, 206 U.S. 46 (1907); New York v. New Jersey, 256 U.S. 296 (1921); North Dakota v. Minnesota, 263 U.S. 365 (1923); Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

377. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 518 (2007) (suit by Massachusetts relying on proprietary and sovereign interests to establish standing to sue the federal government); Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1244 (2019) ("There are four ways in which states can claim financial injuries when suing the federal government. For one, a state may claim a financial injury in a proprietary capacity, much as a private entity might. In addition, there are three different ways in which a state may claim a financial injury in its sovereign capacity.").

378. Massachusetts v. Mellon, 262 U.S. 447, 480 (1923).

379. *Id.*

380. *Id.*

the state's standing to bring suit on behalf of its citizens, the Court reasoned that "the United States, and not the State" acts as parens patriae in the "field" of residents' "relations with the Federal Government."[381]

In the century since *Mellon* was decided, the Court has repeatedly stated that states lack parens patriae standing to bring suit on their citizens' behalf against the federal government.[382] But in 2007, the Court appeared to rely partly on the parens patriae doctrine to hold that Massachusetts had standing to "assert its rights" to have the EPA regulate greenhouse gas emissions under the Clean Air Act.[383] Writing in dissent, Chief Justice Roberts argued that the majority's holding was inconsistent with *Mellon*.[384] In a footnote, the majority discussed the basis of Massachusetts's standing as being rooted in the doctrine of parens patriae and distinguished *Mellon*, reasoning that "there is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do [under *Massachusetts v. EPA*'s holding])."[385]

381. *Id.* at 485–86. *Compare id.* (noting that only the federal government represents the citizens in parens patriae suits), *with* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal . . . each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."). This language from Justice Kennedy's *U.S. Term Limits, Inc.* concurrence was subsequently quoted with approval by *NFIB*. Nat'l Fed. Ind. Bus. v. Sebelius, 567 U.S. 519, 643 n.26 (2012).

382. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 610 n.16 (1982) (quoting *Mellon*'s statement that "[a] State does not have standing as *parens patriae* to bring an action against the federal government" with approval); Haaland v. Brackeen, 599 U.S. 255, 295 (2023) (same, but citing *Snapp* instead of *Mellon*); Murthy v. Missouri, 603 U.S. 43, 76 (2024) (same, but citing *Brackeen* instead of *Snapp* or *Mellon*); Biden v. Nebraska, 600 U.S. 477, 532 (2023) (Kagan, J., dissenting) ("A State may never sue the Federal Government based on its citizens' rights and interests.").

383. Massachusetts v. EPA, 549 U.S. at 520 n.17 (quoting Georgia v. Pa. R.R. Co., 324 U.S. 439, 447 (1945)).

384. *Id.* at 539 (Roberts, C.J., dissenting).

385. *Id.*

Circuits are split on whether the Court truly relied on the parens patriae doctrine in *Massachusetts v. EPA*,[386] and in subsequent decisions, the Court has repeated the statement that states lack parens patriae standing to assert the interests of their citizens against the federal government.[387] For my purposes, it is enough to concede that parens patriae doctrine does not give states standing to protect their populace from the operation of federal law.

The circuit courts have put forth conflicting views as to the source of the federal government's parens patriae power as it is described in *Mellon*. In a pre-*EPA* decision, the Court of Appeals for the Ninth Circuit reasoned that states "ceded" some of the parens patriae role to the federal government when they formed a union.[388] The Court of Appeals for the D.C. Circuit, in its analysis of *EPA*'s scope, grounded the federal parens patriae role in the notion of dual sovereignty: "an 'individual's dual citizenship in both state and nation, with separate rights and obligations arising from each, suggests that both units of government act as parens patriae within their separate spheres of activity.'"[389] In light of "[t]he general supremacy of federal law," the D.C. Circuit reasoned "that the federal parens patriae power should not, as a rule, be subject to the intervention of states seeking to represent the same interest of the same citizens," because assertion of a parens patriae role in this context would "usurp[] the role of the federal government."[390]

While states exercise their parens patriae roles as coequal sovereigns in relation to each other—each protecting the populace within their own borders—they do not function as coequal

386. I find the D.C. Circuit's interpretation—that *Massachusetts v. EPA* relied on the state's *proprietary* standing—more persuasive. *See* Gov't of Manitoba v. Bernhardt, 923 F.3d 173, 182 (D.C. Cir. 2019) (describing the D.C. Circuit's interpretation of *Massachusetts v. EPA*'s conclusion with respect to state standing). I believe the type of standing the Sixth Circuit describes as being ruled out in *Mellon* to be more consistent with the form of private interests standing the Supreme Court rejected in *Snapp*. *See* Kentucky v. Biden, 23 F.4th 585, 596–98 (6th Cir. 2022).

387. *See supra* note 382.

388. *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir. 1973) ("In this country the parens patriae function expanded somewhat and devolved upon the states that, to some extent, ceded it to the federal government.").

389. *Bernhardt*, 923 F.3d at 183 (quoting Pennsylvania v. Kleppe, 533 F.2d 668, 676–77 (D.C. Cir. 1976).

390. *Id.*

guardians of the populace in relation to the federal government. Under the Supremacy Clause, when the federal government acts as "the ultimate parens patriae of every American citizen,"[391] it may preempt the function of a state as parens patriae.

III. APPLYING PARENS PATRIAE TO INTERSTATE DISPUTES OVER ABORTION AND GENDER-AFFIRMING CARE

Like state sovereignty, parens patriae is a double-edged sword. The parens patriae doctrine has justified harmful paternalism toward identifiable individuals and groups who have been deemed legally incapable of making their own decisions.[392] In combination with nuisance law, it has been used to justify paternalistic measures that have caused harm to personal dignity and public health under the banner of defending public morals.[393] Nonetheless, in combination with the state's police powers, it is an essential foundation of good governance when applied to protect collective interests in health and safety.[394] And as a doctrine grounded in constitutional federalism, it provides a useful tool for principled delineation of the purpose, scope, and limits of state sovereignty within a federal system.

In this Part, I demonstrate the descriptive and normative power of the reconceptualized parens patriae doctrine I developed in Part II by applying it to the open legal questions I identified in Part I. Relying on precedents that span all three of the Court's previous applications of parens patriae, I craft arguments that federal judges should use to uphold state health care shield laws and arguments that state judges should use to defend their authority to decline to recognize out-of-state judgments that arise out of bans on reproductive health and gender-affirming care. These arguments may also provide a basis for restrictive states to pursue nuisance claims against providers of

391. South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

392. *See, e.g.,* Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960) (upholding a federal statute "to enable the Government, acting as parens patriae for the Indians, to vacate any disposition of their lands made without its consent"); Ferrer, *supra* note 237, at 923 (describing the parens patriae foundation of the juvenile criminal court system as "a philosophy that couches the state's power to control in the language of care").

393. Stephen M. Engel & Timothy S. Lyle, *Fucking with Dignity: Public Sex, Queer Intimate Kinship, and How the AIDS Epidemic Bathhouse Closures Constituted a Dignity Taking*, 92 CHI.-KENT L. REV. 961, 975, 963–64 (2017).

394. *See* WILEY & GOSTIN, *supra* note 50, at 169.

reproductive health and gender-affirming care, but because of the limited scope of the federal common law of interstate nuisance, such claims would merely provide another avenue for pursing state-law claims in a restrictive state's own courts.

A. PUBLIC NUISANCE: COMMON LAW CLAIMS FOR SUBSTANTIAL AND UNREASONABLE INTERFERENCE WITH PUBLIC RIGHTS

As discussed above, under public nuisance law, a key issue is whether a restrictive state could establish that abortion, contraception, destruction of unused embryos by a fertility clinic, or gender-affirming care—or even mere information about these services—amounts to "a substantial and unreasonable interference with rights held in common by the general public."[395] Conversely, could interference with access to these services be the basis for a public nuisance claim brought by a shield state against private parties or public officials who threaten and harass providers? These issues may be raised in intrastate disputes—claims brought by a government plaintiff against a party acting solely within its jurisdiction—that do not implicate federalism. But they could also be raised in an interstate context.

Plaintiffs may not choose to bring public nuisance claims against providers of reproductive health and gender-affirming care. They probably do not provide significant benefits over existing causes of action available under state law, including the "claw back" provisions some states have adopted to address "hostile" litigation against providers.[396] Nonetheless, analysis of these issues helps clarify the definitional elements I set forth in Part II and provides a helpful starting point for analysis of the constitutional questions I turn to in the rest of Part III. Mirroring the structure used in Parts I and II, I break down open questions relating to public nuisance law into two distinct components: First, I discuss the public effects of the harms states are protecting against and second, I address whether a state's efforts to uphold a particular moral order falls within the protection of public rights.

395. DAN B. DOBBS, THE LAW OF TORTS 1334 (2000); *see also supra* Part I.B.1.b.

396. CRHLP, *Shield Laws*, *supra* note 3.

1. Public Effects

As explained in Part I, courts adjudicating nuisance claims have struggled to define what makes a right distinctively public, such that interference with it constitutes a public nuisance.[397] Critics deride public nuisance as "a tort where liability is based upon *unidentified* ills allegedly suffered by *unidentified* people."[398] For better or worse (depending on how one feels about this "super tort"[399]), the parens patriae precedents analyzed in Part II suggest that the *unidentifiability* of particular individuals who are harmed by a nuisance is essential to the nature of a public right. Public nuisance doctrine exists in part because some kinds of harms threaten populations who are "indefinite,"[400] and "contingent"[401] and therefore not individually identifiable or capable of vindicating their own interests as private parties.[402] One of the reasons public nuisance is a "super tort" is that it unlocks "flexible doctrines of causation and fault that make liability more likely."[403] As critics have noted, "[b]y using public nuisance and other equitable theories of recovery," government plaintiffs "avoid the need to prove specific causation of any individual's illness and to eliminate defenses based upon a [plaintiff's] own conduct, such as contributory negligence and assumption of risk."[404] But the fact that plaintiffs suing as parens patriae establish causation and culpability at the population, rather than individual, level is inherent in the public-protection rationale that parens patriae doctrine embodies.

A shield state's claim that threats against care providers have caused substantial interference with its residents' access to

397. *See supra* Part I.B.1.b.

398. Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 981-82 (2007); *see also* Thomas W. Merrill, *The New Public Nuisance: Illegitimate and Dysfunctional*, 132 YALE L.J.F. 985, 986–87 (2023) (arguing that public nuisance is dysfunctional as a type of regulatory policy, rather than being a second-best alternative).

399. Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN. L.J. 541, 552 (2006).

400. Brody, *supra* note 251, at 938.

401. United States v. Union Pac. R.R. Co., 98 U.S. 569, 596 (1878).

402. Beatty v. Kurtz, 27 U.S. 566, 584 (1829).

403. Wiley, *supra* note 29, at 212.

404. Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 922 (2008).

health care might trigger the defendant to argue that the plaintiff cannot establish causation. Because some people would still be able to access care in spite of the chilling effect of the defendant's interference and some people would have been unable to access care even in its absence, it would be impossible to determine which specific individuals would have had access to the care they need *but for* the defendant's interference. Relying on the understanding of public rights grounded in parens patriae doctrine, the plaintiff state could argue that, while causation would not be traceable at the individual level, population-level effects could be established epidemiologically by tracing reductions in health care access (and associated health harms) at the population level to threatened actions against providers. Current threats might not rise to this level and insufficient time has passed to examine the extent of effects. But if studies bear out a substantial and unreasonable interference with the availability of reproductive and gender-affirming care services resulting in harm to the public's health that would not have occurred but for the specific actions of identifiable defendants, such a claim could be recognized under state public nuisance law.[405] The fact that transgender people make up a small minority of the population would not necessarily defeat the public nature of the interests affected by an interference with access to gender-affirming care. As discussed above, neither nuisance doctrine,[406] nor parens patriae doctrine[407] emphasizes a particular threshold for numerosity. Rather, the focus is on whether the harm is *distinctively* public because it has population-level effects that are not exclusively traceable to identifiable individuals.

Restrictive states could use a similar approach. In the context of gender-affirming care, restrictive states might allege a threat of physical harm to minors. Such states might argue, for example, that defendants entice minors with "gender

405. In addition to the difficulties noted above, public nuisance suits brought by shield states based on substantial interference with access to gender-affirming care might be more challenging than similar suits based on interference with access to reproductive health care, given the relative sizes of affected populations. But in either type of case, it would not be possible to establish that any given individual would have had access to the care they needed but for the defendant's threats, so the harm would be properly understood as "public" in the sense that its effects are not traceable to identifiable individuals. *See supra* Part II.C.4.

406. *See supra* Part I.C.1.b.

407. *See supra* Part II.A.3.

ideology"[408] and the availability of gender-affirming care across state lines—care that restrictive states might characterize as "chemical [or] surgical mutilation"[409] that some undetermined portion of patients might later regret consenting to.[410] A restrictive state's nuisance claim against a purveyor of abortion care or information could similarly be framed as a threat to public health.[411] This claim could be bolstered by a determination that fetuses are persons and thus are members of what might be termed the "fetal populace" under public nuisance law, but it would not be dependent on such a finding.[412] Pollution and pathogens that threaten fetal development are probably within the scope of harms to the populace that are recognized by nuisance law, even if they are framed in terms of harm to potential or future lives, rather than current persons.[413]

2. Public Morals

How a court resolves the related question of whether interference with public *morals* constitutes a nuisance would depend in part on whether litigants bring their claims under state or federal law. On this front, parens patriae precedents provide indirect support for Article III standing as a barrier to bringing moral nuisance claims in federal court. States can probably bring state-law claims against moral nuisances in their own courts, based on their discretion to define public rights within

408. Exec. Order No. 14168, 90 Fed. Reg. 8615, § 3(g) (Jan. 20, 2025).

409. Exec. Order No. 14187, 90 Fed. Reg. 8771, § 4 (Jan. 28, 2025).

410. *See* Rob Stein, *White House Orders NIH to Research Trans "Regret" and "Detransition"*, NAT'L PUB. RADIO (Apr. 11, 2025), https://www.npr.org/sections/shots-health-news/2025/04/10/nx-s1-5355126/trump-nih-trans-regret-detransition-research [https://perma.cc/FZC2-GFJQ] (highlighting disagreement among researchers over the rate of regret after transition); Gonzales v. Carhart, 550 U.S. 124, 159 (2007) (expressing concern that "some women come to regret their choice to abort the infant life they once created and sustained"); NOVAK, *supra* note 151, at 164.

411. *E.g.* People v. Hoffman, 103 N.Y.S. 1000 (N.Y. App. Div. 1907) (citing offense to "public decency" and inducement to "moral laxity"; referring to "health" only in the context of stating the prima facie case of the crime of nuisance); State v. Atwood, 102 P. 295, 299 (Or. 1909) (noting the defendants "were conducting a business that openly outraged the public decency and was injurious to public morals"; referring to "health" only in the context of stating the prima facie case of the crime of nuisance); *accord* People v. Curtis, 136 N.Y.S. 582, 583, 584 (N.Y. App. Div. 1912); State v. Dewey, 292 P.2d 799, 801, 814 (Or. 1956).

412. *Abortionists are Nuisances*, *supra* note 156, at 1605.

413. *See supra* note 51.

their own borders as they see fit, but this would not add much to their current arsenal. Even if state-law moral nuisance claims might strengthen a state's control within its borders, the fact that such claims *could* be brought on a nuisance theory weakens their extraterritorial reach.

At the federal level, there is not currently a viable path for states to bring suit in federal court under the federal common law of interstate nuisance based on harms to public morality. Federal common law nuisances have, so far, been limited to instances of interstate pollution and other matters relating the interstate flow of air and water, and the Court's most recent nuisance precedent sharply limited opportunities for states to pursue even those claims.[414] It is possible that the Supreme Court could take an opportunity provided by interstate disputes over abortion and gender-affirming care to expand the scope of what constitutes a public nuisance under federal common law. But concerns about the slippery slope this would create for similar claims against product manufacturers and other defendants could provide a counterweight to any desire some Justices might have to support restrictive states.

Moreover, parens patriae standing precedents would present a hurdle for states asserting harm to public morals in federal court. The more flexible approach the Court has taken to state standing should not be read to provide support for extending *moral* standing for states. *Snapp*'s omission of public morals in its description of the quasi-sovereign interests that are the basis of parens patriae standing[415] is consistent with the Court's omission of moral injury from its description of the types of injury-in-fact that allow private parties to establish standing.[416] Although the Court has recognized that some types of "intangible injuries" are sufficient for private-party standing,[417] its

414. *See supra* note 165 and accompanying text.

415. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982) (listing only two quasi-sovereign interests: "health and well-being" and "not being discriminatorily denied its rightful status within the federal system").

416. FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1556 (2024) ("An injury in fact can be a physical injury, a monetary injury, an injury to one's property, or an injury to one's constitutional rights, to take just a few common examples.").

417. Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016) (citing cases involving injuries to free speech and free exercise of religion as examples of instances

recent decision in *Food & Drug Administration v. Alliance for Hippocratic Medicine* appears to indicate that moral or ideological opposition remains an insufficient basis for Article III standing.[418] As discussed above, the more flexible Article III standing requirements the Court has applied to states when they sue as parens patriae are best understood as a function of the public-protection rationale for the parens patriae doctrine.[419] Requiring a state to show that *identifiable* members of its population face an imminent threat of actual harm to their person or property would be incommensurate with the population-level focus of parens patriae doctrine. But the state still has to show a threatened economic or physical injury; it is simply permitted to do so through epidemiological evidence of population-level effects.

At the state level, if a restrictive state brings a claim against an out-of-state provider of reproductive health or gender-affirming care in its own courts under its own law of public nuisance, interference with public morals might be sufficient to support a ruling in the plaintiff's favor, even in the absence of sufficient evidence of harms to the health and safety of the public at large, which the state would probably also assert. Moreover, when a state brings a civil action in its own courts, it is generally not required to establish standing. A state's standing is an inherent attribute of its governing authority as a sovereign, just like when it brings a criminal action in its own courts.[420] A private party might even be able to establish standing in a restrictive state's courts based on moral injury alone.[421] Numerous state court decisions, relying on the police power to secure public morality, recognize state and local governments' authority to abate or seek judicial relief for a threat to the social order or public morality—

where the Court has recognized "intangible injuries" as sufficiently "concrete" to confer standing).

418. *All. for Hippocratic Med.*, 144 S. Ct. at 1556.

419. *See supra* Part II.C.4.b.

420. *See* Merrill, *Public Nuisance*, *supra* note 137, at 12 (noting that criminal proceedings are "public action[s], initiated by public authorities"); Woolhandler & Collins, *supra* note 256, at 397 ("[G]overnment now has a prosecution monopoly. When enforcing its legislation in its own courts, the government litigant . . . possesses power exercised on behalf of the public, and it uses litigation as an instrument to administer that power.").

421. *See* Yvonne Lindgren & Michelle Oberman, *Recalibrating Risk Under Dobbs*, 94 FORDHAM L. REV. (forthcoming 2025) (manuscript at 32), https://dx.doi.org/10.2139/ssrn.5003888 ("[M]any clinicians report experiencing high levels of moral injury resulting from their failure to provide the care they believe their patient needs and deserves.").

sometimes in conjunction with a real or purported threat to the public's health or safety, and sometimes by itself.[422] It is conceivable that a state supreme court could determine that providing contraception, abortion, or gender-affirming care or destroying unused embryos at a fertility clinic constitutes unreasonable interference with public morality warranting a nuisance action by the state.

Although there may be good arguments for excluding public morals from the types of harm a state may properly assert in its parens patriae role—as that role has been understood in relation to constitutional federalism—I remain somewhat inclined to defer to states' determinations about the types of harm they wish to exercise parens patriae responsibilities to protect. But even if I concede that a state should be understood to act in a constitutionally significant capacity when it acts as the guardian of the public morals of its populace, the result of this determination is not as dire for shield states as it might appear to be on the surface. To the extent that parens patriae precedents lend support to states' discretion to define the types of public rights they wish to protect, such precedents would merely recognize that each state has *more* power to regulate within its borders, but *less* power to regulate extraterritorially when it asserts an interest in protecting public morals, compared to when it acts to protect private rights.[423]

B. FULL FAITH AND CREDIT: SHIELD STATES' REFUSAL TO ENFORCE RESTRICTIVE STATES' JUDGMENTS

The public-private distinction is also central to an open legal question on the full faith and credit front: the scope of the penal

422. NOVAK, *supra* note 151, at 164.

423. Indeed, Merrill has suggested that the Court's approach to parens patriae standing does not properly reconcile a tension he identifies between the Court's generous recognition of states' parens patriae standing in federal court and "the general design principle," rooted in antiextraterritoriality, "that public officers should ordinarily bring public actions in their own courts." Merrill, *Global Warming*, *supra* note 137, at 305 & n.54 (citing the Court's statement in Missouri v. Illinois, 180 U.S. 208, 232 (1901), that "[t]he rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties").

judgment rule as applied to civil judgments.[424] Which, if any, judgments issued by restrictive states' courts against providers of abortion or gender-affirming care must be enforced by shield states? Relational analysis focused on the role of the state as parens patriae provides helpful guidance by lending content to the distinction between "public justice" and private remedies that is central to the penal judgment rule.[425]

I argue that a state-court judgment based on a civil cause of action should be understood to punish on behalf of the public when it punishes the defendant for harm that is widespread and not traceable to identifiable individuals or seeks to prevent such harm in the future. In this context, where a state's standing to sue in federal court is not at stake, I argue that when a restrictive state's court judgment punishes an individual in the name of protecting public morality, a shield state's courts could fairly determine that it is a penal judgment and therefore exempt from the state's full faith and credit obligations. Thus, I conclude that a restrictive state's civil judgments based on a health care ban, a licensing violation, or a public nuisance claim are not subject to mandatory enforcement by a shield state.

However, I also argue that an award of damages to an individual injured by a defendant's negligence or professional malpractice is entitled to full faith and credit if the judgment is based on application of a professional standard of care, but may not be so entitled if the standard of care applied by the restrictive state's court is derived from the state's law penalizing abortion or gender-affirming care to protect the morals of the populace at large. Similarly, I argue that a wrongful death judgment awarded to an aggrieved relative suing on behalf of a fetus or to an individual who has come to regret the gender-affirming care for which they gave consent could be deemed penal, rather than remedial, if the tribunal court determines it was based solely on the state's prohibition on, rather than noncompliance with, a generally applicable standard of care.

Perhaps counterintuitively, in this context, the fact that a restrictive state's extraterritorial efforts are undertaken in its role as parens patriae with the aim of protecting its populace at large, *weakens* its argument that these efforts fall within the full faith and credit obligations of shield states, rather than

424. *See supra* Part I.B.1.a.

425. Huntington v. Attrill, 146 U.S. 657, 673–74 (1892).

strengthening it. Unlike efforts to enforce a private remedy, efforts to enforce a penal one, one with a distinctively *public* purpose, are not constitutionally entitled to cooperation by sister states.

1. Ban Violations, Licensing Violations, and Public Nuisance Claims

Three types of judgments—including both causes of action the Texas Attorney General is relying on in *Texas v. Carpenter*, as well as any suits that might be brought under the bounty provisions included in some state's abortion bans[426]—should easily qualify as penal judgments that do not require recognition by shield states under the Full Faith and Credit Clause. Shield states' courts may see these as easy cases, but given the paucity of directly on-point precedents, parens patriae doctrine could provide additional support.[427]

Texas's action against Dr. Carpenter for violating the state's abortion ban is an excellent example of a civil action that is punitive in character. Although the Texas Attorney General may argue that his civil suit seeks a remedy for physical harm to an identifiable fetus,[428] the suit is not brought in the fetus's name.[429] Moreover, the $100,000 penalty the Texas court awarded in its default judgment—which is to be paid to the state itself—is not intended to compensate the fetus's next of kin.[430]

426. See *supra* Part.I.A for a description of *Texas v. Carpenter* and abortion-ban bounty suits.

427. Borrowing guidance from parens patriae precedents should not be taken as an indication that shield states' penal judgment argument is inherently weak. The minimal number of direct precedents does not necessarily cut one way or the other. States have only rarely invoked the penal judgment rule, but then again, states have rarely invoked full faith and credit requirements because states frequently recognize sister-state judgements voluntarily based on the comity principle. *See supra* note 42.

428. *See, e.g.*, Press Release, Ken Paxton, *supra* note 149 ("In Texas, we will always protect innocent life and uphold the laws that protect mothers and unborn babies.").

429. *See* Petition and Application for Temporary and Permanent Injunctive Relief, *supra* note 20, at 2 (naming the State of Texas as the sole plaintiff in the lawsuit).

430. *See* Final Judgment and Order Granting Permanent Injunction, *supra* note 84 (finding that Dr. Carpenter violated Texas state law both by practicing medicine "without a license and registration in the State of Texas" and providing abortion care to a Texas resident, "that an unborn child died as a result of these violations," and concluding "that *the State of Texas* should" be awarded a

Instead, the statutory damages available under the state's abortion ban are intended to punish Dr. Carpenter for her violation of the "public justice"[431] of Texas and to deter her and others from providing similar care to undetermined patients—and (in Texas's view) causing similar harm to undetermined fetuses—in the future.[432] The aim of the suit is to uphold the state's chosen public morality and to protect (what the state would consider to be) the maternal and fetal populace at large.

If Texas or another state decides to pursue a similar civil enforcement action under its ban on gender-affirming care for minors—based on a doctor's provision of care to a patient and family who desired it and consented to it—the analysis would be similar. A shield state could argue that it is permitted to refuse to recognize a default judgment from a restrictive state's court because the underlying cause of action is based on what the restrictive state perceives to be its responsibility to uphold a particular moral order. Namely, a moral order in which the restrictive state asserts that biological sex is destiny and, consequently, claims that it must protect the general population of minors who might seek gender-affirming care in the future from the risk that some of those minors might later regret obtaining that care, even if the patient whose care is the basis of the current suit does not.

The fact that the directly affected population—those who seek and receive gender-affirming care across state lines—may not be particularly large as a proportion of the state's total population does not necessarily render the threatened harm private rather than public. As explained above, the Supreme Court's parens patriae precedents reject reliance on numerosity alone to define what makes some types of harm distinctively public.[433] The public-protection rationale for a restriction on gender-affirming care arises from the restrictive states' desire to protect unidentifiable individuals from being convinced that they are transgender and in need of gender-affirming care, rather than

civil penalty of $100,000, a permanent injunction, attorney fees, and courts costs as a result (emphasis added)).

431. Huntington v. Attrill, 146 U.S. 657, 674 (1892).

432. *Cf.* Press Release, Ken Paxton, *supra* note 149 ("Radical out-of-state doctors will not be allowed to peddle dangerous and illegal drugs in Texas to kill unborn babies. Any doctor attempting to do so will be punished to the full extent of the law.").

433. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 599 (1982).

relying exclusively on paternalism towards those who are directly affected by gender-affirming care (which would make little sense given that the individuals directly affected by gender-affirming care both desire and consent to receiving it). The restrictive state's concern about "indirect effects"[434] on its population "at-large"[435] that arise when the state's residents are allowed to access this care renders civil judgments that arise from a ban on gender-affirming care penal.[436]

For example, restrictive states may worry that increased demand for gender-affirming care for minors is induced by "gender ideology" and the availability of out-of-state services, rather than being a natural consequence of an innate mismatch between a minor's biological sex and their gender identity.[437] This increase would be measured at the population level, rather than at the individual level.[438] While Texas may be able to identify specific patients who have sought and received such care, it cannot identify which specific patients need to be protected because they may seek such care in the future. Nor can it pinpoint which of those patients would not have sought treatment but for the availability of it in another state. This is the sense in which the

434. *Id.*

435. Louisiana v. Texas, 176 U.S. 1, 19 (1900).

436. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 599 (1982).

437. Proponents of restrictions on gender-affirming care sometimes point to disproportionate increases in gender dysphoria and demand for gender-affirming care among minors who were assigned female at birth to support the claim that the desire to obtain gender-affirming care is induced by social factors, rather than being innate. Although this hypothesis, referred to as "rapid-onset gender dysphoria," has been refuted by more rigorous studies, it has nonetheless influenced debates over restrictions on gender-affirming care. *See* Jack L. Turban et al., *Sex Assigned at Birth Ratio Among Transgender and Gender Diverse Adolescents in the United States*, 150 PEDIATRICS 49, 50 (2022) (discussing reliance on the rapid-onset hypothesis among proponents of restrictions on gender-affirming care, critiquing the methodology of the study these proponents have relied on to support the rapid-onset hypothesis, and presenting findings of a study that counters it). But even when taking this worldview at face value, it is impossible to determine that any given patient would not have been one who experienced gender dysphoria under the conditions that prevailed in the past.

438. *See, e.g.*, Jody L. Herman & Andrew R. Flores, *How Many Adults and Youth Identify as Transgender in the United States?*, THE WILLIAMS INST. (2025), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Aug-2025.pdf [https://perma.cc/FU68-M37X] (measuring the prevalence of transgender self-identification among adults and youth over age thirteen in the United States by using statistical methods to generalize population-level estimates from surveys that rely on sampling).

"victims" of care being offered across state lines are "indefinite,"[439] and "contingent"[440] and therefore not individually identifiable or capable of vindicating their own interests as private parties.[441] A restrictive state might rely on its guardianship parens patriae power to pursue a lawsuit for a private remedy on behalf of a particular and identifiable minor who lacks legal capacity to choose for themselves. But this would require the state to invalidate the rights of the minor's current parents or guardians and appoint a new guardian to file suit on the minor's behalf.[442]

The fact that a health care ban might be enforced via a civil suit brought by a private plaintiff under a bounty law, rather than by a governmental plaintiff as in *Texas v. Carpenter*, would not defeat its penal nature.[443] In *Huntington*, the Supreme Court noted that "a *qui tam* action to be brought by any … person [other than the victim] for threefold the amount [of what the victim lost], has been held to be remedial as to the loser, though penal as regards the suit by a common informer."[444] Thus, although a qui tam or bounty provision may be a legitimate mechanism for protecting the public at large, funneling the reward damages to a "common informer" renders the resulting judgment penal and limits its extraterritorial reach. If the purpose of a qui tam or bounty provision is to compensate for the inadequacy of alternative enforcement mechanisms that rely on government

439. Brody, *supra* note 251, at 938.

440. United States v. Union Pac. R.R. Co., 98 U.S. 569, 596 (1878).

441. Beatty v. Kurtz, 27 U.S. 566, 584 (1829).

442. *See, e.g.*, TEX. EST. CODE ANN. § 1052.051 (West 2025) (describing the process for a guardianship proceeding).

443. McKusick, *supra* note 105, at 664; *see also* Guha Krishnamurthi, *Are S.B. 8's Fines Criminal?*, 101 TEX. L. REV. ONLINE 141, 144, 149 (2023), https://texaslawreview.org/are-s-b-8s-fines-criminal/ [https://perma.cc/Z46Z-JMDX] (arguing that although S.B. 8 "purports to be a 'civil' regime, on the reasoning that it allows a purely private right of action," it "isn't compensatory to the bounty hunters," and "the intent [of the law] is not compensatory, but punitive").

444. Huntington v. Attrill, 146 U.S. 657, 667 (1892) (first citing Bones v. Booth, 2 W. Bl. 1226 (Gr. Brit. 1788); then citing Brandon v. Pate, 2 H. Bl. 308; then citing Grace v. McElroy, 83 Mass. (1 Allen) 563 (Mass. 1861); then citing Read v. Stewart, 129 Mass. 407, 410 (Mass. 1880); and then citing Cole v. Groves, 134 Mass. 471 (Mass. 1883)).

action,[445] that only strengthens my argument that these are actions taken in the name of protecting the public at large.

Similar to civil actions that enforce state health care bans, civil actions for violations of state professional licensing laws are penal in nature. To impose civil penalties for a licensing violation does not require any showing that an identifiable patient has experienced actual harm.[446] Associated penalties are paid to the state, not to a private party.[447] Indeed, some state courts adjudicating negligence suits by private parties against doctors have held that the failure to maintain a license required by state law is not an adequate basis for satisfying the breach element under the doctrine of negligence per se. These courts have expressly determined that the purpose of state licensing laws is to protect the public at large from substandard care, not to establish a standard of care nor to protect any particular patient from care that satisfies professional standards.[448] Because licensing laws protect the public as a whole, rather than providing a private remedy for injured patients, the addition of a licensing violation

445. Qui tam enforcement schemes are often touted as an important tool given the lack of resources for governmental enforcement. *See, e.g.*, David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1916 n. 7 (2014) (providing citations to legislative history, judicial opinions, and academic articles lauding qui tam enforcement schemes). In the years before *Dobbs* eliminated constitutional protection for the right to choose abortion, the key advantage of bounty-based private enforcement over government enforcement was that it helped a restrictive state evade pre-enforcement judicial review. James E. Pfander, *Judicial Review of Unconventional Enforcement Regimes*, 102 TEX. L. REV. 769, 770 (2024) ("[B]y denying Texas state officials any enforcement authority, S.B. 8 denied plaintiffs a state official to name as a nominal defendant in litigation to block what was then an unconstitutional law.").

446. *See, e.g.*, TEX. OCC. CODE ANN. § 171.002(6) (West 2025) ("'License' means authorization by a state for a physician to engage in the practice of medicine, which would be unlawful without the authorization."); Final Judgment and Order Granting Permanent Injunction, *supra* note 84 (stating that Dr. Carpenter violated Texas' state law by "practicing medicine without a license and registration in the State of Texas").

447. *See supra* note 430.

448. *See, e.g.*, Lingle v. Dion, 776 So. 2d 1073, 1077 (Fla. Dist. Ct. App. 2001) (finding that a violation of a medical licensure law "did not constitute negligence per se" because "[a] license revocation or suspension serves the purpose of protecting the public from unfit physicians rather than punishing the individual doctor" or creating a cause of action for patients "who may have been injured" as a result of the violation); Moreland v. Oak Creek OB/GYN, Inc., 970 N.E.2d 455, 461 (Ohio Ct. App. 2005) (finding that violation of a nursing licensure law did not constitute negligence per se because it "only 'makes provision to secure the safety or welfare of the public'" (citation omitted)).

to Texas's civil action against Dr. Carpenter does not obligate New York courts to give the Texas judgment full faith and credit.

Common law claims for public nuisance should also easily satisfy the penal judgment test. The same characteristics that might make a public nuisance claim viable (under the law of some states, but not under federal law)[449] would render such a suit penal within the meaning of the full faith and credit exception.[450] This is probably true even if such a suit were to be brought by a private party.[451]

Civil actions for public nuisance—whether brought by a governmental or a private plaintiff—are inherently designed to punish "a wrong to the public" rather than to remedy "a wrong to the individual."[452] While a plaintiff bringing such an action may aver that individual parties have been affected by the defendant's actions, these claims do not require a showing of actual harm to any identifiable party. Rather, these actions arise out of laws defining "a breach and violation of public rights and duties, which affect the whole community, considered as a community,"[453] and are intended to address threats to the populace of a state "in general"[454] or "at large,"[455] as recognized by the Supreme Court's leading penal-judgment-rule and parens patriae precedents, respectively.

449. *See supra* Part III.A.1.

450. *Cf.* Merrill, *Public Nuisance*, *supra* note 137, at 12 (arguing that the public nuisance cause of action is "grounded in a type of criminal liability . . . [which] is understood to be a public action, initiated by public authorities, designed to condemn conduct that has been identified as violating basic community norms").

451. Although private plaintiffs must show they have experienced a particularized injury apart from that experienced by the general public, Merrill has argued persuasively that this requirement should be understood as a matter of standing that does not negate the conceptual grounding of the claim in criminal law. *Id.* at 14. Alternatively, courts might analyze public nuisance judgments in favor of private plaintiffs as more analogous to wrongful death or negligence claims (which are discussed below) than to public nuisance judgments obtained by public plaintiffs, which would be penal based on the connections I have drawn above.

452. Huntington v. Attrill, 146 U.S. 657, 668 (1892).

453. *Id.*

454. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982).

455. Louisiana v. Texas, 176 U.S. 1, 19 (1900).

2. Wrongful Death and Professional Malpractice Claims

The most difficult scenario for shield states will be default judgments on wrongful death, negligence, or medical malpractice claims brought by or on behalf of individuals (including fetuses recognized as persons under state tort law or patients who regret their gender transition) injured by a provider of abortion or gender-affirming care. This kind of cross-border dispute between private parties would be distinct from the disputes involving states as litigants that are the primary focus of this Article, and parens patriae doctrine might have less to add to this analysis, but I will offer some thoughts about how the penal judgment rule might operate in such a case.

A patient (or a person suing on behalf of a patient) who brings a negligence claim alleging that an out-of-state healthcare provider injured them by providing services that fell below the standard of care could argue that such a claim is purely remedial and must be recognized by the provider's home state. The fact that liability for injurious conduct serves both to deter future injury and to provide compensation for injuries is probably not enough, by itself, to render a judgment punitive within the meaning of the Supreme Court's full faith and credit precedents.[456] Even the addition of punitive damages to an award granted to an injured patient would not necessarily render the judgment punitive under the penal judgment rule.[457] By itself, the fact that restrictions on abortion or gender-affirming care are contrary to the tribunal state's public policy does not necessarily negate the tribunal state's obligation to recognize such a judgment.[458]

Under the penal judgment rule, civil judgments that are remedial in nature are entitled to recognition while penal judgments that punish on behalf of the public are not. If there were an action by a provider of cross-sex hormones against a Texas patient for nonpayment, the Supreme Court's full faith and credit precedents would require Texas courts to enforce a New York judgment on that debt, even if the transaction was illegal under Texas law. This was how the Supreme Court resolved a conflict between Mississippi and Missouri courts over a debt

456. *Huntington*, 146 U.S. at 668.

457. *Id.* (doubling the award to an injured person is remedial, not penal).

458. *See supra* notes 112–15 and accompanying text (discussing limitations of the public policy exception).

arising from a gambling transaction, while rejecting Mississippi's argument that enforcement was contrary to its public policy.[459] But if Mississippi courts had issued a judgment awarding statutory damages to the loser of the illegal bet on the grounds that the winner had engaged in activity that is banned in Mississippi because gambling degrades public morality, the Missouri courts would not have been bound to enforce it if they determined it was penal in nature.

To determine whether enforcement of a wrongful death or malpractice judgment "would, either directly or indirectly, involve the execution of the penal law of another state,"[460] it will be essential for the shield state and federal courts to parse the role that the restrictive state's prohibition on abortion or gender-affirming care played in the judgement of its state courts. Although "the full faith and credit clause of the Constitution precludes any inquiry into the *merits* of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based,"[461] tribunal courts are empowered "to examine the cause of action merged in the judgment and, if it was based on a penalty, to refuse enforcement."[462] A shield state could determine that reliance on a health care ban—which, as I have argued above, is penal in nature because it is intended to protect the public's morals as well as the public rights to health and safety of the current and future fetal populace or, in the context of gender-affirming care bans, the populace of minors who might seek such care in the future—taints what would otherwise be a private remedy.

Determining what the professional standard of care required of the defendant under the circumstances is a key question in any malpractice case, but it is particularly fraught in a situation where a state has imposed a ban that is at odds with prevailing professional practices.[463] Some states, including shield-state Nevada, adopt a national standard of care

459. See *supra* note 115 and accompanying text for a discussion of Fauntleroy v. Lum, 210 U.S. 230, 238 (1908); *see also supra* Part I.C.1.a.

460. *Huntington*, 146 U.S. at 680–81 (agreeing with the reasoning of a Canadian court's decision in the same case).

461. Milliken v. Meyer, 311 U.S. 457, 462 (1940) (emphasis added).

462. JACKSON, *supra* note 42, at 1 (1945) (citing Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 291 (1888), *overruled as to its holding that tax laws are penal by* Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268 (1935)).

463. *See* Lindgren & Oberman, *supra* note 421 (manuscript at 23–25).

comparing a defendant's conduct to professional standards that prevail at the national—rather than local—level.[464] Other states, including New York and Texas, place "a geographical dimension on the professional standard of care in medicine."[465] For example, in New York, the standard of care for a defendant practicing gynecology "is measured by 'the degree of knowledge and ability of the average Board certified obstetrician/gynecologist in good standing practicing that specialty in the State of New York.'"[466] Texas has adopted a modified version of the locality rule, which holds defendant physicians to the same standard as other physicians practicing in the "same or similar communities" as the defendant.[467] Presumably, a physician in good standing in Texas now complies with the state's restrictions on abortion and gender-affirming care. And Texas might argue that a community in another state cannot be "similar" to one in Texas unless that other state has adopted a similar ban. But these restrictions are based on "public justice"[468]—that is, on the moral, political, and ideological judgments of the state based on what it perceives as the protection of its populace "at large"[469]—not on standards that have emerged from the profession itself.

Conflict of laws principles will determine which state's law a restrictive state's court applies to determine the standard of care in adjudicating a wrongful death or medical malpractice claim—subject to the principle that the court may rely on its state's public policy in determining which substantive body of law to apply.[470] Thus, Texas courts might properly apply the

464. NEV. REV. STAT. § 41A.015 (2025) (defining the standard of care as "the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care"); Marc D. Ginsberg, *The Locality Rule Lives! Why? Using Modern Medicine to Eradicate an Unhealthy Law*, 61 DRAKE L. REV. 321, 370 n.334 (2013) (explaining that Nevada has "a national standard in which the circumstances of the physician are taken into consideration").

465. *Id.* at 323.

466. Spensieri v. Lasky, 723 N.E.2d 544, 547 (N.Y. 1999); *see also* Nestorowich v. Ricotta, 767 N.E.2d 125, 128 (N.Y. 2002) (describing the common law locality rule in New York).

467. Hall v. Huff, 957 S.W.2d 90, 100 (Tex. App. 1997).

468. Huntington v. Attrill, 146 U.S. 657, 673–74 (1892).

469. Louisiana v. Texas, 176 U.S. 1, 19 (1900).

470. *See* Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998) ("A court may be guided by the forum State's 'public policy' in determining the law applicable to a controversy." (citing Nevada v. Hall, 440 U.S. 410, 421–424 (1979))); *see also Hall*, 440 U.S. at 421–24 (stating that Supreme Court precedent "clearly

Texas standard of care to a claim allegedly involving malpractice that harmed a Texas resident while she was located within the state. But conflict of laws principles do not determine whether a shield state like New York, when called on to enforce that judgment, may decline to do so because it deems the judgment to be penal "in its essential character and effect."[471]

The standard of care question raises a broader question about the penal judgment rule. *Who decides* whether a judgment is based on a law that punishes on behalf of the public at large? Deference to the state whose courts issued the judgment would be unworkable because, in the context of a dispute over the enforcing state's full faith and credit obligations, the rendering state's incentive is to disclaim any purpose involving punishment on behalf of the public. Perhaps for this reason, the Supreme Court has framed the test for the penal judgment rule in terms that appear to grant some deference to the court in which the plaintiff seeks domestication, rather than to the state that rendered the judgment:

> The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears *to the tribunal which is called upon to enforce it* to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person.[472]

When a person is injured by care that falls below generally applicable standards developed for the protection of the patient's

establishes that the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy" (citing Pac. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 502 (1939))), *overruled by* Franchise Tax Bd. of Cal. v. Hyatt, 587 U.S. 230, 236 (2019) (holding that "States retain their sovereign immunity from private suits brought in the courts of other States"); *Pac. Ins. Co.*, 306 U.S. at 502 ("[T]he full faith and credit clause does not require one state to substitute for its own statute . . . the conflicting statute of another state . . . .").

471. *Huntington*, 146 U.S. at 683. Whether the Full Faith and Credit Clause would permit a shield state's court to decline to enforce such a judgment on the grounds that the restrictive state's court should not have applied its own state's substantive law to the dispute under conflicts of law principles is beyond the scope of this Article.

472. *Id.* (emphasis added). The *Huntington* Court also noted the Supreme Court's authority to review a tribunal state court's determination de novo: "if the State court declines to give full faith and credit to another state, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith and credit have been given to that judgment, must decide for itself the nature of the original liability." *Id.* at 684.

health and safety, the resulting judgment is non-penal and should be honored by any forum where it may be effectively enforced. This should be true for patients injured in the course of abortion or gender-affirming care, just as it is true for patients injured by health care services that are not highly politicized. But if the judgment would not have been rendered but for the ban, then a tribunal state's courts might fairly classify it as penal in nature. When a patient is injured by care that conforms to professional standards, but which has nonetheless been deemed negligence or an intentional wrong by a restrictive state's courts based solely on a ban adopted for the protection of the public at large, then it should be understood to be a penal judgment exempt from full faith and credit requirements. This should be the case even if the judgment is on a civil cause of action and is awarded to a private party.

C. ANTICOMMANDEERING AND ANTICOERCION: FEDERAL INTERVENTIONS TO DEMAND COOPERATION OR PUNISH JURISDICTIONS FOR SHIELDING CARE PROVIDERS

Could a shield state argue that it is not only permitted, but *entitled* to decline to enforce restrictive state judgments that are penal? Even if the Full Faith and Credit Clause, by itself, does not operate as a limit on federal power to direct states to recognize sister state judgments beyond what the Constitution requires,[473] the anticommandeering principle might. If federal intervention to require more expansive recognition of judgments against providers of abortion and gender-affirming care takes the form of a condition attached to federal funds, courts will consider the anticoercion principle in coordination with the anticommandeering principle. Assuming this argument is accepted, parens patriae precedents might offer insights relevant to multiple open questions of law raised by federal intervention in interstate disputes over abortion and gender-affirming care.

Assuming, for the purposes of this argument, that the Effects Clause does not empower Congress to require states to recognize the penal judgments of sister states, shield states might argue that the anticoercion and anticommandeering principles protect the role of a state government as the parens patriae protector of its populace within its own borders. On this theory, federal full faith and credit requirements for state judgments

473. *See supra* Part I.C.2.a.

enforcing bans on abortion and gender-affirming care would impermissibly enable the extraterritorial reach of states the federal government favors at the expense of those it disfavors. The parens patriae purposes asserted on both sides of interstate conflicts over reproductive health and gender-affirming care may *weaken* a state's enforcement efforts beyond its borders (as I argue above), but parens patriae purposes may *strengthen* a state's efforts to resist federal interference in interstate disputes over how each state sees fit to protect those within its borders.

1. Direct Commands to Expand Full Faith and Credit

Parens-patriae-as-horizontal-federalism is a particularly apt tool for parsing the role-based, relational approach to federalism the Supreme Court adopted in *Printz* and *Reno*.[474] In disputes attempting to parse federal power to tax state operations and regulate state employment contracts, the Court has repeatedly adopted and then cast aside tests that carve out particular substantive domains, "areas of traditional governmental functions,"[475] or "separate spheres"[476] of federal and state authority. It has deemed these tests "unworkable"[477] in subsequent disputes. Instead, the focus is now on distinctions between the different *roles* states play in relation to their populace, their property, the federal government, and—as I argue—their sister states. The federal government is permitted to regulate states in their proprietary roles, but prohibited from regulating states *in their sovereign role* by commandeering them to regulate their residents according to federal policy.[478] As the charity supervision and standing cases show, the state's sovereign capacity to regulate within its borders, and its quasi-sovereign capacity to

474. *See supra* Part I.B.2.a.

475. Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). *National League of Cities* cited "fire prevention, police protection, sanitation, public health, and parks and recreation" as examples of "activities [that] are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *Id.* at 851.

476. *Id.* (citing THE FEDERALIST NO. 45, at 313 (James Madison) (J. Cooke ed., 1961)).

477. *Id.* at 531.

478. *See* Reno v. Condon, 528 U.S. 141, 151 (2000) (upholding a federal law on the ground that it "does not require the States in their sovereign capacity to regulate their own citizens . . . does not require the [State] Legislature to enact any laws or regulations, and [ ] does not . . . require state officials to assist in the enforcement of federal statutes regulating private individuals").

protect its populace, are both related to each other and distinct from the state's proprietary role.

As an illustration, consider a federal law preempting New York's shield law and requiring New York to cooperate with Texas's enforcement of Texas's abortion restrictions. New York could challenge this federal law on the grounds that it unconstitutionally commandeers the executive and judicial officers of New York in their sovereign and quasi-sovereign roles. With respect to the state's sovereign role, New York could rely on parens patriae precedents to argue that it's shield law is an expression of its sovereign powers to demand "recognition from other sovereigns,"[479] and to "exercise . . . sovereign power over individuals and entities within [its] jurisdiction,"[480] including in "the power to create and enforce a legal code, both civil and criminal."[481] With respect to its quasi-sovereign role, New York could rely on parens patriae precedents to argue that its shield law is an expression of the state's quasi-sovereign responsibility as protector of the health of the populace within its borders "in general"[482] and "at large,"[483] because it ensures that reproductive, sexual, and mental health care services are available to unidentifiable residents who may be unable to access these services in the future if in-state providers are punished by restrictive states. In addition, New York could rely on *Snapp*'s recognition of its quasi-sovereign "interest in not being discriminatorily denied its rightful status within the federal system,"[484] via a federal law that subordinates New York's executive and judicial offers to the commands of a sister state.

Federal authorities might point to dicta in *Printz* to argue that an executive order, regulation, or legislation requiring expanded recognition of judgments punishing abortion and gender-affirming care is constitutional in relation to the state's judiciary.[485] But as discussed above, the examples listed in *Printz* (including the Fugitive Slave Acts) can be distinguished on the grounds that they relate to an area traditionally reserved for

479. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982).
480. *Id.*
481. *Id.*
482. *Id.* at 607.
483. Louisiana v. Texas, 176 U.S. 1, 19 (1900).
484. *Snapp*, 458 U.S. at 607.
485. Printz v. United States, 521 U.S. 898, 907 (1997).

federal control. In the case of the Fugitive Slave Acts, these laws were authorized by the more specific and now-repealed Fugitive Slave Clause of the Constitution, rather than depending on the Full Faith and Credit Clause or background federalism principles.

Parens patriae doctrine might provide some additional support for rejecting *Printz*'s suggestion that state judicial officers may not be protected from federal commandeering. As the juvenile court and charity supervision cases show, courts perform the parens patriae role in some states and for some purposes.[486] The judicial branch is a critical part of the sovereign function of government.[487] Shield laws themselves show how states exercise their parens patriae powers, in combination with their police powers, through directives to their courts. New York and other shield states secure the benefits of shielding health care providers for their populace at large by directing their courts not to cooperate with restrictive states.[488] By the same token, federal law directing a shield state's courts to cooperate with restrictive states would provide a means for the federal government to "regulat[e] private actors indirectly by commandeering the regulatory apparatus of the states,"[489] rather than adopting, administering, and enforcing restrictions on its own or with the voluntary cooperation of states that agree with its approach.

There are precedents for Congress and the federal courts to expand the full faith and credit obligations of state governments. But the federal courts' reliance on the Full Faith and Credit Clause to require states that oppose adoption of children by same-sex couples to recognize adoption orders and decrees of sister states[490] did not implicate the penal judgment rule. Nor did the Violence Against Women Act's mandated cross-border recognition of protection orders obtained by individuals who face

486. *See supra* Parts II.1.a–b.

487. Calder v. Bull, 3 U.S. 386, 387 (1798) (emphasis added) ("The establishing courts of justice, the appointment of Judges, and the making regulations for the administration of justice, *within each State*, according to its laws, *on all subjects not entrusted to the Federal Government*, appears to me to be the *peculiar* and *exclusive* province, and duty of the *State Legislatures* . . . .").

488. *See supra* note 19.

489. Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1641 (2006).

490. *Cf. supra* note 16.

credible threats of violence.[491] These federal interventions did not require states to recognize penal judgments. These public acts designated for mandatory recognition provide benefits for the protection of specific, identifiable individuals rather than punishing on behalf of the public at large. These precedents do not implicate a state's parens patriae role in the way that a federal law mandating full faith and credit with respect to sister state restrictions on abortion and gender-affirming care would.

2. Spending Conditions Requiring Expansion of Full Faith and Credit

Practically speaking, the Court has offered spending conditions as an end-run around the anticommandeering doctrine. Can a spending condition be unconstitutional even if it does not put a large proportion of a state's budget at risk? What if the condition fundamentally attacks a state's sovereign and quasi-sovereign interests, not just by requiring it to regulate or enforce a federal law, but by requiring the state to give up its capacity to assert itself in relation to its sister states who are supposed to be coequal sovereigns?

The condition upheld in *Dole*—a federal requirement to raise the drinking age or lose a portion of the state's federal funding for highways—indirectly commandeered South Dakota in its role as sovereign,[492] but not in its quasi-sovereign role as parens patriae. A shield state attempting to distinguish *Dole* might argue that it was the *federal* drinking age requirement, rather than the state's *laxer* approach, that provided health and safety benefits that are impossible to trace to specific individuals. As intriguing as this approach may be, I believe it would be a step too far to argue that spending conditions that express the federal government's role as parens patriae with respect to the populace are valid but spending conditions that interfere with the state's parens patriae protections are invalid. This kind of one-way ratchet for federal spending conditions that protect health, but not those that harm health, might be appealing for the outcomes it would produce. But it exceeds the bounds of what parens-patriae-as-horizontal-federalism can offer and wades too far into

491. Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 829 (2004).

492. South Dakota v. Dole, 483 U.S. 203, 211 (1987) (conditioning five percent of highway funds on states raising the drinking age to twenty-one).

substantive judgments about what is best for health and safety, rather than deferring to state determinations.

The most likely end result is that if the federal government wishes to incentivize states to drop their shields and cooperate with sister states that have heavily restricted abortion and gender-affirming care, then it can only put so much of the state's budget at stake. The state must have a true choice about whether to bargain away its sovereign and quasi-sovereign power in relation to its sister states.[493]

3. Anticommandeering and Anticoercion Beyond Full Faith and Credit

This Article has focused on open legal questions that would be raised by federal intervention in interstate disputes: scenarios where the federal government, in addition to or in place of direct regulation to restrict abortion or gender-affirming care, intervenes to require shield states to cooperate with restrictive states.

An important limit on parens patriae as a doctrine of federalism is that, under existing Supreme Court precedents, it does not equip states with a weapon against the federal government's direct intervention to protect the populace. Commentators may offer arguments challenging the rationale for the Court's holding that states do not have standing in their parens patriae capacity to invalidate a federal law affecting their populace.[494] But that holding currently stands. The Court has reasoned that the federal government, not the states, stands as parens patriae toward the national populace with respect to its relations with the federal government.[495] Thus, the arguments I have advanced in this Article would not support challenges to federal interventions that directly prohibit abortion or gender-affirming care—as opposed to interventions that commandeer or coerce shield states to cooperate with restrictive states.

493. *Compare id.* at 211–12 ("Congress has offered relatively mild encouragement to the States . . . . But the enactment . . . remains the prerogative of the States not merely in theory but in fact."), *with* Nat'l Fed. Ind. Bus. v. Sebelius, 567 U.S. 519, 581 (2012) ("In this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement' it is a gun to the head." (quoting *Dole*, 483 U.S. at 211)).

494. F. Andrew Hessick, *Quasi-Sovereign Standing*, 94 NOTRE DAME L. REV. 1927, 1929 (2019).

495. Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923).

The narrow scope of my argument might also be a strength because it preempts some of the most common arguments against interpreting the Tenth Amendment to impose hefty restraints on federal regulation. As currently understood by the Supreme Court, parens patriae doctrine would not enable states to nullify federal laws, such as those that provide a floor of protection for health care, environmental regulation, or civil rights. Perhaps more importantly, the doctrine would not arrogate power to the federal judiciary to the extent that broader forms of federalism restraints might. "[E]nforcing federalism-based restrictions on national actions," Richard Briffault warns, "could lead the courts into intensely political judgments of the conflicting norms in particular cases" because "many of the values of federalism have comparable countervalues that could be advanced in defense of national legislation."[496] Briffault has further argued that "normative federalism . . . [creates] potential for the simple substitution of judicial preferences with respect to the weighing and balancing of . . . pragmatic and normative concerns for the determinations of elected officials."[497] But a rule limiting federal power to require states to give full faith and credit to penal judgments of sister states—thus requiring them to acquiesce to the extraterritorial overreach of a supposedly coequal state—does not raise the same concerns. In this context, the lower federal courts could follow Supreme Court dicta by deferring to the reasonable judgment of a tribunal state's courts, particularly when those courts are following the directive of a shield law adopted by the state's legislature.

CONCLUSION

Consistent with a broader trend in progressive federalism toward "de-emphasizing . . . separateness from the federal government,"[498] my conception of parens patriae as a federalism doctrine offers a vision of sovereignty without separateness from the *federal* government. It does so by instead emphasizing the separateness *between states* and nondiscrimination by the federal government *among states* as coequal sovereigns. In health

496. Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1349 (1994).

497. *Id.* at 1350.

498. Villazor & Gulasekaram, *supra* note 32, at 1273 (discussing Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010)).

and social care policy, as in immigration policy, "it is clear that sovereignty can be a double-edged sword."[499] But the vision of state sovereignty I offer here provides relatively modest and carefully tailored protection for states.

This Article has argued that the Court's parens patriae precedents could be used to support a more administrable test for distinguishing protection of public rights from protection of private ones, and thus for more clearly delineating the sovereign state functions that are protected by constitutional federalism. In precedents relating to the full faith and credit obligations of states and interstate public nuisance claims, the Court has delineated a particular function for states as protectors of "public rights."[500] In its anticommandeering precedents, the Court has singled out the states' "sovereign capacity to regulate their own citizens" as a particularly significant function under the federalist structure the Constitution creates.[501] Parens patriae precedents provide insight into what makes some harms distinctively public and into the sovereign and quasi-sovereign functions states perform, including in their conflicts with each other over the protection of public rights within and across state borders. States exercise sovereign police power whether they protect private rights or public ones. But under the antiextraterritoriality principle embodied in the Court's full faith and credit precedents,[502] a state's power to project its public-protection efforts across state lines may be more limited in relation to the coequal sovereignty of sister states than its power to protect private

499. *Id.*

500. *See* Huntington v. Attrill, 146 U.S. 657, 668 (1892) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1768) in the context of delineating penal judgments that are not entitled to full faith and credit); New York v. New Jersey, 256 U.S. 296, 301–02 (1921) (describing the plaintiff state as "the proper party to represent and defend such rights" in reference to allegations that the defendant state's conduct "gravely menaced" the "health, comfort and prosperity of the people of the State and the value of their property," apparently referring to common-law public rights to public health, comfort, and wellbeing widely recognized under state public nuisance law); Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 418 (2011) ("[T]he plaintiffs asserted . . . 'substantial and unreasonable interference with public rights'" in relation to harms to property, infrastructure, and health caused by climate change).

501. *E.g.*, Reno v. Condon, 528 U.S. 141, 151 (2000) (upholding a federal law because it "does not require the States in their sovereign capacity to regulate their own citizens").

502. *See supra* Part I.B.1.a.

rights, which its sister states may be required to recognize. Conversely, reading the anticommandeering principle in light of the antiextraterritoriality principle[503] reveals that federal power may be stronger when it requires states to recognize each other's efforts to secure private rights than when it requires states to recognize each other's efforts to protect public rights within their borders. On this reading, the Full Faith and Credit Clause might be understood as striking a compromise by creating a more unified system for the protection of private rights, while allowing for significant fragmentation with respect to the protection of public rights.[504] Borrowing from parens patriae precedents to add meaning to the public-private rights distinction[505] could make this approach more administrable for courts and thus more appealing as an option for the Supreme Court, assuming a majority of the Justices are inclined to continue to leave abortion and gender-affirming care for minors to the states, rather than abrogating the authority of shield states by placing them in subservience to restrictive states.

Whether by design or by default, the structural limits the Framers imposed on federal power created a constitutionally significant role for states as the defenders of distinctively public interests in the health and wellbeing of their populace as a whole, which are not amenable to vindication by private parties representing their individual interests. We each give up some degree of personal liberty so that we may achieve collectively through the state what we cannot achieve individually.[506] Similar to the beneficiaries of charitable trusts, the members of the public whose interests are at stake in the Supreme Court's parens

503. *See supra* Part I.B.2.a.

504. Although criminal enforcement is beyond the scope of this Article, it is worth noting that the Extradition Clause allows fragmentation with respect to criminal laws, which protect public rights. The Extradition Clause has been interpreted narrowly to apply to fugitives who cross state lines after being corporeally—not merely constructively—present in the state whose law they are alleged to have violated. *See* Alejandra L. Caraballo et al., *Extradition in Post-*Roe *America*, 26 CUNY L. REV. 1, 28–30 (2023). Thus, Louisiana officials have limited options available to pursue the criminal charges they have filed against Dr. Carpenter. Caleb Manson, *Post-Dobbs Litigation to Test Federal Extradition Act Enforcement Powers*, DAILY J. (Apr. 4, 2025), https://www.dailyjournal.com/article/384750-post-dobbs-litigation-to-test-federal-extradition-act-enforcement-powers [https://perma.cc/P2RR-455J].

505. *See supra* Part III.

506. WILEY & GOSTIN, *supra* note 50, at 3.

patriae standing cases are "indefinite,"[507] and "contingent"[508] and therefore not individually identifiable or capable of vindicating their own interests as private parties.[509] Asserting and defending these distinctively public rights is one of the legitimating purposes of state sovereignty. The federal government may also have parens patriae responsibility for the health and wellbeing of the national populace, but it lacks plenary police power to exercise that responsibility as fully as states do. Thus, each state's authority to exercise its parens patriae responsibility must be constitutionally protected, at least in relation to its sister states.

As coequal sovereigns in relation to each other, states are protectors of the populace within their borders but are prohibited from applying their protective measures extraterritorially. Parens patriae doctrine equips states with an important shield for the protection of the public at large within their borders, not an extraterritorial sword for projecting their public-protection efforts across state lines. As parens patriae, states may sue other states or out-of-state defendants in federal court to protect the populace within their borders under *federal* law, but in the context of reproductive health and gender-affirming care, that would require reform to create a new federal floor of restrictions. The federal government may regulate the populace of the nation directly by acting within its enumerated powers, but it may not regulate states in their sovereign or quasi-sovereign roles by requiring them to implement sister state judgments based on laws that punish on behalf of the public at large. The Framers understood that achieving this end with respect to chattel slavery required a specific and express provision in the Constitution requiring free states to cooperate with enforcement actions by enslaver states.[510] The federal government may not have a legitimate basis for achieving a similar outcome for abortion or gender-affirming care.

507. Brody, *supra* note 251, at 938.

508. United States v. Union Pac. R.R. Co., 98 U.S. 569, 596 (1878).

509. Beatty v. Kurtz, 27 U.S. 566, 578 (1829).

510. Despite the Fugitive Slave Clause and statutes implementing it, abolitionist states resisted cooperation with enslaver states. For example, Vermont adopted a shield law that functionally nullified the Fugitive Slave Act of 1850. Horace K. Houston Jr., *Another Nullification Crisis: Vermont's 1850 Habeas Corpus Law*, 77 NEW ENG. Q. 252, 261 (2004). For a discussion of Vermont's statute as a model for reproductive health and gender-affirming care shield laws, see Caraballo et al., *supra* note 504, at 53–54.