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Legal Sidebar

Congressional Authority to Regulate Abortion

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On June 24, 2022, the U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, which overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* and held that there is no constitutional right to abortion. (For more detail on the *Dobbs* decision and its impact, see this CRS Legal Sidebar.) The *Dobbs* majority emphasized that its ruling would "return the issue of abortion to the people's elected representatives," and that those elected officials—not the courts—would "decid[e] how abortion should be regulated." Although existing federal laws prohibit certain abortion procedures and protect individuals obtaining reproductive health services from intimidation, most abortion-related matters are regulated at the state level. After *Dobbs*, such state abortion regulations will generally be sustained by federal courts so long as they have a rational basis. (For more information on current state abortion restrictions, see this CRS Legal Sidebar.)

Dobbs has generated heightened interest in federal abortion legislation, and raises important issues about the scope of congressional power to regulate abortion under the Constitution. This Sidebar begins with an overview of Congress's constitutional authority to enact legislation and some limits on those powers. It then discusses in more detail three enumerated powers potentially relevant to legislative efforts to expand or restrict access to abortion—the Commerce Clause, the Spending Clause, and section 5 of the Fourteenth Amendment—and the constitutional limits of those powers.

Limits on Congressional Authority

The Constitution establishes a "system of dual sovereignty between the States and the Federal Government." States generally have broad authority to enact legislation on matters related to the health and general welfare of its citizens. In this vein, the Supreme Court has recognized that there are certain subjects, often of local concern, where states "historically have been sovereign," such as issues related to the family, crime, and education. The states' broad authority is subject only to limitations imposed by the Supremacy Clause, which makes federal law "the supreme Law of the land" and prohibits states from contravening the Constitution or lawful congressional enactments.

In contrast, Congress may only enact legislation under a specific power enumerated in the Constitution, and cannot act beyond the scope of its powers to intrude impermissibly on state sovereignty. In addition, under the anti-commandeering doctrine, Congress may not pass laws requiring states or localities to adopt or enforce federal policies. While Congress cannot force the states to execute federal policies, under the Supremacy Clause it can preempt state laws and thus prevent the states from undermining federal policy.

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Should Congress choose to legislate on abortion-related matters, its action must be appropriate and plainly adapted to the exercise of an enumerated power and in accordance with the foregoing federalism limitations, as well as other constitutional constraints on the exercise of its legislative powers. While several constitutional authorities may support action on abortion-related matters in more specific circumstances—for example, regulation of abortion in federal enclaves such as the District of Columbia—the Commerce Clause, spending power, and section 5 of the Fourteenth Amendment are three potentially relevant enumerated powers that Congress could rely on in enacting more general federal legislation related to abortion.

Potential Sources of Constitutional Authority for Abortion-Related Legislation

Commerce Clause

The Commerce Clause, which grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," authorizes Congress to regulate a wide range of economic and social activities. Congress has invoked the Commerce Clause as its authority to enact legislation on subjects such as criminal law, civil rights, and the environment. In *United States v. Lopez*, the Court set forth the modern test for determining whether a federal statute is within Congress's Commerce Clause power. Under *Lopez*, the Commerce Clause allows Congress to regulate "three broad categories of activity." First, Congress may regulate the "channels of interstate commerce," which include means of transport such as the nation's highways, railroads, navigable waterways, or airspace, as well as the movement of goods flowing across state lines through such channels. Second, Congress may regulate "the instrumentalities of interstate commerce, or persons or things in interstate commerce." The "instrumentalities" refers to the vehicles used within interstate commerce such as airplanes, trucks, or trains, whereas the "persons or things" refer to the people or objects transported by the instrumentalities among the states. Third, and most broadly, Congress may regulate "activities that substantially affect interstate commerce." This category authorizes Congress to "regulate purely local activities" as long as they are "part of an economic 'class of activities' that have a substantial effect on interstate commerce," and it is the basis for a wide variety of federal legislation.

With respect to the third *Lopez* category, courts have looked to several factors to determine whether Congress has validly regulated an activity that "substantially affects" interstate commerce, including (1) whether the activity is economic in nature; (2) whether the statute contains an express jurisdictional element linking the regulated activity to interstate commerce; (3) whether there are express congressional findings regarding the regulated activity's effects on interstate commerce; and (4) the link between the regulated activity and interstate commerce. For example, *Lopez* struck down a law that prohibited the possession of a gun near a school zone, reasoning that the law regulated purely local, *non-economic* activities and lacked any jurisdictional element or congressional findings to link the conduct related to interstate commerce. Similarly, in *United States v. Morrison*, the Court struck down a provision of the Violence Against Women Act that created a federal remedy for victims of gender-motivated violence, despite congressional findings regarding the effect of this violence on interstate commerce. By contrast, the Court has generally upheld legislation it viewed as regulating intrastate *economic* activity—the "production, distribution, and consumption of commodities"—that substantially affects interstate commerce. In *Gonzalez v. Raich*, for example, the Court upheld the application of the federal Controlled Substances Act to the cultivation of marijuana for personal, intrastate medical use on the grounds that the "failure to regulate that class of activity would undercut the regulation of the interstate market" in marijuana. Most recently, in *National Federation of Independent Business (NFIB) v. Sebelius*, the Court held that Congress cannot invoke the Commerce Clause to compel individuals to engage in commercial

activity, concluding that the Commerce Clause did not empower Congress "to regulate individuals precisely because they are doing nothing."

Congress has historically used the Commerce Clause as authority to enact abortion-related legislation. For example, both the Freedom of Access to Clinic Entrances Act of 1994 (FACE Act) and the Partial-Birth Abortion Ban Act of 2003 (PBABA) make references to interstate commerce. The stated purpose of the FACE Act is to "protect and promote the public safety and health and activities affecting interstate commerce" by establishing remedies for conduct that interferes with persons seeking to obtain or provide reproductive health services. Lower courts have held that the FACE Act was a valid exercise of the Commerce Clause power to regulate activities that substantially affect interstate commerce (the third *Lopez* category). The Seventh Circuit (noting its agreement with the Eleventh Circuit and the Fourth Circuit) concluded that the provision of reproductive health services is a "commercial activity." The courts recognized that reproductive health clinics engage in interstate commerce by purchasing, using, and dispensing goods that have traveled in interstate commerce, owning and leasing office space, employing staff, and generating income. Under this line of reasoning, Congress could use its Commerce Clause power to prevent obstruction of access to reproductive health clinics to ensure that individuals are able to "engage in this interstate commercial activity." In the PBABA, Congress included a jurisdictional element to prohibit any physician "who, in or affecting interstate or foreign commerce," knowingly performs a partial-birth abortion. Although the PBABA was challenged in the Supreme Court as violating the Fourteenth Amendment under *Roe* and *Casey*, the parties in that case did not dispute Congress's authority to enact the law under the Commerce Clause, and the Court did not address the matter.

Despite Congress's past reliance on its commerce power to enact abortion-related legislation, some legal scholars question whether the Commerce Clause provides Congress with general authority to regulate abortion. On this view, the performance of an abortion at a local clinic does not necessarily involve or affect interstate commerce, and the availability of a contentious medical procedure is traditionally a state matter. Although the Supreme Court has not directly ruled on the issue, at least one sitting Justice has questioned whether Congress can generally regulate abortion under the Commerce Clause. However, as mentioned above, several federal courts of appeals have concluded that providing reproductive health services is commercial activity that Congress may broadly regulate under the Commerce Clause.

Generally speaking, courts are more likely to uphold an abortion-related law as a valid exercise under Congress's commerce power when the statute contains an express jurisdictional element that limits the regulation to conduct within or affecting interstate commerce, and when there are express congressional findings regarding the effects of the regulated activity on interstate commerce. Congressional findings *alone*, however, may not be enough to support use of the Commerce Clause, particularly when the object of regulation is non-economic and historically within the purview of the state's police power. The scope of the abortion regulation may also matter to this analysis. For example, some abortions may involve interstate travel or the provision of goods (such as medications or surgical tools) across state lines, while other abortions may not. Broader federal abortion laws may require a more extensive showing that abortion is interstate commercial activity rather than an intrastate matter within the traditional areas of state sovereignty. More targeted federal regulations with a more direct connection to interstate commerce, such as laws touching on interstate travel, allowing or prohibiting medication abortion by mail, or regulating the disclosure of reproductive health-related banking, health, or telephone and electronic records to third parties, may be more clearly within Congress's Commerce Clause authority than broader laws.

Spending Clause

The Spending Clause empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." The Supreme Court has held that incident to the spending power, Congress may further its policy objectives by

attaching conditions on the receipt of federal funds. Such conditions often involve compliance with statutory or administrative directives and can apply to any entity receiving federal funds, including states and localities. In *South Dakota v. Dole*, for example, the Supreme Court upheld, as a valid exercise of Congress's spending power, a congressional statute that denied a percentage of federal highway funds to states that did not prohibit the legal purchase or possession of alcohol by people less than 21 years old.

As discussed in more detail in this CRS report, there are five main limitations on Congress's authority to attach conditions to federal funds. First, a funding condition must be "in pursuit of the general welfare." Courts generally afford Congress substantial deference in determining what expenditures are "intended to serve general public purposes." Second, if Congress intends to place conditions on federal funds, it must do so "unambiguously" so that states or other entities have clear notice of the condition and may knowingly choose whether or not to accept the funds. Third, conditions on federal funding must be related or "germane" to "the federal interest in particular national projects or programs." Fourth, other constitutional provisions (such as the guarantees in the Bill of Rights) may independently bar some conditions placed on the grant of federal funds. For instance, Congress may not condition a monetary grant on "discriminatory state action or the infliction of cruel and unusual punishment." Fifth, conditions on federal funding are unconstitutional when they become coercive to the point that "pressure turns into compulsion" or commandeering. For example, in *NFIB v. Sebelius*, the Supreme Court held that a provision in the Affordable Care Act withholding all Medicaid grants from any state that refused to accept expanded Medicaid funding (and its associated conditions) was unconstitutionally coercive because it threatened to terminate "significant independent grants" that were already provided to the states.

Notwithstanding these constitutional limits, Congress retains broad authority to authorize spending and impose conditions on federal funds. Courts have rarely used spending power limitations to invalidate conditions placed on the receipt of federal funds. *NFIB* remains the only instance in the modern era where the Supreme Court invalidated an exercise of the congressional spending power. Post-*NFIB* Spending Clause challenges have largely been unsuccessful in the lower courts.

Pursuant to its powers under the Spending Clause, Congress could leverage federal funds to restrict or expand access to abortion, either directly or indirectly. For example, the so-called "Hyde Amendment" (which prohibits the use of Medicaid funds to pay for abortions) and analogous appropriations provisions generally restrict the use of federal funds to pay for elective abortion procedures. In *Rust v. Sullivan*, the Supreme Court upheld a Hyde-type restriction that prohibited federal Title X funds from being used in programs "where abortion is a method of family planning." Conversely, Congress could choose to repeal or omit Hyde-type amendments and appropriate federal funds to expand access to abortion. For instance, Congress could appropriate funds to pay for the cost of therapeutic and elective abortion procedures under federal programs such as Medicaid, or to provide abortion services through federal programs such as the Veterans Health Administration, as some commentators have advocated.

To the extent that Congress wished to affect state and local laws on abortion through the Spending Clause, it could use conditional funding to encourage states to alter their laws to expand or restrict access to abortion. Conditional spending legislation along the lines that the Supreme Court approved in *Dole* could deny states certain federal funding unless they changed their laws to conform to some federal standard on abortion. For instance, Congress might require states to expand or restrict access to abortion under state law in order to receive various types of federal health care funding. To be constitutional, such conditions would need to accord with the conditional spending requirements set forth in *Dole*, *NFIB*, and other case law. Among other things, Congress must provide clear notice of the condition, the condition must be related to the targeted federal funds, and the condition must not be unduly coercive, so that states may freely decide to accept or reject the conditional funding.

Section 5 of the Fourteenth Amendment

The Fourteenth Amendment, in relevant part, provides that no state shall "deprive any person of life, liberty, or property, without due process of law" or "deny to any person within its jurisdiction the equal protection of the laws." Section 5 of the Fourteenth Amendment grants Congress the power to enforce the Amendment through "appropriate legislation." Although the Court's holding in *Dobbs*—that there is no constitutional right to an abortion—sharply limits Congress's ability to legislate on abortion under the Fourteenth Amendment, section 5 could potentially provide a basis for Congress to enact abortion-related legislation if necessary to vindicate some *other* constitutional right.

Legislation to enforce the guarantees of the Fourteenth Amendment takes two main forms. First, Congress may enact legislation targeting conduct that actually violates the Amendment. Thus, Congress may use its section 5 power to provide for civil or criminal remedies for the deprivation of rights guaranteed by the Fourteenth Amendment. For example, 42 U.S.C. § 1983 provides a private cause of action for individuals claiming that their constitutional rights were violated by state actors. Similarly, 18 U.S.C. § 242—also enacted pursuant to section 5—imposes federal criminal liability on state actors who deprive individuals of their constitutional rights.

The *Dobbs* decision largely forecloses Congress's ability to rely on this first type of section 5 legislation to ensure or limit access to abortion. The majority in *Dobbs* held that there is no constitutional right to abortion under either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. Relatedly, although the *Dobbs* majority did not directly address the argument, Justice Kavanaugh's concurrence observed that "no Justice of this Court has ever advanced" the so-called "fetal personhood" argument that the Fourteenth Amendment requires states to prohibit abortion (a view advocated by some *amici* in *Dobbs*). Even if Congress disagreed with the Court's constitutional determinations, section 5 does not permit Congress to "define its own powers by altering the Fourteenth Amendment's meaning" via statute.

Congress's enforcement power under the Fourteenth Amendment is not limited to remedying or prohibiting actual constitutional violations. Supreme Court precedents recognize that Congress may also use its section 5 power "prophylactically" to prevent and deter constitutional violations "even if in the process it prohibits conduct which is not itself unconstitutional." If valid, prophylactic legislation may prohibit otherwise constitutional conduct and intrude into "legislative spheres of autonomy previously reserved to the States." For example, to prevent racial discrimination in voting, Congress may ban the use of literacy tests in state and national elections, even though the use of literacy tests for voting is not in itself always unconstitutional.

While Congress's prophylactic section 5 authority is broad, it is not unlimited. Congress cannot change or "determine what constitutes a constitutional violation" when legislating pursuant to section 5, but may only remedy violations of established constitutional rights. This means that prophylactic section 5 legislation must target established constitutional violations so that there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." This "congruence and proportionality" test is fairly demanding: courts will examine "whether Congress identified a history and pattern of unconstitutional [violations] by the States" to support the legislation, and whether the legislative remedy is "drawn in narrow terms to address or prevent those violations." In addition, Congress may legislate only against "state action" under section 5; it may not use the Fourteenth Amendment to regulate the conduct of purely private actors.

Although *Dobbs* held that the Fourteenth Amendment does not protect a right to abortion, Congress could potentially legislate on issues related to abortion prophylactically under section 5. To do so, Congress would need to identify some pattern or practice of state constitutional violations associated with abortion, and further determine that increased or decreased access to abortion was necessary to prevent or remedy those constitutional violations. Given *Dobbs*' holding that there is no right to an abortion under the Fourteenth Amendment, those constitutional violations would need to concern some other right protected by the Fourteenth Amendment (such as Bill of Rights provisions incorporated against the states), which is not readily apparent. Arguably, federal legislation that preempts state restrictions on interstate travel could pursued under section 5, although such legislation might be more straightforwardly supported by Congress's Commerce Clause authority. In any event, to be upheld under the Supreme Court's precedents, a federal abortion regulation premised on Congress's section 5 authority would need to be a congruent and proportional remedy for recognized constitutional violations. That analysis would likely depend greatly on the specific legislative record and purpose, and the scope of the remedy provided by Congress.

Citied Authority for Abortion-Related Legislation in the 117th Congress

As discussed in this CRS Legal Sidebar, abortion-related legislation has been introduced in the past several Congresses. For example, the Women's Health Protection Act of 2021 (H.R. 3755/S. 1975), which was passed by the House last year, would create a statutory right permitting health care providers to provide abortion services and preempt state laws restricting that right, such as state prohibitions on abortions prior to fetal viability. The congressional findings in that bill assert authority from both the Commerce Clause (stating that "[a]bortion restrictions substantially affect interstate commerce" and "affect the cost and availability of abortion services"), as well as section 5 of the Fourteenth Amendment. A more recent bill in the Senate, the Women's Health Protection Act of 2022 (S. 4132), omits the findings section.

Other introduced legislation seeks to restrict access to abortion on a national basis. For example, the Pain-Capable Unborn Child Protection Act (H.R. 1080/S. 61), introduced in the 117th Congress, would make it a federal crime to perform an abortion if the probable post-fertilization age of the fetus is 20 weeks or greater. The legislative findings in H.R. 1080 (but not S. 61) assert authority for the bill under "the Supreme Court's Commerce Clause precedents" and section 5 of the Fourteenth Amendment, citing specifically the Due Process and Equal Protection Clauses.

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