

Saint Louis University Law Journal

Volume 51
Number 3 *If Roe Were Overruled: Abortion and
the Constitution in a Post-Roe World (Spring
2007)*

Article 4

4-25-2007

If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World

Richard H. Fallon Jr.
Harvard Law School

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

Recommended Citation

Richard H. Fallon Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 St. Louis U. L.J. (2007).

Available at: <https://scholarship.law.slu.edu/lj/vol51/iss3/4>

This Childress Lecture is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

**IF *ROE* WERE OVERRULED: ABORTION AND THE
CONSTITUTION IN A POST-*ROE* WORLD**

RICHARD H. FALLON, JR.*

INTRODUCTION

What would be the legal and constitutional consequences if the Supreme Court were to overrule *Roe v. Wade*?¹ Where would the power to regulate abortions lie, and what constitutional restrictions on regulatory authority, if any, would exist? Would abortion questions vanish from the courts, or would new constitutional questions arise? If the latter, would those questions be hard or easy, and how similar or dissimilar would they be to the questions presented in *Roe* and its progeny? In the ongoing discussion about whether *Roe* will or ought to be overruled, these potentially important questions have received less attention than they deserve. In exploring them, my purpose is not to judge whether *Roe v. Wade* was correctly decided or whether the Supreme Court now should overrule it. I want only to consider what the constitutional landscape would look like if the Court were to consign *Roe* to the ashbin of history.

Although both my inquiry and my conclusions are intended to be analytical, not normative, I want to make a point, or a series of points, aimed at correcting what seem to me to be four widespread fallacies—certainly among the general public, and to some extent even among lawyers and judges. First, many people assume that a Supreme Court decision overruling *Roe v. Wade* would essentially wipe the legal slate clean and frame only prospective issues about whether the states should adopt new statutes regulating abortion.² This

* Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School. I am grateful to Charles Fried, Jack Goldsmith, Joel Goldstein, Dan Meltzer, Martha Minow, Gerry Neuman, Matthew Price, and Joe Singer for extremely helpful comments on earlier drafts, and to all the formal and informal commentators when a version of this Article was delivered as the Childress Lecture at Saint Louis University School of Law on October 13, 2006. Sam Walsh and Martin Kurzweil provided superb research assistance.

1. 410 U.S. 113 (1973).

2. See, e.g., William Baude, Op-Ed, *States of Confusion*, N.Y. TIMES, Jan. 22, 2006, § 4, at 17 (“[I]n the absence of *Roe*, states would largely be free to regulate [abortion] as they saw fit. Some states would permit abortion on demand, while some would ban it; many would fall somewhere in between.”); Linda Chavez, Editorial, *Hysteria Over Abortion Blinds Dems to Reason*, GRAND RAPIDS PRESS, Nov. 4, 2005, at A7 (“A reversal on *Roe v. Wade* would simply turn the issue of abortion back to the states. . . . [A]fter more than 30 years of virtually unfettered

is false. In a number of states, statutes enacted prior to the decision of *Roe* in 1973 remain on the books. Where this situation obtains, the old laws would sometimes, perhaps typically, become operative and enforceable unless repealed. Indeed, it is imaginable that officials in some states might attempt to enforce pre-*Roe* anti-abortion strictures *retroactively* against conduct that occurred when *Roe v. Wade* was the law of the land. If so, the resulting legal issues would not all be easy ones.

A second fallacy involves the notion that an overruling of *Roe v. Wade* would necessarily return responsibility for abortion regulation to the states.³ If Congress so chose, it could either forbid or protect abortion on a nation-wide basis. State control would exist only insofar as Congress chose to tolerate it.

A third fallacy is that absent action by Congress, no significant constitutional issues about state power to regulate abortion would remain.⁴ In a phrase, the courts could escape the abortion wars. This is perhaps the most important fallacy about the consequences of a decision to overrule *Roe*, and the one with which I am most concerned. A measure of the prominence of this fallacy, even among legal elites, comes from its encouragement by no less

access to abortion, it is unlikely that many states would pass restrictive laws.”); Carolyne Zinko, *An Ideological Rumble; The Abortion Issue: Public Opinion Is Polarized and Bitter Long After Roe vs. Wade Ruling*, S.F. CHRON., Jan. 8, 2006, at A1 (“Many assume that if the Supreme Court reversed *Roe vs. Wade* and sent the issue back to the states, individual states would have to pass new legislation to ban abortions” (quoting CTR. FOR REPROD. RTS., WHAT IF *ROE* FELL?: THE STATE-BY-STATE CONSEQUENCES OF OVERTURNING *ROE V. WADE* 1 (2004), http://www.crlp.org/pdf/bo_whatifroefell.pdf)).

3. See, e.g., Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85, 93 (2005) (“[T]he issue should be returned to the states. When that is done, the American people themselves, through their elected representatives, will be able to exercise local control over abortion and to consider the entire impact of abortion on women, their health, and relationships.”); Susan Estrich, *The Likely Tie-breaker on Abortion? Not Alito*, SAN JOSE MERCURY NEWS, Jan. 29, 2006, at 1P (“Even if [Justice Anthony] Kennedy were to vote against *Roe*, the battle wouldn’t end. It would just shift to the states, allowing each one to decide what rights, if any, women would have to choose abortion.”); Eyal Press, *My Father’s Abortion War*, N.Y. TIMES, Jan. 22, 2006, § 6 (Magazine), at 57 (“Not a few commentators lately, including some who support abortion rights, have suggested that it would not be the worst thing if the availability of abortion were left to state legislatures to decide, which is what will happen if *Roe* is overturned.”).

4. See, e.g., Jonathan Last, Editorial, *Next Step: Scrapping ‘Roe’*, PHIL. INQUIRER, Mar. 12, 2006, at D5 (“[I]f *Roe v. Wade* is overturned, abortion does not disappear or suddenly become illegal—it simply reverts to the states, where elected officials can make, and change, abortion laws according to the will of the people.”); Fred Mann, *Abortion Fight May Move to States*, WICHITA EAGLE, Jan. 22, 2006, at 1B (quoting Richard Levy, a University of Kansas constitutional law professor, as saying: “[Overturning *Roe*] would mean states are free to regulate abortions however they might choose”); Bruce Nolan, *Groups Paint Picture of Post-Roe Landscape*, NEW ORLEANS TIMES-PICAYUNE, July 24, 2005, at 1 (“[Reversal of *Roe*] would almost certainly pitch abortion into state legislatures to be protected, regulated or banned as local forces saw fit”).

estimable an analyst than Justice Antonin Scalia. Writing in partial dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁵ in which the Supreme Court majority reaffirmed the essential holding of *Roe v. Wade*, Justice Scalia not only deplored that *Roe* had “inflamed our national politics,” but also appeared to promise that by overruling *Roe* the Court could get itself out of “the abortion-umpiring business.”⁶ However alluring the prospect of a judicial retreat from the abortion wars otherwise might be, any hope that the Court could achieve a total respite from abortion issues is naïve.⁷ If *Roe* were overruled, it is true that there would be little doubt about the states’ power to prohibit abortions within their territorial jurisdictions (in the absence of national legislation enacted by Congress), at least unless some states went further than the pre-*Roe* regulatory norm and attempted to ban abortions that were necessary to preserve the life of the mother. It is likely, however, that some states would impose further restrictions, including prohibitions against travel by their citizens for the purpose of obtaining out-of-state abortions. If so, very serious constitutional questions would arise—and, somewhat ironically, a central issue for the Supreme Court would likely be whether the states’ interest in preserving fetal life is weighty enough to justify them in regulating abortions that occur outside their borders. Too, some right-to-life states might attempt to prohibit speech within their borders that encourage pregnant women who wished to terminate their pregnancies to seek abortions in states that permit them.⁸ If so, the resulting First Amendment issues could require the Court to weigh state interests in discouraging abortion against the competing interests of women in obtaining abortion-related information.

A fourth fallacy is that the overruling of *Roe v. Wade* could be a relatively discrete decision that would pose no threat to the surrounding body of cases upholding fundamental rights under the Due Process and Equal Protection Clauses.⁹ No matter how narrowly a decision overruling *Roe* might be written,

5. 505 U.S. 833, 979–1002 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

6. *Id.* at 995–96.

7. *Cf. id.* at 943 n.12 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Justice Scalia is uncharacteristically naïve if he thinks that overruling *Roe* . . . will enable the Court henceforth to avoid reviewing abortion-related issues.”).

8. In *Bigelow v. Virginia*, the Supreme Court invalidated a Virginia statute which prohibited abortion advertising. 421 U.S. 809 (1975). The overruling of *Roe v. Wade*, should it occur, would leave significant questions about *Bigelow*’s continuing viability. For discussion, see *infra* notes 116–29 and accompanying text.

9. Charles Fried advanced this argument while arguing before the Supreme Court in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). See *Transcript of Oral Arguments Before Court on Abortion Case*, N.Y. TIMES, Apr. 27, 1989, at B12 (“[W]e are not asking the Court to unravel the fabric of unenumerated and privacy rights . . . which this Court has woven. . . . Rather, we are asking the Court to pull this one thread.”); see also CHARLES

there could be no guarantee against ripple effects in future cases challenging other Supreme Court precedents.

In exploring widespread but by no means ubiquitous misunderstandings about the effects of a possible Supreme Court decision to overrule *Roe v. Wade*, I shall develop two principal themes. First, as I have asserted already, an overruling of *Roe* would not withdraw abortion-related questions from the courts, but instead would present the Court with a new set of morally freighted questions to replace the older set that has now grown familiar. Second, among the constitutional issues that would emerge in the wake of an overruling of *Roe v. Wade* would be acute and sensitive ones involving the respective meanings of state and national citizenship as state efforts to stop abortion bumped up against freedoms long associated with unitary nationhood.

I. IDENTIFYING THE LEGAL BASELINE IN A POST-*ROE* WORLD

Many people appear to think that a decision overruling *Roe* would leave Congress and the states with a blank slate on which to write with respect to abortion legislation: The state laws that fell when the Supreme Court decided *Roe* in 1973 would remain in the graveyard in which the Court interred them, and although state legislatures could regulate the future with a free hand, the burden of inertia would lie with those seeking to restrict abortions.¹⁰ The reality is otherwise. The overruling of *Roe* would revitalize pre-existing abortion prohibitions in a number of states. In addition, overruling *Roe* would create potential legal issues about whether women and doctors could be sanctioned under pre-1973 statutes for actions in which they engaged prior to *Roe v. Wade*'s being overruled.

A. *Status of Pre-Roe Anti-Abortion Statutes*

When *Roe* was decided in 1973, all fifty states had some form of abortion regulation, and thirty-one states forbade abortion in all circumstances except to save the life of the mother.¹¹ An important question involves the legal status of the pre-*Roe* statutes if *Roe* should be overruled. Although many states formally repealed their old abortion laws in the years after *Roe*, seventeen states currently have laws on their books that would forbid nearly all abortions.¹² Contrary to the expectations of most non-lawyers, the old statutes

FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 75–76 (1991).

10. See *supra* note 2 and accompanying text.

11. See Forsythe & Presser, *supra* note 3, at 94 & n.35.

12. According to the Center for Reproductive Rights, there are four states with pre-*Roe* abortion laws that have never been enjoined by any court. CTR. FOR REPROD. RTS., *supra* note 2, at 8. Eleven additional states have never repealed pre-*Roe* statutes. *Id.* at 10. Two more states have adopted new statutory restrictions on abortion in the anticipation of *Roe* being overruled. *Id.*

would spring back to life in any state in which subsequent legislation has not expressly or impliedly repealed them. When a federal court, including the Supreme Court, holds a law to be unconstitutional, it does not excise the legislation from the statute books, but only signals that it will not permit the law to be enforced. Once an overruling of *Roe v. Wade* lifted the bar to enforcement, previously enacted state laws forbidding abortion would regain their vitality as soon as any judicial injunctions that now bar their enforcement were lifted.

A nice illustration of the underlying legal principle emerges from the so-called *Legal Tender Cases*, in which the Supreme Court first held that the Legal Tender Act of 1862, which authorized the use of paper money to pay all debts public and private, was constitutionally invalid as applied to obligations created before the Act's passage,¹³ but then reversed itself less than two years later.¹⁴ In its overruling decision, the Court made clear there was no need for Congress to reenact the Legal Tender Act.¹⁵ The legislation remained on the statute books and thus eligible for enforcement once the Supreme Court corrected its constitutional error. Although the Legal Tender Act was a federal rather than a state statute, a federal court has no more authority to bar enforcement of a state statute that accords with the currently authoritative understanding of the Constitution than it has to deny enforcement to a federal statute that it once erroneously held to be unenforceable.¹⁶

It is possible to imagine a constitutional challenge to this conclusion. In an article written more than a decade ago, William Treanor and Gene Sperling argued that if the Supreme Court were to overturn *Roe*, it should recognize an exception to the usual rule that state legislation can be enforced after a judicial decision barring its enforcement has been reversed.¹⁷ But I doubt that the

13. *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 626 (1869).

14. *Knox v. Lee* (The Legal Tender Cases), 79 U.S. (12 Wall.) 457, 553 (1870). In the interim, two new Justices had been appointed to the Court, and their votes sufficed to reverse the previous 5-3 majority. Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 377 (1981).

15. *Legal Tender Cases*, 79 U.S. (8 Wall.) at 552-53.

16. This conclusion reflects the long-settled rules that a court must apply the law as it exists at the time of decision, not as it existed previously, see, for example, *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), and that Supreme Court decisions overruling previous decisions ordinarily apply retroactively as well as prospectively, see, for example, *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). State courts have overwhelmingly reached the same conclusion. See, e.g., *State ex rel. Badgett v. Lee*, 22 So. 2d 804, 806 (Fla. 1945); *Pierce v. Pierce*, 46 Ind. 86, 95 (1874). Commentators have reached this conclusion as well. See William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1915 (1993) (collecting authorities).

17. Treanor & Sperling, *supra* note 16. Among their arguments were that a Supreme Court decision that rendered a statute unenforceable might have rendered it impossible to muster

Supreme Court could recognize such an exception even if it wanted to do so. The Court has no constitutional authority to stop the states from enforcing validly enacted state laws that do not violate the Constitution, at least insofar as those laws are applied only to conduct occurring *after* a repealing decision so that no party could claim a lack of fair notice.¹⁸

To put the point more directly, under current constitutional jurisprudence I think the conclusion is unavoidable that a decision to overrule *Roe* would return a number of states to the statutory state of affairs that existed prior to *Roe v. Wade* and prior to the dawning of the movement for women's rights of which *Roe* was a part—at least as far as the federal Constitution is concerned. This last qualification is potentially important because a decision by the Supreme Court to overrule *Roe v. Wade* would likely thrust new, hotly charged issues of state law onto the dockets of state supreme courts in a number of states. One obvious question for state courts would be whether their state constitutions possibly recognize abortion rights that the federal Constitution would cease to protect if *Roe* were overruled.¹⁹ In some states, state courts would also need to decide whether state legislation enacted since 1973 that did not expressly repeal pre-*Roe* anti-abortion laws might have done so impliedly.²⁰ The question whether a later state statute has impliedly repealed an earlier one is a question of state law on which state courts would have the final word.

B. “Retroactive” Enforcement of Pre-*Roe* Statutes

Once it is recognized that *Roe v. Wade* removed no state anti-abortion laws from the statute books, but only decreed them to be unenforceable, another question that would arise upon the overruling of *Roe* is whether states with pre-*Roe* anti-abortion statutes could enforce those statutes retroactively, against conduct that occurred while *Roe v. Wade* remained the controlling Supreme Court pronouncement. This would be a question of surprising intricacy.

Under the regime of *Roe v. Wade*, federal courts have issued injunctions barring the enforcement of state anti-abortion legislation in nearly all states. Interestingly, there are at least four states in which injunctions have not been issued,²¹ presumably because everyone took it for granted that state laws contrary to *Roe* could not be enforced even in the absence of a judicial decree

support to repeal the statute that otherwise could have been repealed and that reliance interests might also have developed. *Id.* at 1917–38.

18. For discussion of the fair notice issues that would be occasioned by the retroactive application of a statute once held unconstitutional, see *infra* notes 21–43 and accompanying text.

19. According to the Center for Reproductive Rights, state courts have recognized state constitutional protections for abortion rights in nineteen states. CTR. FOR REPROD. RTS., *supra* note 2, at 12.

20. *See id.* at 9 (discussing implied repeal).

21. *Id.* at 8.

to that effect. I shall discuss the special questions that might arise in those states below. In most states, however, doctors have performed abortions and women have procured them under the protection of specifically applicable judicial orders enjoining prosecutions for acts protected by *Roe v. Wade*. Surely these doctors could not be prosecuted for engaging in conduct protected by a judicial injunction—or could they?

Perhaps surprisingly, Supreme Court authority leaves the answer to this question less than clearly settled. A ground for uncertainty arises from a dictum in *Dombrowski v. Pfister*,²² a 1965 case in which the Court enjoined the enforcement of a state statute under the First Amendment overbreadth doctrine.²³ In order to rule a statute unconstitutionally overbroad, a court must first ascertain its breadth or meaning. Somewhat awkwardly for a federal court, the meaning of a state statute is a question of state law, ultimately within the authority of state rather than federal courts to decide.²⁴ In *Dombrowski*, the Supreme Court thus acknowledged the possibility that a state court, in a suit for a declaratory judgment, might provide a “narrowing construction” of the law that it had found to be overbroad and thus reveal the challenged statute not to be overbroad after all.²⁵ If that circumstance should materialize, the Court said, then the injunction that it had ordered should be vacated and prosecutions under the statute could resume, at least for conduct that occurred after the narrowing construction was obtained.²⁶ With respect to the possible prosecution of conduct occurring during the pendency of a federal injunction, the Court said this: “Our cases indicate that once an acceptable limiting construction is obtained, it may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendants.”²⁷

This cryptic and ambiguous pronouncement—addressed to a situation at least partly analogous to that which would exist if a state were to attempt to prosecute conduct occurring under cover of a federal injunction enforcing *Roe v. Wade*—reflects two competing considerations. On the one hand, the *Dombrowski* dictum acknowledges the Justices’ uncertainty that the federal judiciary could have any lawful authority to bar the states from enforcing what the Supreme Court ultimately comes to recognize as a constitutionally valid

22. 380 U.S. 479 (1965).

23. On the First Amendment overbreadth doctrine, see generally Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991).

24. See generally David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759 (1979) (discussing issues confronting federal courts asked to enjoin state statutes or hold them unconstitutional).

25. *Dombrowski*, 380 U.S. at 483.

26. *Id.* at 490–92 & n.7; see also *Osborne v. Ohio*, 495 U.S. 103, 115 (1990) (citing *Dombrowski*, 380 U.S. at 491 n.7).

27. *Dombrowski*, 380 U.S. at 491 n.7 (citations omitted).

state statute. On the other hand, there is a concern about fair warning to criminal defendants.

Although *Dombrowski* equivocated concerning which of these considerations would prevail in a case of conflict, I find it difficult to imagine that the Justices ever would, or should, permit the criminal prosecution of conduct that occurred under the protection of a judicial injunction reflecting then-controlling Supreme Court precedent. In recent years, the Court has maintained, sometimes stridently, that its pronouncements on constitutional issues are the “supreme law of the land” and must, accordingly, be accepted as binding by all others.²⁸ It is virtually unimaginable that the Court could find that citizens who relied on judicial injunctions, issued pursuant to the judicially declared supreme law, could subsequently be held to have done so at risk of criminal prosecution if the Supreme Court should ever change its mind.²⁹ The requirement of fair notice is appropriately strict in criminal prosecutions.³⁰ Even apart from the clear precedential authority of *Roe v. Wade*, there are strong arguments that a federal injunction necessarily provides an immunity against prosecution for conduct occurring under its protection, even if the injunction is later vacated as not warranted by law.³¹ The conferral of judicial

28. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *see City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (“The power to interpret the Constitution in a case or controversy remains in the Judiciary.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 868 (1992) (“Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals.”); *United States v. Nixon*, 418 U.S. 683, 705 (1974) (“We therefore reaffirm that it is the province and duty of this Court ‘to say what the law is’ . . .” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

29. In the *Dombrowski* context, by contrast, it is at least plausible to maintain that a person relying on a federal court declaration that a state statute is unconstitutionally overbroad must rely on a determination of *state* law with respect to which a federal court judgment does not necessarily reflect the supreme law of the land, since the meaning of state statutes is ultimately a question of state law to be resolved authoritatively by state courts.

30. *See, e.g., Rabe v. Washington*, 405 U.S. 313, 315–16 (1972) (holding that a defendant had no fair warning that his actions were proscribed when they would not have fallen within a statute’s prohibitory ambit prior to an unexpected judicial construction). Beyond the constitutional requirement of fair notice, many states follow the Model Penal Code, which permits a defense of mistake of law when the defendant has reasonably relied on a judicial decision that is later deemed erroneous. MODEL PENAL CODE § 2.04(3)(b)(ii) (1962).

31. In *Oklahoma Operating Co. v. Love*, Justice Brandeis, in affirming the award of preliminary injunctive relief, asserted flatly and arguably dispositively that even if a challenged regulation should ultimately be upheld, “a permanent injunction should, nevertheless, issue to restrain the enforcement of penalties accrued pendente lite.” 252 U.S. 331, 337–38 (1920). Nevertheless, in *Edgar v. MITE Corp.*, concurring and dissenting opinions skirmished over the related but distinct question whether preliminary relief entered by a federal court can immunize a plaintiff from prosecution for acts occurring after the injunction’s issuance if the statute is

power to resolve cases and controversies may imply a judicial capacity to grant relief with at least this much efficacy.³²

A different and more difficult question might be presented in civil rather than criminal proceedings predicated on actions taken in reliance on *Roe* that were not specifically protected by a federal injunction—either because an injunction was so written as to protect only the specific plaintiffs who had sought injunctive relief, and not an open class of all women and doctors within the state,³³ or because the civil proceedings occurred in one of the states in which the courts never entered any injunction at all.³⁴ Suppose that, under these circumstances, the father of a fetus brought a tort action, which was authorized by state law, against the woman or doctor who caused the fetus's destruction. Or suppose that a state sought to withdraw the medical licenses of doctors who were not specifically protected by *Roe*-based injunctions and who had notoriously furnished "abortion on demand" on the ground that such conduct revealed a disqualifying defect of medical judgment or personal character. Would the defendants in these civil cases be entitled to rely on the defense that their actions were perfectly lawful under *Roe v. Wade*, even if *Roe* had subsequently been overruled?

ultimately upheld as constitutionally valid in further proceedings or on appeal. *Compare* 457 U.S. 624, 648–49 (1982) (Stevens, J., concurring in part and concurring in the judgment) (maintaining that federal judges have no authority to confer immunity from prosecution under a statute ultimately determined to be constitutionally valid), *with id.* at 657 (Marshall, J., dissenting) (maintaining that "in the ordinary case . . . it should be presumed that an injunction secures permanent protection from penalties for violations that occurred during the period it was in effect").

32. *But cf.* *Steffel v. Thompson*, 415 U.S. 452, 482 (1974) (Rehnquist, J., concurring) (maintaining that a federal declaratory judgment pronouncing a state statute constitutionally invalid would not constitute binding authority in a subsequent state court criminal action to enforce the statute).

33. For discussion of the pertinence of the distinction between class relief and relief specifically accorded only to named parties, see Shapiro, *supra* note 24, at 768–79. To put the point in a nutshell, a non-party to a federal action that results in an injunction can subsequently invoke the precedential effect of the underlying federal judgment, but cannot successfully enter a claim of issue preclusion. *Id.*

34. For purposes of brevity of exposition, I am here collapsing two issues into one. One issue involves the pertinence of the criminal/civil distinction, the other the pertinence of the question whether conduct did or did not occur under the protection of a federal injunction. Apart from interests of brevity, I frame the question this way because I am inclined to think both that (1) criminal prosecutions of conduct protected by *Roe* would be prohibited, see *supra* notes 28–30 and accompanying text, and that (2) conduct protected by a federal injunction could not provide the basis for state impositions of civil sanctions or penalties reflecting a judgment that the conduct was legally culpable, see *supra* notes 31–32 and accompanying text. On these assumptions, the most challenging question would involve state attempts to impose civil liability or sanctions on abortion related activities prior to the overruling of *Roe* that were not specifically protected by a judicial injunction.

In civil cases, the Supreme Court has permitted the enactment and retroactive enforcement of regulatory legislation imposing duties that could not specifically have been anticipated at the time when pertinent conduct occurred.³⁵ “[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations,” the Court has said, “even though the effect . . . is to impose a new duty or liability based on past acts.”³⁶ The only question is whether the legislature has a rational basis for wanting to apply rules retroactively to conduct that occurred in the past.³⁷

In the case of changes of law resulting from revised judicial interpretations of the Constitution, whether or not new legislation is involved, the Court has recently insisted that even surprising decisions not only can, but must, apply retroactively.³⁸ The Court’s stance on this issue has varied over time. It once took the position that it possessed discretion to deny retroactive effect to decisions that reflected a sharp break with prior law and that had engendered strong reliance interests.³⁹ Under this policy, a decision to overrule *Roe*, and thus to strip it of protective force for the future, would presumably not apply retroactively. In recent years, however, the Court has recurrently rejected arguments that its decisions should apply prospectively only, even when those decisions would have been difficult to anticipate.⁴⁰ Indeed, in *Harper v.*

35. See, e.g., *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730–34 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16–18 (1976). Although the Court occasionally asserts that retroactive legislation is disfavored, the only recent case actually to invalidate a retroactively applicable statute is *Eastern Enterprises v. Apfel* in which the plurality opinion relied on a “takings” rationale that would have no applicability to the retroactive enforcement of state anti-abortion rules. 524 U.S. 498, 532–36 (1998).

36. *Usery*, 428 U.S. at 16.

37. See *Pension Benefit Guar. Corp.*, 467 U.S. at 729 (asserting that “the strong deference” ordinarily accorded to regulatory legislation “is no less applicable when that legislation is applied retroactively”).

38. See, e.g., *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991).

39. See *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971) (laying down a test for determining whether new rules should apply retroactively in civil cases). At the time when *Chevron Oil* was decided, the Court had already developed a parallel formula for determining whether to give retroactive effect to path-breaking decisions establishing new constitutional protections for defendants in criminal cases. See *Linkletter v. Walker*, 381 U.S. 618, 629 (1965) (declining to give retroactive effect to a path-breaking decision in a criminal case). For discussion and criticism of the Court’s historical non-retroactivity practice, see Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557 (1975); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991).

40. See, e.g., *Harper*, 509 U.S. at 97; *James B. Beam Distilling Co.*, 501 U.S. at 537–38, 540. Reversing its earlier position, the Court has similarly held that once it has declared a rule of constitutional law in a criminal case, “the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review.” *Griffith v. Kentucky*, 479 U.S. 314, 322–23 (1987).

Virginia Department of Taxation,⁴¹ the Court said flatly that “[w]hen this Court applies a rule of federal law to the parties before it, that rule . . . must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.”⁴²

Notwithstanding *Harper*’s seemingly categorical pronouncement, I would hesitate to state unequivocally that a decision overruling *Roe v. Wade* would eliminate any *Roe*-based defense in cases seeking to predicate civil damages or regulatory consequences on abortions performed prior to the overruling decision and not specifically protected by then-extant federal injunctions. The Court could imaginably hold that the overruling of *Roe* would present “special circumstances,” not present in any of its other recent cases, justifying an exception to the rule laid down in *Harper*.⁴³ At the very least, however, a decision to this effect would cut against the grain of the Court’s recent decisions asserting the necessary retroactivity of its constitutional decisions.

C. Summary

The argument that I have made so far could be summarized as follows: *Roe v. Wade* did not eliminate state laws barring abortion, but only established that those laws could not be enforced so long as *Roe* remained in force. This is a subtle difference, but potentially an important one. If *Roe* were overruled, the judicially enforced prohibition against state anti-abortion laws would disappear, not only for the future, but possibly also for at least some retrospective purposes.

II. POST-OVERRULING ABORTION REGULATION BY THE FEDERAL GOVERNMENT

Many people appear to assume that a Supreme Court decision overruling *Roe v. Wade* would necessarily return responsibility for abortion regulation or non-regulation to the states.⁴⁴ This is another fallacy. Under current doctrines,

41. 509 U.S. 86.

42. *Id.* at 97.

43. See *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 755 (1995) (noting the possibility of arguments that “special circumstances” might justify a departure from *Harper*’s non-retroactivity rule); see also *Ryder v. United States*, 515 U.S. 177, 184–85 (1995) (observing that “whatever the continuing validity” of the once controlling *Chevron Oil* framework for assessing whether Supreme Court decisions should be applied retroactively in civil cases, the award of retroactive relief to the petitioner before the Court would not entail “the sort of grave disruption or inequity . . . that would bring that doctrine into play”).

44. See, e.g., Forsythe & Presser, *supra* note 3, at 93.

it seems likely that Congress would have the authority either to ban abortions or to protect abortion rights on a nation-wide basis.⁴⁵

For Congress to regulate abortion, it would need to find a source of authority in the text of the Constitution.⁴⁶ Two candidates immediately suggest themselves, one of which is relatively implausible but the other almost certainly adequate. The relatively implausible source of regulatory authority would be Section Five of the Fourteenth Amendment.⁴⁷ If the Supreme Court overruled *Roe* in such a way as to establish that fetuses were persons in the constitutional sense, then Congress could presumably enact legislation pursuant to Section Five to prevent the states from denying fetuses the same protection that they give to other persons.⁴⁸ It seems highly unlikely, however, that the Court would put a decision overruling *Roe* on this ground.⁴⁹ Among other considerations, its doing so might well imply a state *obligation* to prohibit abortion in the same way that it prohibits other murders.⁵⁰ Much more likely is that a Supreme Court that wished to overrule *Roe* would say that states have sufficiently powerful interests to justify their enactment of legislation protecting fetal life even if fetuses are not persons in the constitutional sense.

If the fetuses are not persons in the constitutional sense, then any claim of congressional power to regulate abortion would presumably rest on the Commerce Clause.⁵¹ Under existing Commerce Clause doctrine, congressional power to regulate and thus to prohibit abortions would seem plain. Abortions are services sold in interstate commerce, and the business of

45. Indeed, in 2003 Congress passed a law regulating so-called partial-birth abortions. 18 U.S.C. § 1531 (Supp. 2005).

46. See generally Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. ON LEGIS. 319 (2005) (analyzing congressional power to enact anti-abortion legislation under the Commerce Clause and Section Five of the Fourteenth Amendment).

47. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

48. See *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (“Section 5 legislation is valid if it exhibits ‘a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’” (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997))).

49. As the Supreme Court noted in *Roe v. Wade*, the word “person” is generally used throughout the Constitution in ways that presuppose the occurrence of birth. 410 U.S. 113, 156–58 (1973); see also Alec Walen, *The Constitutionality of States Extending Personhood to the Unborn*, 22 CONST. COMMENT. 161, 164–66 (2005) (outlining reasons not to view fetuses as persons in the constitutional sense).

50. Cf. *Roe*, 410 U.S. at 157 n.54 (“[T]he penalty for criminal abortion specified . . . is significantly less than the maximum penalty for murder If the fetus is a person, may the penalties be different?”).

51. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

providing medical care, including abortions, is intertwined with commerce in innumerable ways.⁵²

A complication could imaginably arise if an abortion provider sought to escape the reach of congressional regulatory power by making abortions available on a non-commercial basis. The Supreme Court has linked Congress's power to regulate activities that have a substantial effect on interstate commerce to the regulated activities' commercial character.⁵³ Even if an abortion provider offered its services free of charge, however, Congress's regulatory power would appear to be clear under *Gonzales v. Raich*,⁵⁴ which upheld Congress's authority to regulate the non-commercial production and possession of medical marijuana based on the theory that marijuana is a commodity for which a commercial market exists.⁵⁵ As it is with marijuana, so it would seemingly be with abortions: a generally applicable statute could be enforced even in cases that themselves lacked any commercial element.⁵⁶

52. Congress thus relied on the Commerce Clause when it enacted the Freedom of Access to Clinic Entrances Act of 1994 (FACE), Pub. L. 103-259, 108 Stat. 694 (1994) (codified at 18 U.S.C. § 248 (2000)), which prohibits intentionally injuring, intimidating, or physically interfering with anyone seeking reproductive healthcare services near a health care facility, and the courts of appeal have unanimously affirmed its authority to do so. *See, e.g.*, *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) (upholding FACE as within Congress's commerce power by virtue of its protection of people involved in interstate commerce and its regulation of conduct with a substantial effect on interstate commerce); *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995) (same); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995) (same).

53. *See Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *United States v. Morrison*, 529 U.S. 598, 610-11 (2000).

54. 545 U.S. 1.

55. *See id.* at 18.

56. It is possible, of course, that a Supreme Court that was prepared to overrule *Roe v. Wade* would also be prepared to overrule *Raich*. There were three dissenting votes in *Raich*, all coming from Justices conventionally tabbed as conservatives. *See id.* at 42 (O'Connor, J., dissenting) (joined in part by Rehnquist, C.J., and Thomas, J.); *id.* at 57 (Thomas, J., dissenting). Just as conservatives tend to be skeptical of *Roe v. Wade*, conservatives also tend to be hostile to the breadth of congressional regulatory power under the Commerce Clause that the Supreme Court recognized in *Raich*. *See, e.g., id.* at 45 (O'Connor, J., dissenting) ("The Constitution . . . does not tolerate reasoning that would 'convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.'" (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995))). But so long as Commerce Clause doctrine remains substantially unaltered, we could have national legislation forbidding abortion if Congress chose to enact it.

Even if a Court overruling *Roe* did not also overrule *Raich*, any disposition by conservative Justices to support the position taken by the *Raich* dissents could imaginably give rise to a strangely ironic position if Congress enacted anti-abortion legislation and if a non-commercial abortion provider claimed a constitutionally mandated exemption from the law. If some conservative Justices adhered to the dissenting position in *Raich* that Congress lacked regulatory power, and if there were still some hold-out liberal Justices unwilling to renounce *Roe*, then the Justices holding those otherwise minority positions might coalesce to reach the conclusion that non-commercial abortion providers were exempt from prosecution under a federal anti-abortion statute.

A symmetrical conclusion would probably obtain if political majorities in Congress took a more tolerant view of abortion than some state legislatures and, instead of prohibiting abortions, sought to authorize them in at least some circumstances. Congress might directly authorize the commercial delivery of abortion services pursuant to its commerce power. Or it might establish a federal scheme for the licensing of doctors, license doctors to perform abortions under some or all circumstances, and forbid state interference with doctors in the performance of any medical function for which they were federally licensed.⁵⁷ Either of these options would seem fairly clearly constitutional under current law.

It is imaginable, of course, that a “conservative” Supreme Court that was prepared to overrule *Roe* might also be prepared to redefine and limit Congress’s commerce power to avoid this conclusion.⁵⁸ Or the Court might achieve the same effect by, for example, defining the point at which a fetus becomes a person with a constitutionally protected right to life as a question primarily of state law in much the way that the existence of a constitutionally protected liberty or property interest can depend on state law.⁵⁹ Building on this foundation, the Court might then say that Congress could not use its power under the Commerce Clause to authorize deliberate killings that state law would otherwise prohibit. But a ruling to this effect would mark a considerable departure from current doctrine, under which state efforts to define persons cannot limit federal regulatory authority. Accordingly,

57. It seems clear that Congress would have the power to establish such a scheme under the Commerce Clause. For example, the federal Controlled Substances Act requires physicians to register with the Attorney General in order to prescribe most drugs. 21 U.S.C. §§ 823(b), (f) (2000). It also allows the Attorney General to revoke a physician’s license if he or she “has committed such acts as would render his [or her] registration . . . inconsistent with the public interest.” 21 U.S.C. § 824(a)(4). Attorney General John Ashcroft tested the limits of this congressionally conferred power by promulgating a regulation that characterized the prescription of federally controlled substances for the purpose of assisting suicide as “inconsistent with the public interest,” even if state law authorized such conduct. Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56,607, 56,608 (Nov. 9, 2001). Although the Supreme Court found that this particular regulation lay beyond the scope of the powers delegated by Congress in *Gonzales v. Oregon*, 126 S. Ct. 904, 925 (2006), the Court affirmed that “[e]ven though regulation of health and safety is ‘primarily, and historically, a matter of local concern,’ there is no question that the Federal Government can set uniform national standards in these areas.” *Id.* at 923 (citation omitted) (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985)).

58. See generally Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002) (identifying different strands of judicial conservatism and exploring their relationships to one another).

59. See RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 530–36 (5th ed. 2003) (discussing the relation of state and federal law in defining constitutionally protected liberty and property under the Due Process Clause).

although not wholly without trepidation, I would opine that if Congress can permissibly regulate the practice of medicine at all, then it can preempt state pro-life legislation that conflicts with its regulatory agenda.⁶⁰

With Congress almost certainly possessing the power to forbid abortion, and probably capable of protecting abortion rights as well, it is plain that the overruling of *Roe* would not *necessarily* return responsibility for abortion policy to the states. Much more likely, the states would have authority to control the availability of abortion only at the sufferance of Congress.

III. THE PERMISSIBILITY OF STATE REGULATIONS INVOLVING ABORTION

At least in the absence of federal regulation, many people appear to assume that the overruling of *Roe v. Wade* would eliminate the need for federal courts to assess the constitutionality of state anti-abortion legislation and, in particular, that it would necessarily eliminate the need for federal courts to assess the weight of state interests in protecting fetal life.⁶¹ Justice Scalia's opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* appears to promise no less.⁶² But the assumption is fallacious if stated categorically.⁶³ Much would depend on the types of legislation that the states might enact in a post-*Roe* era.

A. *Regulations Threatening the Life of the Mother*

To begin with, a rather obvious constitutional question would present itself if one or more states in a post-*Roe* world were to enact anti-abortion prohibitions that included no exceptions whatsoever, even in cases in which abortion was necessary to protect the life of the mother. The status of this and much other post-*Roe* anti-abortion legislation might well depend on exactly how a decision overruling *Roe* was written—a point that I have made passingly already and shall develop more fully below. But one clear possibility would be for the Court to say that there is no “fundamental” right to abortion, because abortion rights are not firmly grounded either in the text of the Constitution or in a specific historical understanding of constitutional liberty, and accordingly

60. A federal regulatory scheme preempts state authority to regulate in a particular area if there is an express statement of preemption, if the federal scheme occupies the field, or if there are conflicts between the state and federal laws such that abiding by both is physically impossible or the state law stands as an obstacle to the accomplishment of congressional objectives. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203–04 (1983). *See generally* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

61. *See supra* note 4 and accompanying text.

62. 505 U.S. 833, 995–96 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

63. *See id.* at 943 n.12 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“State efforts to regulate and prohibit abortion in a post-*Roe* world undoubtedly would raise a host of distinct and important constitutional questions . . .”).

that the states may regulate abortions so long as they have a rational basis for doing so.⁶⁴ If the Court took this line, the question arising from a prohibition against abortions necessary to save the life of the mother would be whether the mother's interests become sufficiently fundamental in this context to override the state's interest in fetal life or, probably more likely, whether a prohibition against abortions needed to save a mother's life would survive rational basis review. An argument that such a prohibition would fail rationality analysis could begin with the dissenting opinion of then-Justice William Rehnquist in *Roe v. Wade* itself. Although Justice Rehnquist dissented from the majority's decision to treat abortion as a fundamental right that could be infringed only to advance "compelling" governmental interests, he said flatly that if a statute "were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that . . . [the statutory prohibition] would lack a rational relationship to a valid state objective . . ."⁶⁵ But not all would necessarily reach the same conclusion within a rational basis framework. It is thus quite imaginable that the Supreme Court would need to determine the constitutionality of abortions necessary to save the life of a mother.

Moreover, if the Court were prepared to hold that abortion prohibitions went too far in cases in which a mother would otherwise die, it would likely also need to decide a number of closely related questions involving the precise location of the constitutional line. If a state could not prohibit abortions necessary to save a woman from certain death even if *Roe v. Wade* were otherwise overruled, could a state ban abortions needed to prevent likely death? Possible death? Certainty of very serious damage to health? Likelihood of serious damage to health? Unless a Court overruling *Roe* determined that the Constitution imposes no restrictions at all on a state's authority to ban abortions within its borders, even with the life of the mother at stake, then line-drawing questions of this kind would potentially arise.

B. *Extraterritorial Regulation*

At least as likely to reach the Supreme Court if *Roe* should be overruled would be questions involving the constitutionality of legislation enacted in anti-abortion states attempting to bar women from traveling to pro-choice states to abort unwanted fetuses. In 1972, the last year of the pre-*Roe* regime, roughly 40% of the women procuring abortions in the United States did so

64. *Cf.* *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (asserting that substantive due process protection extends only to fundamental rights that, as carefully described, "are, objectively, 'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty.'" (citations omitted) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937))).

65. *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting).

outside their state of residence.⁶⁶ If *Roe* were overruled, it thus seems likely, and is surely possible, that at least some states that prohibited abortion within their borders might attempt to use one or another regulatory tool to stop their citizens from traveling out of state to procure abortions of fetuses conceived within their territory. Most straightforwardly, pro-life states might enact laws making it unlawful for their citizens to procure out-of-state as well as in-state abortions.⁶⁷ Going a significant step further, a state that was serious about barring abortion as a means of protecting fetal life might even attempt to make it unlawful for out-of-state doctors to perform out-of-state abortions on the citizens of the regulating state, even within the territory of a state that permitted abortion.

Numerous other state stratagems to discourage abortion are also imaginable, including restrictions on abortion advertising and abortion counseling, and I shall discuss some of them below. But I start with the central case of a state criminal statute making it unlawful for citizens of that state to procure out-of-state as well as in-state abortions of fetuses conceived within the regulating state. At least for non-lawyers, it is probably tempting to think that states can regulate conduct that occurs within their borders but not elsewhere. But matters are not so simple. In assessing the constitutionality of a state's efforts to bar the out-of-state abortion of fetuses conceived within the state, the courts would need to work through a myriad of issues under a variety of constitutional provisions.

1. The Due Process and Full Faith and Credit Clauses

In thinking about the issues that would be raised by a state law barring citizens of that state from procuring out-of-state abortions, I begin with the two provisions of the Constitution under which the courts have most frequently addressed so-called "choice of law" or "conflicts of law" issues, the Due Process and Full Faith and Credit Clauses. The Due Process Clause provides that no state may "deprive any person of life, liberty, or property, without due

66. NANETTE J. DAVIS, *FROM CRIME TO CHOICE* 228 & table 10.1 (1985); see Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 453 (1992) (discussing statistics in Davis's *FROM CRIME TO CHOICE*).

67. For discussion of whether such legislation would be constitutionally valid, see, for example, C. Steven Bradford, *What Happens if Roe Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 127 (1993); Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873 (1993); Seth F. Kreimer, "But Whoever Treasures Freedom . . .": *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907 (1993) [hereinafter Kreimer, "But Whoever Treasures Freedom . . ."]; Kreimer, *supra* note 66, at 453; Gerald L. Neuman, *Conflict of Constitutions? No Thanks: A Response to Professors Brilmayer and Kreimer*, 91 MICH. L. REV. 939 (1993).

process of law.”⁶⁸ The Full Faith and Credit Clause requires that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”⁶⁹ Although these two clauses otherwise have quite different functions, the Supreme Court has generally assumed that they impose identical restrictions on states’ choice-of-law decisions about whether to apply their laws to events occurring out of state.⁷⁰

Suppose, to begin, that in a post-*Roe* world Utah had a law forbidding its citizens to procure abortions, whether in state or out of state, but California law permitted abortions. Under these circumstances, it might be thought that either the Due Process Clause or the Full Faith and Credit Clause would require a Utah court as much as a California court to apply the California law, which permits abortion, in any criminal prosecution arising from an abortion performed in California. In conflicts-of-laws terminology, the underlying intuition would be that legislative or regulatory jurisdiction both follows and is limited by territorial jurisdiction: the only state that can regulate conduct occurring within the United States is the state within which the conduct occurs.

Echoing this intuition, some scholars have asserted categorically that any effort by a state to apply its criminal laws extraterritorially would violate the Constitution.⁷¹ Indeed, in support of this position, opponents of extraterritorial abortion regulation could point to *Bigelow v. Virginia*,⁷² in which the Supreme Court—just two years after its decision in *Roe v. Wade*—reversed Virginia’s conviction of a Virginia newspaper editor for printing an advertisement for an abortion referral service in New York.⁷³ The Court wrote:

The Virginia Legislature could not have regulated the advertiser’s activity in New York, and obviously could not have proscribed the activity in that State. Neither could Virginia prevent its residents from traveling to New York to obtain those services, or, as the state conceded, prosecute them for going there.

68. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. XIV, § 1.

69. U.S. CONST. art. IV, § 1.

70. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981) (plurality opinion) (“This Court has taken a similar approach in deciding choice-of-law cases under both the Due Process Clause and Full Faith and Credit Clause.”); *id.* at 333 (Powell, J., dissenting) (applying the same test as the plurality and stating that “the Court has recognized that both the Due Process and Full Faith and Credit Clauses are satisfied if the forum has such significant contacts with the litigation that it has a legitimate state interest in applying its own law”); EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* 78–79 (2d ed. 1992).

71. See, e.g., ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 42 (3d ed. 1982) (“[N]o state may punish its citizen for what he does in the exclusive territorial jurisdiction of another state where what was done was lawful.”).

72. 421 U.S. 809 (1975).

73. *Id.* at 829.

Virginia possessed no authority to regulate the services provided in New York⁷⁴

Despite this language from *Bigelow*, which some scholars have argued is only dictum anyway,⁷⁵ the categorical claim that states may never enact or enforce extraterritorial criminal legislation seems too strong.⁷⁶ To see why, it may be useful to begin with Supreme Court decisions upholding the authority of states to apply their civil laws in lawsuits involving out-of-state events. Modern conflicts-of-law principles establish that a state's regulatory jurisdiction depends on its "contacts" with or interests in a transaction, not necessarily on whether a transaction occurred within its territory.⁷⁷ Within the resulting framework, "a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, the application of the law of more than one jurisdiction"—including the law of states that are geographically remote from the triggering events.⁷⁸ The question is whether a state that wants to apply its law has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."⁷⁹

In cases involving civil rather than criminal law, the Supreme Court has said repeatedly that an important consideration in assessing whether a state can

74. *Id.* at 822–24 (citations omitted).

75. Whether the above-quoted passage in *Bigelow* ought to be considered dictum is the subject of an intricate scholarly debate. See Kreimer, *supra* note 66, at 459 n.27 (arguing the passage is not dictum); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1907 (1987) (arguing that language in *Bigelow* is dictum); see also Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 955–64 (2002) (summarizing the debate and weighing in on the side of Regan).

76. See Bradford, *supra* note 67, at 127 (concluding that there is "little authority" to support the claim that the Constitution categorically bars extraterritorial application of state criminal laws); Rosen, *supra* note 75, at 963–64 (concluding that the Constitution does not bar states from regulating the conduct of their citizens who have traveled to evade state law).

77. See, e.g., *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985) (permitting the application of a state's law based on "a significant contact . . . creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair") (citations omitted).

78. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981) (plurality opinion). In *Hague*, a Minnesota court applied substantive Minnesota law to the accidental death of a Wisconsin man on a Wisconsin road. *Id.* at 305–06. The Court found that Minnesota had sufficient contacts to justify application of its law because Hague held a job in Minnesota, because Allstate did business there, and because Hague's spouse had subsequently moved to the state. *Id.* at 319–20. The dissenters agreed that the forum state may sometimes apply its substantive law to an out-of-state accident, but they disagreed with the conclusion that Minnesota's contacts in this case established a sufficient state interest to apply its own law. *Id.* at 336 (Powell, J., dissenting). But see *Shutts*, 472 U.S. at 822 (denying application of the forum state law to class members who had no contacts with the forum state).

79. *Shutts*, 472 U.S. at 818 (quoting *Hague*, 449 U.S. at 313).

apply its laws to out-of-state events is whether one of its citizens was involved.⁸⁰ In other words, a state has an enduring contact with its citizens and an interest in their well-being. In the civil context, this contact would sometimes suffice to make a state's enforcement of its law to regulate out-of-state conduct neither arbitrary nor unfair. In addition, a state might assert a contact or interest involving a fetus conceived within its borders. Indeed, a pro-life state might even claim that the fetus was a person whose life it was entitled to protect.

Bigelow to the contrary notwithstanding, there is reason to think that the Supreme Court would assess a state's efforts to apply its criminal laws to out-of-state events by employing a contacts-based framework similar to that which it employs in gauging the permissibility of a state's application of its civil laws to transactions occurring out of state. In several cases that *Bigelow* failed to cite, the Court has actually held that the states can apply their criminal laws extraterritorially, albeit under circumstances involving potentially distinguishable facts.⁸¹ Once the door is open to any extraterritorial extension of a state's criminal jurisdiction, it becomes at least arguable that some kind of contact or interest-based analysis is necessary to distinguish permissible from

80. See, e.g., *Hague*, 449 U.S. at 318–19; *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66, 72 (1954); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08 (1930); see also *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996) (holding that “a State may not impose economic sanctions on violators of its laws with the intent of changing tortfeasors’ lawful conduct in other States” and that “the economic penalties that a State . . . inflicts on those who transgress its laws . . . must be supported by the State’s interest in protecting its own consumers and its own economy”). None of these cases says, however, that the citizenship or residence of one of the parties is necessarily sufficient to justify a state in applying its law to an out-of-state occurrence.

81. In *Skiriotes v. Florida*, Florida applied its criminal law to a Florida diver who, while outside of state waters, took marine sponges. 313 U.S. 69 (1941). The Court concluded that states may regulate the conduct of their citizens on the high seas. *Id.* at 73–74. Although *Skiriotes* may not serve as controlling precedent for criminal conduct not on the high seas, it at least stands for the proposition that there is no formal bar to extraterritorial application of state criminal laws. See Bradford, *supra* note 67, at 130–32. Another Supreme Court case validating the extraterritorial application of state criminal law was *Strassheim v. Daily*. 221 U.S. 280 (1911). In *Strassheim*, the defendant, while in Illinois, allegedly bribed a Michigan state official to purchase used machinery and pass it off as new. *Id.* at 281–82. The Court upheld the conviction on the grounds that, even though the criminal conduct took place outside the state, Michigan jurisdiction was obtained because the conduct was intended to produce and did produce harmful effects within the state. *Id.* at 284–85. *Nielsen v. Oregon* rejected a state’s efforts to assert extraterritorial criminal jurisdiction, but it did so on peculiar facts involving Oregon’s prosecution of a Washington resident for using a particular kind of fishing net, for which the defendant had a Washington license, on the Washington side of the Columbia River. 212 U.S. 315, 321 (1909). The precedential value of *Nielsen* may thus be limited because in it the regulating state had neither territoriality nor domicile as a basis for jurisdiction. See also Bradford, *supra* note 67, at 129 (asserting that “[t]he greatest problem with *Nielsen* is that it reflects a discredited constitutional philosophy of choice of law” because it was decided in an era in which “the Supreme Court applied strict territorial limits even to civil choice of law”).

impermissible extensions. Nor can the Supreme Court decisions upholding extraterritorial application of state criminal laws be dismissed as merely aberrational. It is well settled that the United States, which is subject to due process limitations similar to those applicable to states, can regulate the conduct of U.S. citizens even when it occurs abroad.⁸² In apparent reliance on this analogy, the Restatement of the Conflicts of Laws echoes the Supreme Court's decision in *Skiriotes v. Florida*⁸³ in asserting that "[a]n individual State of the United States also has jurisdiction to apply its local law in certain instances to its absent citizens."⁸⁴ In addition, there are state court cases, some running back to the nineteenth century,⁸⁵ that have applied state criminal laws to out-of-state events. In the modern day, too, courts have upheld the enforcement of state criminal statutes to punish such out-of-state conduct as non-payment of child support and detention of a child by a non-custodial parent.⁸⁶ Indeed, one writer goes so far as to maintain that *Bigelow* is the "only decision calling into question the extraterritorial authority of states over citizens."⁸⁷

82. "[T]he United States may apply its criminal law to acts done by its nationals in other countries (*United States v. Bowman*, 260 U.S. 94 (1922); cf. *Blackmer v. United States*, 284 U.S. 421 (1932)) and may tax its absent nationals upon property situated abroad (*United States v. Bennett*, 232 U.S. 299 (1914)) and upon income derived therefrom. *Cook v. Tait*, 265 U.S. 47 (1924)." RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 9 cmt. f (1971).

83. 313 U.S. at 77.

84. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 9 cmt. f (1971). In *Sun Oil Co. v. Wortman*, the Supreme Court suggested that the Full Faith and Credit Clause should "be interpreted against the background of principles developed in international conflicts law." 486 U.S. 717, 723 (1988).

85. See *Hanks v. State*, 13 Tex. Ct. App. 289 (Ct. App. 1882) (upholding Texas authority to punish the forging in Louisiana of a certificate of title to Texas land); *Commonwealth v. Gaines*, 4 Va. (2 Va. Cas.) 172 (1819) (upholding the application of Virginia criminal law against a Virginia citizen who stole a horse in the District of Columbia).

86. See *Bradford*, *supra* note 67, at 100–04 (collecting cases). Several courts faced with this dilemma have overcome presumptions against extraterritorial jurisdiction on the grounds that failures to pay child support or to return children to the proper custodian are criminal omissions that occur constructively within the home state. See, e.g., *State v. Doyle*, 828 P.2d 1316 (Idaho 1992); *State v. Doyen*, 676 A.2d 345 (Vt. 1996). Other courts have concluded that the out-of-state activity produces an in-state harm. See, e.g., *State v. Kane*, 625 A.2d 1361 (R.I. 1993); *Rios v. State*, 733 P.2d 242 (Wyo. 1987). Such cases show a willingness to extend extraterritorial jurisdiction in substance, if not in form.

The Model Penal Code states that a state can impose criminal liability based on acts occurring in other states as long as the applicable statute "expressly prohibits conduct outside the State" and the regulated conduct "bears a reasonable relation to a legitimate interest of th[at] State." MODEL PENAL CODE § 1.03(1)(f) (1962).

87. Mark P. Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893, 907 n.94 (1988); see also *Rosen*, *supra* note 75, at 896 ("Home States indeed have a presumptive power to regulate their citizens' out-of-state activities to avoid travel-evasion. . . . Such powers are

When authorities upholding the assertion of state power to impose criminal penalties on conduct occurring out of state are matched against the clear, on-point assertion in *Bigelow v. Virginia* that one state “possesse[s] no authority to regulate the services provided in [another state],”⁸⁸ I would not pretend to pronounce a confident judgment on whether, following the overruling of *Roe v. Wade*, the Due Process and Full Faith and Credit Clauses would permit a pro-life state to make it a crime for its citizens to procure abortions in other states. But I have no hesitation in concluding that this question would be a difficult one that is not clearly resolved in the negative by the Supreme Court’s past decisions.

This is itself a relatively strong conclusion, adequate to refute the claim that the overruling of *Roe v. Wade* would necessarily remove difficult abortion questions from the Supreme Court’s docket. But a further, perhaps more surprising speculation may also be worth venturing. In assessing whether a state could regulate its citizens’ efforts to procure out-of-state abortions, the Court might possibly hold categorically that states can always deploy their criminal law to regulate their citizens’ out-of-state conduct. Or the Court might hold that the Due Process and Full Faith and Credit Clauses always bar state criminal prosecutions based on out-of-state occurrences. Or, what seems to me most likely, the Court might hold that a state can regulate its citizens’ out-of-state conduct only insofar as that conduct has some further impact on the state’s interests or policies that reverberate within the regulating state. If so, the Court would need to determine whether the states have a sufficient interest in the lives of fetuses conceived by their citizens within their borders to justify the exercise of extraterritorial regulatory jurisdiction.⁸⁹ Framed within the conceptual apparatus of conflicts of laws, the question would be whether a regulating state had “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law [would be] neither arbitrary nor fundamentally unfair.”⁹⁰

2. An Aside on Conflicts of Laws and the Implications of State Citizenship

If I am right in my analysis so far, the overruling of *Roe v. Wade* would not only invite disputes about the permissible extraterritorial application of state anti-abortion laws, but also bring to the fore a largely unappreciated ambiguity in the constitutional claim that responsibility for abortion regulation should be

consonant with longstanding Supreme Court caselaw, and they have not been undermined by the case of *Bigelow v. Virginia* or any Supreme Court decision since.”).

88. *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975).

89. See Kreimer, *supra* note 66, at 478–79; Bradford, *supra* note 67, at 114–18.

90. *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981)).

returned to the states. As the case of extraterritorial legislation highlights, the relevant question is: Which states should get to make the decision for whom?

So far, I have suggested that if this question needs to be resolved pursuant to a contacts- or interest-based analysis, then it would be too simple to assume categorically that each state necessarily gets to frame the abortion rules applicable to all abortions occurring within its territory. It is at least possible that Utah might have sufficient contacts to justify its prohibiting a Utah citizen from getting an abortion in California, even if abortion would otherwise be lawful in California.

Suppose for the moment that this is true (even though I do not mean to be claiming ultimately that it necessarily is true). On this supposition, a further question arises about whether the Due Process and Full Faith and Credit Clauses would also permit Utah to make it a crime for a California doctor practicing in California to abort the fetus of a Utah citizen who had traveled to California just to procure an abortion there.

I do not know the answer to this question. On the one hand, it might be asserted that Utah had no contacts with a California doctor that would justify it in applying its criminal law to an abortion performed by that doctor in California.⁹¹ Issues of fair notice might also arise if a California doctor had no reasonable way of knowing whether a patient resided within an anti-abortion state or whether her fetus was conceived there. On the other hand, if Utah could make it a crime for a Utah citizen to undergo an abortion in California, it is not obvious that Utah should be able to apply its law to one party to the transaction but not to the other, especially insofar as it could be said that the California doctor was an accomplice to a crime the adverse effects of which— involving the death of a fetus—were felt in Utah. The dispositive question, once again, might involve whether the state's interest in the life of a fetus gave it a sufficient "contact" to make the exercise of its regulatory jurisdiction neither "arbitrary nor fundamentally unfair."⁹²

As before, however, it is not crucial for my current purposes to attempt to resolve the scope of the power that pro-life states might have to criminalize out-of-state abortions if *Roe v. Wade* should be overruled. My point is more analytical than normative or predictive: If the Supreme Court were to overrule *Roe v. Wade*, it would almost certainly need to confront hard issues about the meaning of both state citizenship and national citizenship. With respect to state citizenship, competing claims would be at stake. From one direction,

91. *Cf.* *Home Ins. Co. v. Dick*, 281 U.S. 397, 404, 407–08 (1930) (finding that Texas could not apply its law to an action against an out-of-state defendant based on events all of which had occurred in New York or Mexico, even though the plaintiff was and had been a Texas domiciliary). *But cf.* *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194, 202–06 (2d Cir. 1978) (applying New York choice-of-law rules and New York substantive law in a wrongful death action against a Virginia corporation based on the death of a New York domiciliary in Virginia).

92. *Shutts*, 472 U.S. at 818 (quoting *Hague*, 449 U.S. at 313).

some states would likely claim authority to regulate their citizens' conduct—and, in particular, the procurement of abortions—outside their borders.⁹³ From another direction, other states might assert an entitlement to immunize their citizens from prosecution under the laws of another state for conduct occurring within the borders of the citizens' own state.⁹⁴ For example, California might claim authority to immunize California doctors from prosecution under the laws of Utah for performing abortions within the state of California, even if the abortions involved Utah women who had conceived their fetuses in Utah. But the contest of claims of authority would not merely pit state against state. Hovering in the background, of course, would be a further deep question about whether there are rights of national citizenship, embodied perhaps in the Due Process Clause, to be able to avoid the reach of a particular state's regulatory policies, of which one might conscientiously disapprove, by absenting oneself from that state's territorial jurisdiction.⁹⁵

In framing these questions, I am less interested in attempting to squeeze the competing interests into a contacts-based framework than in identifying what the Supreme Court in a practical sense would need to decide. In substance and effect, the Court would need to weigh one state's interests in protecting fetal life against another state's interests in making abortion within its territory a matter of individual conscience, and it would need to do so while, at the same time, taking account of the implications of national citizenship. So much for the idea that the overruling of *Roe v. Wade* would remove hard decisions about abortion regulation from the judicial province.

3. Further Potential Barriers to State Regulation

In suggesting that states' efforts to regulate abortions outside their territories would require the Supreme Court to assess the significance of state interests in regulating out-of-state abortions, I am in one sense getting ahead of myself. Even if state legislation barring out-of-state abortions would not run afoul of the Due Process or Full Faith and Credit Clauses, other constitutional

93. For a defense of the view that states should have the option of attaching far-reaching consequences to state citizenship, see Rosen, *supra* note 75. For a response, see Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973 (2002).

94. Professor Brilmayer argues that the implicit policy of pro-choice states in a post-*Roe* world would be to immunize individual choices relating to abortion and that, in this case of conflict between the laws of pro-choice states and states attempting to regulate abortion extraterritorially, "[t]erritoriality trumps residence." Brilmayer, *supra* note 67, at 892. For a skeptical rejoinder, see Neuman, *supra* note 67, at 949–50 & n.44 (emphasizing that state conferrals of "sovereign immunity" from suit are not binding in the courts of other states under *Nevada v. Hall*, 440 U.S. 410 (1979)).

95. See Kreimer, "*But Whoever Treasures Freedom . . .*," *supra* note 67, at 914–21 (so arguing).

provisions might apply. Critics of anti-abortion legislation have already cited a number of constitutional norms or doctrines under which objections could be raised to states' attempts to prevent their citizens from procuring out-of-state abortions. Although I want to say a few words about a number of such objections, I shall not pretend to resolve them all. Once again, my principal point will be that state efforts to regulate abortion in the aftermath of an overruling of *Roe v. Wade* would potentially raise a variety of constitutional issues, some of them difficult and contentious.

a. Privileges and Immunities Clause

Professor Seth Kreimer⁹⁶ has argued that a state law prohibiting its citizens from procuring abortions in states where abortion was otherwise lawful would violate the Privileges and Immunities Clause of Article IV, which provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”⁹⁷ This is a plausible argument. Read literally, the Privileges and Immunities Clause appears to establish that a citizen of Utah, traveling in California, should be entitled to the privileges and immunities enjoyed by California citizens in the state of California, including any privileges and immunities involving abortion.⁹⁸

On another interpretation, however, the Privileges and Immunities Clause is a non-discrimination provision the sole effect of which is to prohibit host states from imposing hostile regulations on out-of-state visitors. Read this way, the Privileges and Immunities Clause does not limit the obligations that a state can impose on its *own* citizens when they travel out of state.⁹⁹ If *Roe v. Wade* were overruled, efforts by pro-life states to prohibit their citizens from procuring out-of-state abortions could thus force the Supreme Court to choose between dueling interpretations of the Privileges and Immunities Clause.

b. Sixth Amendment

Some commentators have maintained that a state's attempt to prohibit out-of-state abortions would run afoul of the “vicinage requirement” of the Sixth Amendment, which specifies that the trial of crimes must occur in the state in

96. *Id.* at 917.

97. U.S. CONST. art. IV, § 2, cl. 1.

98. See Kreimer, “*But Whosoever Treasures Freedom . . .*”, *supra* note 67, at 917.

99. See Rosen, *supra* note 75, at 900–03. Professor Rosen cites to language in a number of early cases suggesting that the Clause applies only to host-state regulations of visitors. *Id.* Among modern cases, he relies on *United Building and Construction Trades Council v. Mayor of Camden* in which the Court held that unlike citizens of other states, New Jersey residents could not maintain a Privileges and Immunities Clause challenge to a New Jersey law because “New Jersey residents at least have a chance to remedy at the polls any discrimination against them.” *Id.* (quoting *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 217 (1984)).

which the alleged crime occurred.¹⁰⁰ Again, however, the argument to this effect is disputable. A threshold question is whether the vicinage requirement even applies to state criminal prosecutions. Although the Supreme Court has held that the Fourteenth Amendment makes nearly all provisions of the Bill of Rights applicable against the states, it has rejected the “total incorporation” theory and has insisted on a provision-by-provision assessment of whether particular guarantees are “fundamental to the American scheme of Justice.”¹⁰¹ Applying this test, at least one state court has held that the vicinage requirement applies to the states.¹⁰² The weight of authority, however, lies against incorporation: the three Circuit Courts of Appeals that have considered the issue and several state courts have ruled that the vicinage requirement does not apply to state prosecutions.¹⁰³ If those decisions hold up, there would be no Sixth Amendment obstacle to a state court’s enforcement of a state law prohibiting out-of-state abortions. In order to determine whether a state could apply its criminal laws to abortions occurring outside its territory, the Supreme Court might therefore need to resolve the division about whether the Sixth Amendment vicinage requirement applies to state court criminal prosecutions.

Even if the Supreme Court found that the vicinage requirement applied to state prosecutions, further issues would arise from readily imaginable state efforts to redefine the crime that they wished to prohibit so that it occurred within the state that sought to forbid abortions.¹⁰⁴ For example, a state might make it unlawful for any women to engage in intrastate travel for purposes of obtaining an abortion, or it might forbid conspiracy to cause the destruction of a fetus, regardless of whether the actual destruction occurred in state or out of state. Questions about the constitutionality of measures such as these—not all of which are clearly resolved under current doctrine—would then need to be confronted on their own terms.

c. Commerce Clause

Among the most serious challenges to the constitutionality of states’ efforts to stop their citizens from obtaining out-of-state abortions would involve the Dormant Commerce Clause. Although the Commerce Clause is framed as an affirmative grant of power to Congress, the Supreme Court has

100. See Kreimer, *supra* note 66, at 484–85.

101. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

102. See *Miss. Publishers Corp. v. Coleman*, 515 So. 2d 1163, 1165 (Miss. 1987).

103. See *Caudill v. Scott*, 857 F.2d 344, 345–46 (6th Cir. 1988); *Cook v. Morrill*, 783 F.2d 593, 595 (5th Cir. 1986); *Zicarelli v. Dietz*, 633 F.2d 312, 325–26 (3rd Cir. 1980); *Price v. Superior Court*, 25 P.3d 618, 630, 632–33 (Cal. 2001); *Sailor v. State*, 733 So. 2d 1057, 1062 n.6 (Fla. Dist. Ct. App. 1999); *State v. Bowman*, 588 A.2d 728, 730 (Me. 1991); *Commonwealth v. Duteau*, 424 N.E.2d 1119, 1125–26 (Mass. 1981); *Garza v. State*, 974 S.W.2d 251, 259 (Tex. App. 1998).

104. See *Bradford*, *supra* note 67, at 144–45.

long held that it also bars the states from enacting some types of regulatory legislation that interfere with the flow of commerce among the states.¹⁰⁵ At the core of Dormant Commerce Clause jurisprudence lies a sharply two-tiered structure. Under it, state regulations that purposely or facially discriminate against interstate commerce are virtually per se illegal.¹⁰⁶ By contrast, nondiscriminatory statutes that incidentally restrict the flow of interstate commerce trigger a balancing test, most famously articulated in *Pike v. Bruce Church, Inc.*¹⁰⁷

Where [a state statute] regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question [whether the regulation should be invalidated] becomes one of degree. And the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.¹⁰⁸

Within this framework, a state's law prohibiting its citizens from obtaining abortions would not discriminate against interstate commerce: it would ban abortions performed in-state as well as out-of-state. Within the two-tiered analytical structure that normally applies, the question would therefore be whether the burden on interstate commerce was "excessive" when measured against the "local" interest in preventing abortions. To make this determination, the Supreme Court, strikingly if not ironically, would need to assess the strength of a state's interest in preserving fetal life within a balancing calculus, notwithstanding the frequent suggestion that the overruling of *Roe v. Wade* would spare the courts from needing to make such assessments.

A complication arises, however, from a more minor, never fully explicated theme in Dormant Commerce Clause doctrine that condemns state efforts to engage in extraterritorial regulation. In *Healy v. Beer Institute*, for example, the Supreme Court said flatly that the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."¹⁰⁹ If the Court means literally what it said in *Healy*, then state criminal laws forbidding their citizens from obtaining out-of-state abortions would obviously offend the Commerce Clause (even though it might still be possible for a state

105. *E.g.*, *Welton v. Missouri*, 91 U.S. 275, 281–82 (1876).

106. *See, e.g.*, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

107. 397 U.S. 137 (1970).

108. *Id.* at 142 (citation omitted).

109. 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982)) (omission in original).

to avoid the Commerce Clause problem by framing its law to prevent in-state travel for purposes of procuring an abortion).

It is not wholly clear, however, that the *Healy* dictum proscribing extraterritorial state legislation applies categorically to all cases or, more pointedly, that it would necessarily apply to state anti-abortion legislation. In condemning extraterritorial regulation as impermissible under the Dormant Commerce Clause, the Supreme Court has typically spoken in contexts involving what it calls economic protectionism—efforts by one state to shield an in-state group or industry from out-of-state competition.¹¹⁰ Whatever other objections state anti-abortion legislation might invite, it would obviously not be “protectionist” in this distinctively economic sense. Accordingly, it could be argued that state statutes that regulate out-of-state transactions by their citizens in order to promote non-economic goals (such as the preservation of fetal life) lie outside a prohibition that properly applies only to economically protectionist legislation.

I do not know whether the Supreme Court would accept this argument. Once again, however, it seems plain that the overruling of *Roe v. Wade* could easily confront the Court with a difficult, currently unresolved issue about the constitutional permissibility of state anti-abortion legislation. What is more, it is at least plausible to think that the Dormant Commerce Clause doctrine that requires courts to weigh “local benefits” against national interests in the free flow of commerce would require the Court to make an explicit assessment of the strength of the states’ interest in preserving fetal life.

d. Right to Travel

It is surely arguable that state laws barring their citizens from procuring out-of-state abortions would violate the long recognized constitutional right of interstate travel. In *Bigelow v. Virginia*, in which the Supreme Court stated that one state could not prohibit its citizens from procuring abortions in another state that made abortion lawful, Justice Blackmun’s opinion cited right-to-travel cases.¹¹¹ It also is arguable that a prohibition against out-of-state abortions would create a disincentive to travel and restrict the “experiment with modes of living other than those sanctioned at home” that the right to travel ought to protect.¹¹²

It would probably be a mistake, however, to regard it as simply settled that a state’s prohibition against out-of-state abortions of fetuses conceived within

110. See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982) (“[W]e have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other.”); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531–32 (1949).

111. 421 U.S. 809, 824 (1975) (citing *Doe v. Bolton*, 410 U.S. 179, 200 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969); *United States v. Guest*, 383 U.S. 745, 757–59 (1966)).

112. Kreimer, “*But Whoever Treasures Freedom . . .*,” *supra* note 67, at 915.

the prohibiting state would always and necessarily violate the right to travel. Among other things, a number of cases have upheld state restrictions on travel by their citizens for purposes of avoiding obligations that the state is otherwise constitutionally permitted to impose. For example, the Supreme Court has held that because a state can forbid a parent to abandon a dependent child, it can also make it a crime for a parent to travel outside the jurisdiction for the purpose of avoiding that obligation.¹¹³ By similar reasoning, it could be argued that whether a state infringes the right to travel by prohibiting its citizens from procuring out-of-state abortions would normally depend on whether the prohibition against out-of-state abortions is one that the state could otherwise validly impose—and, as I have been arguing at length now, the question of whether and when one state might otherwise be able to preclude its citizens from obtaining out-of-state abortions is very much open to debate.

However this question might be resolved, there is at least one kind of case in which the right to travel would inescapably have a distinctive bearing. The right to travel would be most clearly pertinent in cases in which a woman procuring an out-of-state abortion did not return to her prior state of residence but, in conjunction with the abortion, migrated to another state, perhaps not least because she wanted to become a citizen of a state with abortion laws that she found enlightened or congenial. Even in this case, it might be argued that the state in which a fetus was conceived, by one of its citizens, has a sufficient attachment to the fetus to warrant state regulation to protect it. For example, it might be maintained that if a state can lawfully impose an obligation on pregnant women not to destroy their fetuses, it can bar their efforts to avoid this obligation by taking up residence in another state.¹¹⁴ To resolve the competing claims in a case such as this would require deep immersion in cases involving conflicts of laws and, inevitably, an ultimate judgment suffused by contestable normative assessments.

Without offering a judgment of my own, I would simply note, indeed emphasize, that in a case in which a woman wanted to change her residence in order to escape one state's anti-abortion legislation that political majorities in other states would reject as tyrannical and unjust, there is a palpable tension between the competing claims of state and national citizenship under the Constitution of the United States. Can one state's interest in protecting fetal life outweigh a woman's asserted right, rooted in her national citizenship, to migrate to another state and to enjoy the privileges or immunities of citizenship

113. *Jones v. Helms*, 452 U.S. 412, 420 (1981).

114. See generally Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 1 (2005) (exploring comparable issues arising from state efforts to enforce obligations arising from gay marriage).

of that other state?¹¹⁵ This hard and important question starkly spotlights one of the principal points that I have meant to emphasize so far: the overruling of *Roe v. Wade* could not simply transfer responsibility for abortion regulation to the states and thereby absolve the courts of responsibility for constitutional oversight, for the power of the states to regulate abortion necessarily implicates rights of national citizenship. By overruling *Roe*, the Supreme Court could and would eliminate one set of national rights that women confronted with anti-abortion regulations now can claim under the Due Process Clause. Inescapably, however, hard questions about the constitutionality of state anti-abortion legislation would continue to present themselves under other provisions of the Constitution.

C. *Abortion, Free Speech, and National Citizenship*

A state that was strongly committed to preserving fetal life might not rest content with forbidding abortion within its territorial jurisdiction and with banning (or at least attempting to ban) its citizens from procuring out-of-state abortions. Such a state might also prohibit activities likely to encourage women to seek abortions, such as the advertising of or provision of information concerning out-of-state abortion services. Virginia, for example, had taken this step in the statute that provoked the Supreme Court's decision in *Bigelow v. Virginia*.¹¹⁶ In states in which abortion is legal, abortion advertising and counseling enjoy First Amendment protection. But for commercial advertising to be protected under the First Amendment, the Supreme Court has said repeatedly that it must "concern lawful activity."¹¹⁷ The question thus arises whether the overruling of *Roe v. Wade* would inaugurate a regime in which First Amendment rights to engage in abortion-related speech would vary from state to state, depending on whether particular states permitted or prohibited abortion.

115. Even if it were assumed that a woman who left a pro-life state to become a domiciliary of a pro-choice state thereby escaped the reach of the pro-life state's criminal laws, a question would potentially remain whether her purported change of residence was genuine and valid, if the woman thereafter returned to the state whose regulations she had fled. For discussion of relevant precedents, see Bradford, *supra* note 67, at 132-35. Professor Bradford concludes that "an extraterritorial abortion would be risky for the pregnant woman unless she truly intended to change residence and not return to her original domicile." *Id.* at 135.

116. 421 U.S. at 811.

117. *E.g.*, *Cent. Hudson Gas & Elec. Corp v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980); *see also* *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973) ("Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.").

1. Prohibitions Against Abortion Advertising

If *Roe v. Wade* were overruled, there is no doubt that any state forbidding abortion within its borders could also prohibit the advertising of abortions to be performed within its territorial jurisdiction, even though similar advertising would remain constitutionally protected in pro-choice states.¹¹⁸ A more challenging question would arise if an anti-abortion state attempted to extend its prohibition of abortion advertising to encompass advertisement of abortion services provided in other states that had not outlawed abortions. In thinking about the constitutionality of such a prohibition under the First Amendment, myriad distinctions might be relevant, but for the sake of simplicity I shall organize my discussion around two divergent hypotheses. I shall imagine, first, that the state that wishes to ban the advertising of out-of-state abortions either has not barred its citizens from traveling out of state to procure abortions or that it would be constitutionally impermissible for a state to impose this form of extraterritorial regulation. I shall then assume, alternatively, that a state barring the advertisement of out-of-state abortions has also made it unlawful for its citizens to procure out-of-state abortions and that the Constitution permits it to do so.

a. Advertisements of Lawful Out-of-State Abortions

If we assume first that an anti-abortion state attempts to prohibit the advertising within its borders of abortions that are lawful in other states, the precedents most pertinent to the prohibition's constitutionality would seem to point in opposite directions. In *Bigelow v. Virginia*, the Supreme Court invalidated a Virginia prohibition against the advertising within Virginia of abortions that were lawful in New York.¹¹⁹ The Court's decision emphasized three points. First,

the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia.¹²⁰

118. Disparity of this kind would not be wholly unprecedented. In *United States v. Edge Broadcasting Co.*, the Supreme Court upheld a federal statute prohibiting the broadcast of lottery advertising by any broadcaster located in a state that banned lotteries. 509 U.S. 418 (1993). Similarly, First Amendment rights vary from state to state under the Supreme Court test that makes the definition of constitutionally unprotected "obscenity" depend on what is "patently offensive" under state or local, rather than national, "contemporary community standards." See, e.g., *Miller v. California*, 413 U.S. 15, 24 (1973). Nevertheless, the overruling of *Roe* would pave the way for significant new variations.

119. *Bigelow*, 421 U.S. 809.

120. *Id.* at 822.

Second, “the activity advertised pertained to constitutional interests” recognized in *Roe v. Wade*, which had come down in the course of Bigelow’s appeal.¹²¹ Third, the Court emphasized that abortion services were legal in New York and said expressly that a state “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.”¹²²

In *United States v. Edge Broadcasting Co.*,¹²³ however, the Court upheld a federal statute that barred media outlets located in states that banned lotteries from advertising out-of-state lotteries that were legal in the states in which they occurred. The Court reached its conclusion in *Edge Broadcasting* by applying the four-part test that it had developed in *Central Hudson Gas & Electric Corp. v. Public Service Commission*¹²⁴ to gauge the permissibility of regulations of commercial advertising. Under that test, the Court determined that the federal government had a “substantial” interest in supporting the policies of the non-lottery states, which had permissibly prohibited a long-suspect practice that “implicate[d] no constitutionally protected right.”¹²⁵ Having done so, the Court also concluded that the challenged federal statute directly advanced the government’s interest and that it was not more extensive than necessary to serve that interest.¹²⁶ Perhaps significantly, the Court did not cite to or attempt to distinguish *Bigelow*, even though Justice Stevens, writing in dissent, relied heavily on that earlier case in arguing that the Court had already decided that advertisements for conduct that is legal in another state should receive First Amendment protection.¹²⁷

Although it would be arguable that after *Edge Broadcasting*, *Bigelow* no longer controls any case in which the advertised activity has been forbidden by the state that also wants to bar the advertisement and does not “implicate[] [a] constitutionally protected right”¹²⁸ (as abortion advertising would not if *Roe v. Wade* were overruled), there is also an argument to be made on the other side. In more recent cases, the Supreme Court has expressed deep skepticism about the constitutional permissibility of regulating truthful advertising that does no more than provide information about the availability of a lawful product or

121. *Id.*

122. *Id.* at 824–25.

123. 509 U.S. 418 (1993).

124. 447 U.S. 557, 566 (1980) (“For commercial speech to come within [the First Amendment], [1] it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.”).

125. *Edge Broad.*, 509 U.S. at 426.

126. *Id.* at 427–30.

127. *Id.* at 439 (Stevens, J., dissenting).

128. *Id.* at 426.

service (such as I am now assuming that abortion would be in the jurisdictions in which it would be performed).¹²⁹ Significantly, however, the recent cases that have struck down bans on advertisements that merely convey truthful information have never confronted the permissibility of a state's efforts to restrict the advertising within its borders of a product or activity that that state has outlawed within its territorial jurisdiction.¹³⁰

The question that would be presented by an anti-abortion state's attempt to ban the advertising of abortions that would be lawful in other states would thus seem to be a contestable one. In resolving such a case, the Supreme Court would necessarily and explicitly have to assess the weight of an anti-abortion state's interest in barring abortion advertising, at least to determine whether this interest rose to the level of being "substantial" under the *Central Hudson* test.¹³¹ If so, the Court would then need to determine whether the prohibition directly advanced the state's interest and was no broader than necessary. In making determinations such as these, the Court could hardly fail to take note of the weight and nature of the interests supporting and opposing a ban on abortion advertising.

b. Advertising of Abortions That Would Be Unlawful in Some But Not All Cases

If we assume now that an anti-abortion state, say Utah, has constitutionally permissibly made it a crime for its citizens to procure out-of-state as well as in-state abortions, the First Amendment analysis develops new complexities, as becomes readily apparent if we imagine the issues that would arise from the advertising of an abortion provider located in a pro-choice state that reached Utah through some nationally available medium such as a magazine or internet website. On the one hand, an advertisement offering abortion services to citizens of Utah (among others) would propose a commercial transaction that would be unlawful for any currently pregnant Utah resident to enter. On the

129. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (emphasizing "that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving information about tobacco products"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (invalidating a ban on advertising that conveyed truthful information concerning liquor prices).

130. In *Greater New Orleans Broadcasting Association, Inc. v. United States*, the Supreme Court invalidated a federal statute barring all broadcast advertisements of casino gambling, including advertisements of such gambling by broadcasters located in states in which casino gambling was legal. 527 U.S. 173 (1999). In doing so, however, the Court did not question the continuing validity of *Edge Broadcasting*. Instead, its decision rested mostly on the rationale that the challenged statute was "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Id.* at 190. "Had the Federal Government adopted a more coherent policy, or accommodated the rights of speakers in States that have legalized the underlying conduct, this might be a different case," the Court said. *Id.* at 195 (citation omitted).

131. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

other hand, if the services would be performed in another state, say California, it would not necessarily be unlawful for an abortion provider in California, which permits abortions, to enter into the same transaction with a woman who was not a Utah citizen if the agreement were reached and the abortion were performed in California. At the threshold of analysis under the now-prevailing test for the regulation of commercial speech, a court would therefore have to confront the question—so far unprecedented in the Supreme Court—whether in these circumstances the advertisement “concern[ed] lawful activity,”¹³² and thus triggered First Amendment protection under the *Central Hudson* test, or whether it proposed at least some unlawful transactions and was therefore categorically prohibitible. In resolving this question, a court would need to consider that if it were to accept the second characterization, the practical effect would be to allow the states with the most restrictive anti-abortion legislation to limit what could lawfully be advertised in any newspaper or magazine of national circulation or in any other medium of nationwide reach.

This result might seem draconian from a First Amendment perspective even if the Supreme Court were prepared to allow the states very great flexibility to impose substantive restrictions on their citizens’ access to abortion even after their citizens had traveled out of state. To be sure, the Court has permitted what is obscene and therefore prohibitible to be defined partly by reference to local “community standards.”¹³³ The upshot is that the

132. *Id.*

133. In *Hamling v. United States*, the Court rejected a challenge to a federal statute that proscribed the mailing of obscene materials and left obscenity to be defined locally as permitted under *Miller v. California*, 413 U.S. 15, 24 (1973). *Hamling*, 418 U.S. 87 (1974). In *Sable Communications of California, Inc. v. Federal Communications Commission*, the Court similarly rejected a challenge to a federal statute that subjected a “dial-a-porn” operator to local obscenity standards. 492 U.S. 115, 117–18, 131 (1989). The Court rejected Sable’s argument that the statute effectively subjected it to the obscenity standards of the least tolerant community in the nation. *Id.* at 124. The Court seemed to assume that Sable could have excluded callers from certain states had it wanted to and that it ought to bear the burden and cost of excluding them. *See id.* at 125. More recently, however, the Court has appeared to struggle with the question whether a federal regulatory statute could incorporate the varied state definitions of obscenity in regulating speech on the Internet. In *Ashcroft v. American Civil Liberties Union (Ashcroft I)*, the Court rejected a facial challenge to the Child Online Protection Act (COPA), which subjected website producers to criminal penalties for allowing children to have access to materials that would be considered obscene according to the standards of their local community, on the ground that the respondents had not met their burden of showing that COPA was substantially overbroad. 535 U.S. 564 (2002). In doing so, however, the Justices divided over whether speech made available over the Internet could be judged by the standards of particular local communities. Writing for a plurality of four Justices, Justice Thomas wrote that “[i]f a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities.” *Id.* at 583. But Justice O’Connor wrote separately to note, *inter alia*, that the reasoning of *Hamling* and *Sable* would be too burdensome as applied to the Internet and to argue

state with the broadest prohibition against obscenity may shape what any nationwide distributor of sexually explicit materials will dare to disseminate anywhere. More directly on point, the state with the broadest prohibition against obscenity can determine what a nationally distributed advertisement of sexually explicit materials can lawfully offer as available for direct delivery. But obscenity is different from commercial advertising. The Court has adjudged that any material that is obscene under the standards of any state has so little value that practical disincentives to its dissemination are not matters of significant constitutional concern. By contrast, recent Supreme Court decisions suggest that the national and constitutional interest in ensuring the free flow of truthful information about goods and services that are lawfully available in other jurisdictions is a good deal stronger.¹³⁴

The cases that emphasize the value of commercial advertisements are, of course, all distinguishable. The products and services involved in them could all be provided lawfully—as measured by all potentially applicable laws—to all of those to whom they were offered. Accordingly, it might be said, to come within the reach of past decisions protecting commercial speech, an abortion advertiser would need to restrict what it advertised. It could offer to perform abortions only for women who could lawfully abort their fetuses under all of the laws applicable to them, including the laws of their states of residence. But would it be constitutionally tolerable for anti-abortion states to insist that any abortion provider who wanted to engage in national advertising must limit its offer of abortion services to citizens of states that permit their residents to have abortions? This question might occasion no difficulty if it were assumed that one state, such as Utah, could validly make it a crime for a California doctor to perform an abortion on a Utah citizen even within the state of California. But suppose, slightly more weakly, that Utah could make it a crime for a Utah woman to procure an abortion in California, but not for a California doctor to perform an abortion there, even on a Utah resident. Under these circumstances, would the First Amendment permit Utah effectively to restrict nationwide advertising by California abortion providers? If *Roe v. Wade* were overruled, the Supreme Court might need to confront this question about the

that the Court should adopt a national obscenity standard for the Internet. *Id.* at 587 (O'Connor, J., concurring in part and concurring in the judgment). Justice Breyer took a similar position in his concurrence, as did Justice Kennedy, who wrote for the remaining Justices. *Id.* at 590–91 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 594–95 (Kennedy, J., concurring in the judgment). In *Ashcroft v. American Civil Liberties Union (Ashcroft II)*, the Court held the COPA unconstitutional on the ground that it was not narrowly tailored to a compelling governmental interest (because it failed to consider the possibility of using filters to shield children from obscene images rather than restrictions on the websites themselves), but it did not revisit the question whether speech posted on the Internet could be adjudged obscene pursuant to local community standards. 542 U.S. 656, 666–70 (2004).

134. See, e.g., *Lorillard Tobacco*, 533 U.S. at 564; *44 Liquormart*, 517 U.S. 484.

respective claims of state regulatory authority and the free speech rights entailed by national citizenship.

2. Prohibitions Against Abortion Counseling

Similarly complex and largely uncharted First Amendment issues would arise if, following the overruling of *Roe v. Wade*, a state that banned in-state abortions and also forbade its citizens to seek out-of-state abortions should ban the provision of abortion counseling or the dissemination of information with the aim of inciting or abetting the procurement of (illegal) abortions to be performed out of state. In *Brandenburg v. Ohio*¹³⁵ the Supreme Court established stringent protections for politically motivated speech aimed at inciting illegal conduct, including a proviso that incitements could not be prohibited unless likely to produce “imminent” illegal action.¹³⁶ It is less than wholly clear, however, whether and, if so, how *Brandenburg* limits the capacity of states to punish speech that aids and abets, rather than incites, the commission of a crime by instructing pregnant women on how to obtain illegal abortions.

If an anti-abortion state sought to prohibit the dissemination of information about the availability of out-of-state abortion services on the ground that such information would predictably abet the procurement of abortions prohibited by that state’s laws, its regulation would force the Supreme Court to determine the constitutional protection, if any, that should be afforded to what Eugene Volokh has characterized as “crime-facilitating speech.”¹³⁷ According to Volokh, the Court has yet to confront the First Amendment issues posed by speech that provides information that predictably assists criminal activity but also has the potential to advance beneficial purposes such as contributing to public debate.¹³⁸ At the very least, state efforts to stifle speech that would aid and abet the procurement of illegal out-of-state abortions would thus give rise to unresolved constitutional questions.¹³⁹

135. 395 U.S. 444 (1969).

136. *Id.* at 447.

137. Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005). For other valuable commentary, see KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* (1989).

138. Volokh, *supra* note 137, at 1128 (“No Supreme Court case squarely deals with crime-facilitating speech.”). Professor Volokh supports this contention by referring to an opinion by Justice Stevens who wrote in a statement relating to the denial of certiorari that “Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech.” *Id.* at 1128 (quoting *Stewart v. McCoy*, 537 U.S. 993, 995 (2002) (Stevens, J., respecting the denial of certiorari)).

139. If anti-abortion states could otherwise ban the advertising of out-of-state abortions or the abetting of efforts to procure out-of-state abortions within their borders, a further set of issues would arise involving the constitutionality of their efforts to assert personal jurisdiction over out-of-state entities whose only contacts with the regulating state came through internet websites. In

D. “Culture Wars” and the Meaning of State and National Citizenship

Critics of Supreme Court decisions involving socially divisive issues that are not clearly resolved by the original understanding of pertinent constitutional language have sometimes argued that the Court should avoid participation in an ongoing “culture war” between competing conservative and liberal moralities.¹⁴⁰ If a culture war exists, then judicial neutrality possesses at least a surface allure. It seems doubtful, however, that neutrality is a live option.

Imagine a jurisprudential world following the reversal of *Roe v. Wade* in which, without violating the Constitution as construed by the Supreme Court, some states not only prohibit abortion within their own territory, but also make it unlawful for their citizens to undergo out-of-state abortions. In addition, these same anti-abortion states prohibit abortion advertising and abortion counseling. For the citizens of these states, abortion is illegal, even when they have journeyed elsewhere, and some talk about the desirability and availability of abortions is illegal too when they are in their state of residence.

Other states, by contrast, have no prohibitions against abortion. Within these states, abortion advertising and counseling enjoy First Amendment protection. For citizens of these states, abortion is legally available both within the jurisdiction and also within any other state that permits it.

In a world such as this, the stakes of the culture war—if this is an apt term of description—would be exceedingly high. Rights would vary dramatically from state to state in some cases and with state citizenship in others. More significance would attach to state citizenship than attaches now.¹⁴¹ At the extreme, a woman’s right to procure a lawful abortion, anywhere, could depend on the state of which she happened to be a citizen, and her right to obtain certain kinds of abortion-related information could depend on the state

the leading case involving the print media, *Calder v. Jones*, the Supreme Court held that employees of a Florida-based magazine were amenable to suit in California based on the foreseeable effects of an article damaging the plaintiff’s reputation in California, even though they personally had had no other contacts with California. 465 U.S. 783 (1984). No case involving a state’s personal jurisdiction over an out-of-state website operator has yet reached the Supreme Court, and the lower court decisions have not reached a consensus on a controlling test or principles. For useful discussions, see Arthur R. Miller, *The Emerging Law of the Internet*, 38 GA. L. REV. 991, 995–96 (2004); Wendy Perdue, *Aliens, the Internet, and “Purposeful Availment”*: A Reassessment of Fifth Amendment Limits on Personal Jurisdiction, 98 NW. U. L. REV. 455 (2004); Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, The Internet, and the Nature of Constitutional Evolution*, 38 JURIMETRICS J. 575 (1998); Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171 (2001).

140. See, e.g., *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

141. For a normative defense of the view that states should be able to regulate out-of-state conduct by their citizens and one which champions a constitutional regime that permits the states to attach large consequences to state citizenship, see Rosen, *supra* note 75.

in which she happened to be located. Correspondingly, the scope of freedom that currently attends national citizenship would diminish.

It is unthinkable that the Supreme Court could allow a transition from the jurisprudential regime that we now inhabit to the one that I have just imagined without repeated, difficult assessments of state anti-abortion legislation of various kinds. The notion that by overruling *Roe* the Supreme Court could extract itself from controversial assessments of the constitutionality of state anti-abortion legislation is not just a fallacy. It is a delusion.

IV. IMPLICATIONS FOR SUBSTANTIVE DUE PROCESS AND FUNDAMENTAL CONSTITUTIONAL RIGHTS

It has sometimes been asserted that a Supreme Court decision overruling *Roe v. Wade* would, or at least could, be so written that the rest of constitutional jurisprudence involving fundamental rights would survive unaltered.¹⁴² Although claims involving what an overruling decision would do and what it could do require separate analysis, confident assertions about limited impact should not be accepted at face value in either case.

If the Supreme Court decided to overrule *Roe*, there are many ways in which it might do so, each with different immediate implications. As I noted above, it is imaginable, but highly unlikely, that the Court would reject *Roe* on the ground that fetuses are persons in the constitutional sense with the same rights to life as any other persons in the United States.¹⁴³ Or the Court could overrule *Roe* on the ground that the only rights substantively protected under the Due Process Clause are those deeply rooted in tradition, thereby calling directly into question the decision in *Lawrence v. Texas*¹⁴⁴ protecting private acts of homosexual intimacy. Or the Court might conclude that the states have “compelling” interests in protecting fetal life from the moment of conception. A decision so reasoned might have significant implications for any or all of the issues that I have discussed already that depend at least partly on the nature and significance of a state’s interests in being able to prohibit abortions, including possibly abortions occurring out of state. Or, perhaps most modestly, the Court might hold simply, at least in the first instance, that whatever other rights of sexual and procreative autonomy might exist under the Due Process Clause and might receive more stringent judicial protection, abortion is different because it inherently entails the destruction of a fetus. A ruling to this effect would establish only that state measures limiting abortion do not offend the Due Process Clause as long as they are rationally related to the states’ legitimate interest in protecting fetal life.

142. See *supra* note 9 and accompanying text.

143. See text accompanying *supra* notes 47–50.

144. 539 U.S. 558 (2003).

Given this array of possibilities, I see no reason to credit the predictive claim that if the Supreme Court were to overrule *Roe v. Wade*, it would or could be expected to do so only on the last, most apparently modest ground. Assertions about how the Court would overrule *Roe* if it should decide to do so are necessarily speculative.

Even if a Supreme Court decision overruling *Roe* were initially written in the most modest possible terms, however, it would still be hasty and misleading to conclude that the decision would have no effect on constitutional jurisprudence protecting fundamental rights outside the sphere of abortion rights. Once again, the claim's fallacy would lie in its representation of a hazardous prediction as a matter of fact. In truth, the consequences of a decision to overrule *Roe* would not be knowable in advance, no matter how narrowly the Court's opinion might be written.

Regardless of the wording of an overruling decision and regardless of the immediate intentions of the Supreme Court, it is imaginable, though by no means certain, that a renunciation of *Roe v. Wade* would initiate a new epoch of constitutional law, largely through its effect on the surrounding culture and practice of constitutional politics. A Supreme Court decision overturning *Roe* would reflect what academic commentators call "popular constitutionalism."¹⁴⁵ Popular constitutionalism is a broad, loose concept that subsumes diverse positions linked only by their shared view that the beliefs and activities of the American public not only do, but should, help to determine the resolution of constitutional issues. In its tamer versions, popular constitutionalism may imply no more than that surrounding political and cultural currents inevitably affect the way that the courts, and especially the Supreme Court, develop constitutional law.¹⁴⁶ One such influence comes through presidential nominations and congressional confirmations of Supreme Court Justices and other federal judges. The investiture of these functions in politically accountable officials tends to produce a federal judiciary whose overall outlook lies within the mainstream of public opinion.¹⁴⁷ Proponents of relatively weaker versions of popular constitutionalism also emphasize that judges and Justices are likely to attend to the public's sense of what is fair and prudent in rendering decisions on matters of high salience.¹⁴⁸

145. Prominent examples include LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); and Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

146. See, e.g., Friedman, *supra* note 145; Post, *supra* note 145, at 8–9.

147. See Friedman, *supra* note 145, at 2609.

148. See Post, *supra* note 145, at 77.

A more robust version of popular constitutionalism, recently championed by Dean Larry Kramer, maintains that “the People themselves,” rather than the courts, have both the right and the power to make ultimate decisions about constitutional issues.¹⁴⁹ In claiming that the people should decide constitutional questions, Kramer does not mean that the courts should not issue judgments in constitutional cases. He maintains, instead, that other institutions of government, which are themselves representatives of the people, should not necessarily feel bound to accept Supreme Court decisions as ultimately authoritative.¹⁵⁰ More affirmatively, the people should demand through politics that the Court bring its decisions in line with the popular will.

Political resistance to *Roe v. Wade* epitomizes the kind of robust popular constitutionalism that Kramer valorizes.¹⁵¹ From the time the Supreme Court first decided *Roe*, Congress and the state legislatures have recurrently enacted legislation aimed at provoking a judicial reconsideration, and either a softening or a total abandonment, of the abortion rights that *Roe* recognized. The Republican Party has made the appointment of pro-life, anti-*Roe* judges a plank in its political platform.¹⁵² Presidents have made nominations to the Supreme Court with the aim of getting *Roe* reversed, and the Senate has confirmed nominees with full awareness of the Presidents’ aims.

As the triumphant culmination of one exercise in robust popular constitutionalism, the toppling of *Roe v. Wade* could imaginably introduce a new equilibrium in which political agitation surrounding constitutional issues would recede. It is equally imaginable, however, that the demise of *Roe* would inspire other popular constitutional movements, whether similar or dissimilar in their political allegiances, and encourage a burgeoning of the attitude that Supreme Court decisions are properly viewed as provisional only, subject to appeal to the court of public opinion. However politicized the process of nomination and confirmation of federal judges is now, it might become more so, especially if, as I have argued, a decision to overrule *Roe* framed large, contentious new issues about the meaning of state and national citizenship.

In offering these reflections, I want to emphasize that I am not making any prediction about whether the overruling of *Roe v. Wade* would do more to spur or to deflate robust popular constitutionalism. Nor do I mean to take a stand about whether an increase of robust popular constitutionalism should be

149. See KRAMER, *supra* note 145.

150. See *id.* at 249–53.

151. See, e.g., NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE 97–120 (1996) (discussing anti-*Roe* efforts of the Reagan Administration).

152. See 2004 Republican Party Platform: A Safer World and a More Hopeful America, available at <http://www.gop.com/media/2004platform.pdf> (last visited Mar. 28, 2007) (“We support the appointment of judges who respect traditional family values and the sanctity of innocent human life.”).

welcomed or decried. Although I believe that the Supreme Court's historic role in our constitutional order has been a force more for good than for bad, I agree with those who maintain that in cases of reasonable disagreement, it is fairer, all else equal, to allow decision-making power to be shared by the people as a whole than to concentrate power in nine Supreme Court Justices.¹⁵³ My sole and simple point is that the overruling of *Roe v. Wade* could easily trigger significant changes in our political and constitutional cultures.

It is also readily imaginable that the overruling of *Roe* would have subtle, unforeseeable impacts on the sitting Justices of the Supreme Court and on the institutional climate in which they function. It is possible, for example, that the success of a popular constitutional movement in toppling *Roe* could have a chastening, moderating effect on the judiciary. The felt lesson might be that the Court should avoid further adventurism, however adventurism might be defined, in much the same way that the Court retreated into relatively deferential quiescence in the years following the collapse of its resistance to New Deal regulatory legislation.¹⁵⁴

It is equally possible, however, to imagine that the overruling of *Roe v. Wade*, brought about through popular constitutionalism, would subtly encourage judges and Justices to re-imagine themselves, not as occupants of a role defined by norms of legal craft and constitutional tradition, but as tribunes of the people, vested with a mandate to remake constitutional law to fit the people's liking. Over the course of its history, *Roe* has developed progressively broader and deeper roots in constitutional doctrine. It has been reaffirmed repeatedly, most famously and dramatically in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁵⁵ and the number of decisions that have either relied on *Roe* or *Casey* or at least assumed their validity has increased with the passage of time.¹⁵⁶ However intended initially, the overturning of *Roe* would be a judicially bold act that could (though it would not necessarily) prove exhilarating to those who did the deed. Many of those who have tasted power come to relish its exercise. If the Court overturned *Roe* tomorrow, what other contested monuments of our constitutional law might appear ripe for abandonment the day after? It is impossible to know.

As I have perhaps intimated already, however, *Lawrence v. Texas*,¹⁵⁷ which invalidated a state anti-sodomy statute on the ground that it threatened the

153. See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

154. See generally WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995) (discussing the political crisis surrounding judicial resistance to the New Deal and its aftermath).

155. 505 U.S. 833 (1992).

156. See, e.g., *Ayotte v. Planned Parenthood*, 126 S. Ct. 961 (2006); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

157. 539 U.S. 558 (2003).

dignity and equal citizenship of homosexuals, would appear especially vulnerable. *Lawrence* relied heavily on the reasoning of *Planned Parenthood v. Casey*,¹⁵⁸ which itself reaffirmed *Roe*'s "central holding" and thus would presumably be overruled by any decision in which *Roe* was overruled. What is more, if *Lawrence* were overruled, then *Romer v. Evans*,¹⁵⁹ which invalidated a state constitutional amendment on the ground that it discriminated impermissibly against homosexuals, could easily appear vulnerable too. The rationales of the two decisions, both written by Justice Kennedy and both emphasizing homosexuals' rights to equal status with other citizens, are largely overlapping. If *Lawrence* fell, the Court might therefore conclude, ultimately if not immediately, that *Romer* could or should not stand either.

In offering these musings, I want to emphasize, once again, that I am not predicting that the overruling of *Roe* would necessarily lead to the overruling of any other case. My more cautious claim is that in constitutional law, as in the world generally, there is always the potential for a butterfly effect. Although nothing is certain, no one should doubt that a decision overturning *Roe v. Wade* would be the constitutional equivalent of a very large butterfly.

CONCLUSION

From a constitutional point of view, getting rid of *Roe v. Wade* could not be neat and simple. In the wake of an overruling decision would come a multitude of legal issues, some excruciatingly hard. Rather than attempting to summarize the issues that the Supreme Court might need to confront if *Roe* were overruled, I want to conclude instead by re-emphasizing two themes.

One involves the so-called culture wars. Abortion is a fiercely divisive issue. There is certainly an attraction to getting the Supreme Court disengaged from a controversy that calls upon it to take sides that will predictably be viewed as partisan by those who disagree with the Court's substantive decisions. As I have argued, however, abstention from the culture wars would not be a live option for the national judiciary in a post-*Roe* world, especially insofar as one state's attempts to stop its citizens from procuring out-of-state abortions would intrude its regulatory power into the territorial jurisdiction of another state. Lines would need to be drawn between the respective regulatory jurisdictions of states that wished to ban abortion and of states that sought to permit abortion. In drawing those lines, courts would need to appraise the competing state interests. The obvious but unavoidable awkwardness is that differences about how to define, weigh, and accommodate those interests would implicate issues close to the heart of our deepest cultural divisions. Given the nature of the constitutional debate, courts could not simultaneously

158. 505 U.S. 833 (1992).

159. 517 U.S. 620 (1996).

retreat to neutral ground and fulfill their constitutional obligations, even if *Roe v. Wade* should be overruled.

Another, connected theme has involved state and national citizenship. *Roe* nationalized abortion rights to a considerable extent. Accordingly, a decision overruling *Roe* would narrow the rights that flow from national citizenship. Less obviously, such a decision would also generate deep issues about the significance of state citizenship and about the capacity of states to regulate the efforts of their citizens to procure abortions, even when they do so out of state. In states that made abortion a crime, issues would also arise about how far, if at all, speech advertising and promoting abortion could be criminalized, the national guarantees of the First Amendment notwithstanding.

As I have emphasized repeatedly, my aim is not to judge whether *Roe v. Wade* should be overruled. But when contemplating the possible eradication of that jurisprudential landmark, we ought to have a clear-eyed view of the constitutional consequences. If *Roe* were to go, it would not go gently. Instead, its departure would roil the waters of constitutional law and surrounding politics and churn up a host of new controversies. No matter how much the Supreme Court might wish to extricate itself from abortion debates, it could not imaginably do so.

