

## GENDER, ABORTION, AND TRAVEL AFTER *ROE*'S END

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### INTRODUCTION

This Essay responds to Professor Richard Fallon's *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*.<sup>1</sup> Professor Fallon's Article exposes as fallacies four popular beliefs about the legal landscape after the end of *Roe v. Wade*,<sup>2</sup> including the belief that states restricting abortion will and can reach conduct only within their boundaries. As he persuasively explains in debunking this "third fallacy,"<sup>3</sup> criminal authority probably extends beyond state lines, and the outer limits of a state's criminal legislative jurisdiction pose a host of contested issues, including the tension between national and state citizenship.<sup>4</sup>

Although endorsing Professor Fallon's rejection of our intuitively territorial understanding of criminal law, this Essay proceeds a step further, however—examining a fallacy that lies within his third fallacy and the consequences of this new fallacy. Briefly put, while Professor Fallon's analysis of the third fallacy assumes that states banning abortions seek to protect a particular class of fetuses, this Essay challenges that assumption. This Essay emphasizes instead such states' purpose of controlling women and explores what this policy of policing gender behavior means for the out-of-state abortions hypothesized by Professor Fallon. This closer look at an abortion-banning state's purposes and policies complements Professor Fallon's

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1. Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611 (2007).

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

3. Fallon, *supra* note 1, at 625–48.

4. *See id.* at 640–48.

use of modern choice-of-law theory, which relies on such underlying purposes and policies to decide multistate cases.

After exploring and modifying the law hypothesized in Professor Fallon's third fallacy, this Essay analyzes the choice-of-law and constitutional questions posed by extraterritorial criminal abortion bans. It then considers recent developments that suggest less controversial but equally effective alternatives for deterring out-of-state abortion activity: civil remedies, principally tort liability, but also injunctive relief. This Essay concludes by challenging Professor Fallon's self-proclaimed non-normative position.<sup>5</sup> Instead, I express my opposition to overruling *Roe*, situating this opposition in a long line of important choice-of-law cases about legal rules that subordinated women and constrained their agency.

### I. EXTRATERRITORIAL CRIMINAL ABORTION LAWS

A common view of the United States after *Roe*'s end envisions a patchwork of state laws, with some permitting abortion and others banning it. This view not only reflects the state of affairs before the Supreme Court decided *Roe* in 1973, but also accords with an understanding of abortion as a matter of family law, traditionally a state prerogative.<sup>6</sup> And it provides one illustration of the oft-cited slogan of federalism that looks to experimentation conducted within "the 'laboratory' of the States"<sup>7</sup> for successful resolution of contentious issues of social policy.

Yet, just as before *Roe*,<sup>8</sup> women with sufficient resources and determination might well travel from their homes in restrictive states to more permissive jurisdictions to terminate their pregnancies. Hence, a state truly committed to preventing abortions would legislate to plug this travel "loophole."

#### A. *Exploring the Geography of Conception*

Against this background, Professor Fallon hypothesizes "a state criminal statute making it unlawful for citizens to procure out-of-state as well as in-state

5. *Id.* at 633.

6. *See, e.g., In re Burrus*, 136 U.S. 586, 593–94 (1890); Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821 (1995).

7. *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 292 (1989) (O'Connor, J., concurring) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); *see also, e.g., Atkins v. Virginia*, 536 U.S. 304, 326 (2002) (Rehnquist, C.J., dissenting); Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 18–19 (2000).

8. In perhaps the most publicized pre-*Roe* case of migratory abortion, Sherri Finkbine went to Sweden to terminate a pregnancy after the teratogenic effects of Thalidomide became known. *See Sherri Finkbine, The Lesser of Two Evils*, in *THE CASE FOR LEGALIZED ABORTION NOW* 15 (Alan F. Guttmacher ed., 1967).

abortions of fetuses conceived within the regulating state.”<sup>9</sup> In fact, over and over he writes about citizens pregnant with fetuses conceived locally,<sup>10</sup> albeit with the following qualification:

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.<sup>11</sup>

Professor Fallon’s Article does not explain his emphasis on the location of conception.<sup>12</sup> Yet his focus on fetuses conceived locally by women citizens of restrictive states poses many problems—practical, doctrinal, and theoretical—that merit exploration. After analyzing these questions, I conclude that Professor Fallon’s emphasis on the place of conception is not only unnecessarily difficult and obfuscatory, but it is also altogether unnecessary.

The practical problems stem from both prosecutorial obligations and the incentives created by Professor Fallon’s law. First, if in-state conception constitutes an element of the crime defined by the restrictive state, the prosecution must prove this element beyond a reasonable doubt.<sup>13</sup> How would the evidence be collected, except in the case in which the male participating in conception became a witness for the state—perhaps creating a whole new category of “he said/she said” controversies? Indeed, if any shred of the right to privacy first recognized in *Griswold v. Connecticut*<sup>14</sup> and recently reinvigorated by *Lawrence v. Texas*<sup>15</sup> survives the hypothesized overruling of *Roe*,<sup>16</sup> then investigations of the place of conception would prove highly problematic.

9. Fallon, *supra* note 1, at 627.

10. *Id.* at 627, 630, 633, 634, 639.

11. *Id.* at 634.

12. In informal conversation, he indicated that the location of conception might prove determinative in assessing the constitutionality of a restrictive state’s application of its own law to an out-of-state abortion. Conversation with Richard H. Fallon, Jr., Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School, in St. Louis, Mo. (Oct. 13, 2006); *see infra* notes 99–105 and accompanying text.

13. *See, e.g.,* United States v. Booker, 543 U.S. 220, 230 (2005) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

14. 381 U.S. 479 (1965); *see id.* at 485 (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?”).

15. 539 U.S. 558 (2003); *see id.* at 578 (“The present case . . . does not involve public conduct or prostitution. . . . The State cannot demean [petitioners’] existence or control their destiny by making their private sexual conduct a crime.”).

16. Professor Fallon considers this issue in his analysis of the “fourth fallacy,” the erroneous view that “a Supreme Court decision overruling *Roe v. Wade* would, or at least could, be so

Further, if the restrictive state's ban covered only local conceptions, then—in its effort to discourage evasive, out-of-state abortions—this ban might encourage evasive, out-of-state sexual relations, undertaken elsewhere by local citizens as an extra precaution against an unwanted pregnancy within this state's control. In other words, if a truly risk-averse citizen of a restrictive state were to do all she could to avoid undesired consequences, then she would not only use birth control, which might fail, but she would also willingly engage in sexual relations only outside this state. Hence, the restrictive state's message, under Professor Fallon's hypothetical statute, would become: "If you really don't want a pregnancy that you must continue, then don't have sex here." This message would give an entirely new meaning to the term "fertility tourism," which now refers to travel undertaken for access to assisted reproductive technologies!<sup>17</sup> More significantly, this "no-sex-here" message would raise right-to-privacy problems under precedents like *Griswold* and *Lawrence*.<sup>18</sup>

Finally, the foregoing analysis assumes that the place of sexual intercourse and the place of conception always coincide. Apart from present-day disagreements about whether "conception" refers to fertilization or subsequent implantation,<sup>19</sup> even *Roe* itself acknowledged "embryological data that purport

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written that the rest of constitutional jurisprudence involving fundamental rights would survive unaltered." Fallon, *supra* note 1, at 648.

17. See Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Theory*, 57 HASTINGS L.J. 295 (2005); see also Debora Spar, *Reproductive Tourism and the Regulatory Map*, 352 N. ENG. J. MED. 531, 531 (2005); Felicia R. Lee, *Driven by Costs, Fertility Clients Head Overseas*, N.Y. TIMES, Jan. 25, 2005, at A1; cf. *Hodas v. Morin*, 814 N.E.2d 320, 322 (Mass. 2004); Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399, 444–52 (1990).

This scenario also conjures up references to old prosecutions under the Mann Act, which now prohibits transporting an individual in interstate commerce "with intent that such individual engage . . . in any sexual activity for which any person can be charged with a criminal offense . . ." 18 U.S.C. § 2421 (2000); see, e.g., *Caminetti v. United States*, 242 U.S. 470, 486 (1917) (construing predecessor statute's terms, which prohibited transportation of females across state lines "for the purpose of prostitution or debauchery, or for 'any other immoral purpose'").

18. Some commentators read *Lawrence* to protect a right to sexual pleasure, as against the state. See Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1582 (2004) (*Lawrence* "resembles nothing so much as the Playboy Philosophy articulated by Hugh Hefner during the 1960s in a long, ambitious series of essays in *Playboy* magazine."). But see *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004) (upholding ban on sale of sex toys), *cert. denied sub nom. Williams v. King*, 543 U.S. 1152 (2005); *State v. Acosta*, No. 08-04-00312-CR, 2005 WL 2095290 (Tex. Crim. App. Aug. 31, 2005) (same), *cert. denied sub nom. Acosta v. Texas*, 127 S. Ct. 129 (2006).

19. The disagreement has surfaced in the context of emergency contraception. For example, an op-ed piece by Mitt Romney, then-Governor of Massachusetts, explaining his veto of a law facilitating access to emergency contraception, asserted that the drug would "terminate life after conception." Mitt Romney, Op-Ed., *Why I Vetoed Contraception Bill*, BOSTON GLOBE, July 26, 2005, at A17. The contrasting view maintains that "[t]he science is very clear that [emergency

to indicate that conception is a 'process' over time, rather than an event . . . ."<sup>20</sup> As a result, participants and prosecutors alike would have difficulty pinpointing the location of conception, whether trying to escape a law that covers only abortions of fetuses conceived in a particular state or to prove this law's violation.

Of course, criminal statutes have an expressive function. Whether or not the need to prove in-state conception would make the hypothetical ban unworkable as a practical matter, once on the books a law communicates a state policy and influences behavior. Yet, if this line of thinking helps avoid the practical problems, it also reveals other problems.

One such additional problem is doctrinal. If the state uses the location of conception as a way to distinguish "its" fetuses from fetuses that belong to another state, it has chosen an unusual reference point. Even if a restrictive state equates a fetus with an infant—so that conception for a fetus would play the role that birth now plays for an infant—states ordinarily attach little doctrinal relevance to this variable. Although birth in the United States does make one a citizen of this country,<sup>21</sup> nonetheless, for example, an application of a state's child abuse laws does not depend on the place of the child's birth. Indeed, as I develop later, to the extent that a state might seek to protect "its" fetuses from abortion, it probably would focus on *domicile* as the relevant geographic connection.<sup>22</sup> Under traditional doctrine, an infant takes the domicile of the parent by operation of law even if the infant is born elsewhere and has never lived in the state.<sup>23</sup>

Moreover, the doctrinal importance of the parent's domicile helps expose a theoretical problem in Professor Fallon's hypothetical—a new fallacy within the fallacy that he analyzes. By suggesting that a restrictive state would limit its extraterritorial prohibitions to situations in which its female citizens were pregnant with fetuses conceived locally and by imagining a judicial need to balance "one state's interests in protecting fetal life against another state's interests in making abortion within its territory a matter of individual conscience,"<sup>24</sup> Professor Fallon implies that abortion bans simply aim to protect fetuses—and a narrow class of them at that. I disagree, theorizing that the underlying policies first and foremost concern women and contending that Professor Fallon's approach obscures this point.

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contraception] does not cause an abortion." Russell Shorto, *Contra-Contraception*, N.Y. TIMES, May 7, 2006, § 6 (Magazine), at 48 (quoting William Smith of the Sexuality Information and Education Council of the United States).

20. *Roe v. Wade*, 410 U.S. 113, 161 (1973).

21. 8 U.S.C. § 1401(a) (2000).

22. See *infra* notes 93–106 and accompanying text.

23. See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48–49 (1989).

24. Fallon, *supra* note 1, at 634 (quoted *supra* in text accompanying note 11).

### B. *Abortion Laws Will Keep Their Gender After Roe*

In contrast to Professor Fallon's suggestion, I would assert that abortion bans principally aim to control women and to regulate gender behavior. One can find many clues—from scholarship, case law, legislation, and empirical studies—to support this thesis. These clues and the policies they reveal, in turn, materially affect the choice-of-law inquiry evoked by hypothetical extraterritorial abortion prohibitions. This section examines these clues, setting the stage for a modern choice-of-law analysis.

To begin, a number of persuasive scholarly accounts unmask abortion restrictions as official efforts to impose traditional gender norms, regardless of any apparent emphasis on the fetus. For example, in her historical analysis and critique of the Supreme Court's abortion jurisprudence, Professor Reva Siegel resists efforts to confine our understanding of human reproduction to a physiological process.<sup>25</sup> She demonstrates that, instead, "it is a social process, occurring in and governed by culture"<sup>26</sup> and "[i]n each culture, norms and practices of the community, including those of family, market, medicine, church, and state, combine to shape the social relations of reproduction."<sup>27</sup> Examined in context, abortion restrictions reflect a norm of compulsory motherhood and, according to Siegel, "from a social standpoint . . . [a] legislature's purpose in enacting restrictions on abortion is to pressure or compel women to carry a pregnancy to term which they would otherwise terminate . . . ."<sup>28</sup> Further, she explains, with a focus on the fetus as a rationale for abortion restrictions, "state action compelling women to perform the work of motherhood can be justified without ever acknowledging that the state is enforcing a gender status role."<sup>29</sup> Many others share this basic perspective, including Professors Sylvia Law,<sup>30</sup> Frances Olsen,<sup>31</sup> and Donald Regan,<sup>32</sup> to name just a few.

The Court's recent opinions reinforce this scholarly understanding of abortion restrictions as gender regulation. When a majority of the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>33</sup> upheld a mandatory waiting period and state script to "inform" individual abortion

25. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

26. *Id.* at 267.

27. *Id.*

28. *Id.* at 357–58.

29. *Id.* at 277.

30. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016–21 (1984).

31. Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 126–33 (1989).

32. Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979) (analyzing how abortion restrictions single out pregnant women to be Good Samaritans).

33. 505 U.S. 833 (1992).

choices, the joint opinion of Justices O'Connor, Kennedy, and Souter validated a portrait of women as incompetent decisionmakers, dependent on the state to orchestrate their deliberation and provide relevant information.<sup>34</sup> The dissenting Justices took this image of incompetence and dependence a step further in explaining why they would have also upheld a spousal notification requirement that the majority struck down.<sup>35</sup> Quoting the now much more significant words of then-Judge Alito of the U.S. Court of Appeals for the Third Circuit, the dissenters wrote: "the Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems—such as economic constraints, future plans, or the husbands' previously expressed opposition—that may be obviated by discussion prior to the abortion."<sup>36</sup> As Professor Samuel Bagenstos has observed, the Justices have already started down a doctrinal path of justifying abortion restrictions "in the name of choice," and this path could lead them to conclude that "autonomy may be best served by prohibiting abortion entirely—particularly if the pressures that operate on a woman's choice are subtle and hard to detect in any particular instance."<sup>37</sup> I would simply emphasize the gendered nature of this particular concept of autonomy and the underlying state purposes that it reflects.

More recent cases on the validity of so-called "partial-birth abortion bans" also provide telling evidence of the gender regulation at work in contemporary abortion regulations. These cases reveal official efforts to subordinate women and their health, not for the sake of saving fetuses, but rather for the sake of expressing a symbolic or ideological position.

In *Stenberg v. Carhart*,<sup>38</sup> in which a majority struck down a Nebraska statute, several of the opinions noted that the law, which contained no exception for the woman's health, would not prevent a woman from

34. *Id.* at 880–87 (joint opinion); cf. Kenneth L. Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 2003 SUP. CT. REV. 357, 425–26 (2003) (speculating why Justice O'Connor might have agreed to this result in order to secure votes to invalidate the spousal notification requirement, which "surely presented the women's-rights aspect of the case in its strongest light").

35. *Casey*, 505 U.S. at 974–76 (Rehnquist, C.J., dissenting).

36. *Id.* at 974–75 (Rehnquist, C.J., dissenting) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 726 (3d Cir. 1991) (Alito, J., concurring in part and dissenting in part)).

37. Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, 29 HARV. J.L. & GENDER 425, 449 (2006). Professor Siegel's more recent work examines the rise of arguments that "abortion hurts women," invoked to justify restrictions on abortion for the purpose of protecting women. See Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (2007) (discussed *infra* notes 55–64 and accompanying text).

38. 530 U.S. 914 (2000).

terminating a pregnancy so long as she used a different method or procedure.<sup>39</sup> Against this background, Nebraska's stated legislative interests invite close analysis. According to the state's brief, quoted by the Court, the law "'show[s] concern for the life of the unborn,' 'prevent[s] cruelty to partially born children,' and 'preserve[s] the integrity of the medical profession.'"<sup>40</sup> In his *Stenberg* dissent, Justice Kennedy described the law as the reflection of the state's finding of "a consequential moral difference" between abortion methods.<sup>41</sup>

We can see, then, that the state would subordinate women's health in the service of an ideological position. Said differently, once saving a fetus is "off the table" and alternative abortion methods are taken into account, the remaining state interests are largely symbolic. And the state would place the burden of advancing these ideological or symbolic interests solely on women, even at the cost of their health. This calculus, trading off women's health against a state's symbolic expression, arguably reflects the norm of self-sacrifice and service traditionally presumed of women.<sup>42</sup> But, even if one does not accept this characterization, at the very least it is clear that the state's goals do not include the protection of particular fetuses.

The transcript of the oral arguments in the Supreme Court in the challenge to the federal ban on "partial birth abortion," *Gonzales v. Carhart*,<sup>43</sup> identifies a similar balance of interests. Again, official efforts to jettison protection for a

39. The majority concludes that the ban's language covered not only dilation and extraction (D & X) abortions but also the more commonly performed dilation and evacuation (D & E) abortions and hence imposed an unconstitutional undue burden. *Id.* at 938–46. Yet the majority also observed, "The Nebraska law, of course, does not directly further an interest 'in the potentiality of human life' by saving the fetus in question from destruction, as it regulates only a *method* of performing abortion." *Id.* at 930. Justice Ginsburg made a similar point. *Id.* at 951 (Ginsburg, J., concurring). And Justice Kennedy's dissent asserted that "the law denies no woman the right to choose an abortion." *Id.* at 957 (Kennedy, J., dissenting).

40. *Id.* at 930–31 (quoting Brief for Petitioners 48).

41. *Id.* at 962 (Kennedy, J., dissenting).

42. See, e.g., Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971) (interpreting anti-abortion laws as imposing Samaritan duties on women). When Professor Regan relies on this analysis, however, he contrasts laws requiring sacrifice for the sake of a specific individual with laws requiring sacrifice for the sake of a public interest. Regan, *supra* note 32, at 1606. One can also see this norm of maternal self-sacrifice in cases ordering caesarean sections over the pregnant woman's objection. See, e.g., *In re A.C.*, 573 A.2d 1235, 1237 (D.C. 1990) (reversing order below requiring caesarean); see also, e.g., Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492 (1993) (noting how outsider pregnant women, in particular, are presumed selfish when they reject recommended treatment); cf. Susan M. Wolf, *Physician-Assisted Suicide, Abortion, and Treatment Refusal: Using Gender to Analyze the Difference*, in PHYSICIAN-ASSISTED SUICIDE 167 (Robert F. Weir ed., 1997) (contrasting abortion with assisted suicide and worrying that females' willingness to sacrifice their interests to relieve others of their care makes women a target of involuntary euthanasia disguised as assisted suicide).

43. 126 S. Ct. 1314 (2006) (granting certiorari).



woman's health (as shown by testimony in the courts below, albeit contrary to congressional findings) are defended in the name of an objective conceded to be something other than saving a fetal life.<sup>44</sup> Hence, the opinions in *Casey* and the laws challenged in *Stenberg* and *Gonzales v. Carhart* cast doubt on the fetal focus that Professor Fallon assumes in his examination of post-*Roe* extraterritorial abortion bans.

To be fair, however, one must consider the possibility that *Roe* and subsequent cases have distorted contemporary abortion regulation. In other words, once *Roe* indicated that protecting fetal life becomes a "compelling state interest" only after viability,<sup>45</sup> anti-abortion legislatures necessarily crafted their laws in the shadow of such Court-imposed limitations. And when *Casey* pushed back from *Roe*'s strict approach, authorizing pre-viability promotion of "know[ledge] that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term,"<sup>46</sup> legislatures likely incorporated these newly approved objectives into their enactments. Perhaps without the constraints required by the Supreme Court, states banning abortion would indeed seek to protect individual fetuses and, hence, Professor Fallon's post-*Roe* scenario properly accounts for this predictable change.

Two rejoinders emerge from the structure of many abortion restrictions themselves, however. First, many restrictions that would follow the demise of *Roe* would likely contain rape and incest exceptions, exceptions appearing in the various regulations that exist today. For example, current federal law governing the military disallows abortions at Department of Defense facilities except when the pregnancy endangers the woman's life or results from rape or incest.<sup>47</sup> Laws providing federal funds to the states as part of certain public assistance programs generally disallow payments for abortion services except those for pregnancies threatening the woman's life or resulting from rape or incest.<sup>48</sup> As one proponent of abortion prohibitions recently explained his support for rape and incest exceptions on national television: "It's a situation where the pregnancy was not voluntary, and I think the law ought to draw a different balance under those circumstances."<sup>49</sup> This approach to abortion

44. Transcript of Oral Argument at 15–17, *Gonzales v. Carhart*, 126 S. Ct. 1314 (2006) (No. 05-380), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-380.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-380.pdf).

45. *Roe v. Wade*, 410 U.S. 113, 163–64, 173 (1973).

46. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872 (1992) (plurality opinion) (providing the joint opinion of Justices O'Connor, Kennedy, and Souter).

47. 10 U.S.C. § 1093 (2000).

48. 42 U.S.C. § 1397ee(c)(7) (2000).

49. *Meet the Press: Senate Debate; Missouri Incumbent Senator Jim Talent vs. Democrat Claire McCaskill* (KSDK television broadcast Oct. 8, 2006).

regulation reveals that fetal protection is really not the overriding objective.<sup>50</sup> Rather, abortion prohibitions seek to compel that women's (voluntary) sexual activities always have consequences—motherhood or at least the risk of motherhood.<sup>51</sup>

Second, criminalization, both old and new, targets the conduct of the abortion provider but not the woman, treating her as a victim of the procedure that she has elected. Historian Leslie Reagan has chronicled the law's conflicting constructions of the abortion patient, contrasting legislative efforts to cast the woman as an accomplice with judicial impulses to portray her as a victim.<sup>52</sup> Although we might suppose that post-*Roe* bans will have difficulty addressing this issue, given modern sex-equality jurisprudence,<sup>53</sup> considerable evidence indicates that the understanding of woman-as-victim will persist.<sup>54</sup>

A task force report provided to the South Dakota legislature pursues this notion to the hilt, expressly promoting a “woman-protective” rationale for outlawing abortion.<sup>55</sup> The “talking points” in this rhetorical strategy include allegations about coercion from the “abortion industry,” emotional difficulties

50. I do not want to overstate the point. Some modern abortion restrictions do not include exceptions for rape and incest. *See, e.g.*, LA. REV. STAT. ANN. § 40:1299.30 (2006) (providing a prohibition designed to take effect upon reversal of *Roe v. Wade*). *But see* S.B. 2391, § 2(2), 2007 Leg., Reg. Sess. (Miss. 2007) (providing a prohibition, signed by Gov. Haley Barbour on Mar. 22, 2007, designed to take effect upon reversal of *Roe*, but with a rape exception).

51. I have written elsewhere about the gender-based double standard concerning sexual pleasure reflected in modern popular culture and anti-abortion efforts. *See* Susan Frelich Appleton, *Unraveling the “Seamless Garment”: Loose Threads in Pro-Life Progressivism*, 2 U. ST. THOMAS L.J. 294, 297–98 (2005). The idea that, for women at least, sex should have consequences also helps explain resistance to scientific developments such as emergency contraception and the vaccine to prevent human papillomavirus. *See generally* Michael Specter, *Political Science: The Bush Administration's War on the Laboratory*, NEW YORKER, Mar. 13, 2006, at 58.

52. Leslie Reagan, *Victim or Accomplice?: Crime, Medical Malpractice, and the Construction of the Aborting Woman in American Case Law, 1860s–1970*, 10 COLUM. J. GENDER & L. 311 (2001) (examining conflicting and evolving understandings of the abortion patient).

53. *See* Samuel W. Buell, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1778–79 (1991) (criticizing punishment of abortion provider, but not the woman, as incoherent and symptomatic of a denial of female autonomy).

54. In notable counterexamples, Nicaragua and El Salvador ban all abortions and subject both the provider and the woman to imprisonment. *See* Jack Hitt, *Pro-Life Nation*, N.Y. TIMES, Apr. 9, 2006, § 6 (Magazine), at 40; Marc Lacey, *Nicaraguan Legislature Passes Total Ban on Abortion*, N.Y. TIMES, Oct. 27, 2006, at A8; James C. McKinley, Jr., *Nicaragua Eliminates Last Exception to Strict Anti-Abortion Law*, N.Y. TIMES, Nov. 20, 2006, at A5. Further, some laws in the United States allow prosecution of the woman. *Cf.* Raja Mishra, *DA Declines to Seek Murder Charges in Abortion Case: Woman Accused of Using Pills to End Pregnancy*, BOSTON GLOBE, Mar. 29, 2007, at B5.

55. *See generally* Siegel, *supra* note 37, at 1007–29 (examining Report of the South Dakota Task Force to Study Abortion (2005)).

dubbed “post-abortion syndrome,” and physical risks to women.<sup>56</sup> Not surprisingly, then, South Dakota’s recently enacted in-your-face challenge to the Supreme Court, a statute that would ban all but life-saving abortions<sup>57</sup> and that the citizens of the state rejected at the ballot box,<sup>58</sup> provides that “[n]othing in [this legislation] may be construed to subject the pregnant mother upon whom any abortion is performed or attempted to any criminal conviction and penalty.”<sup>59</sup> The Louisiana ban—poised to spring into effect upon *Roe*’s burial—contains identical language.<sup>60</sup> Similarly, the Federal Partial Birth Abortion Ban Act of 2003 exempts the woman from prosecution for a conspiracy or the substantive offense.<sup>61</sup>

A law designed principally to achieve fetal protection would seek to maximize deterrence of abortion, punishing both the woman and the provider.<sup>62</sup> By contrast, the exemption of the woman in the South Dakota, Louisiana, and federal laws sends a different message. It indicates legislative purposes to deny women’s agency and decision-making competence and, through paternalism, to perpetuate gender inequality. It constructs women as objects of state control through others, here abortion providers.<sup>63</sup> Although not necessary for reaching this conclusion, the gender-based rhetoric underlying South Dakota’s anti-abortion exercise provides strong reinforcement.<sup>64</sup>

One final source helps make the case that abortion restrictions address the behavior of women rather than the protection of fetuses in their own right.

56. *See id.* at 1009–14.

57. S.D. CODIFIED LAWS §§ 22-17-7–12 (2006).

58. *See* Monica Davey, *South Dakotans Reject Sweeping Abortion Ban*, N.Y. TIMES, Nov. 8, 2006, at P8. After the referendum, the legislative session ended with no new abortion legislation enacted. *See* Megan Myers, *S.D. Abortion Debate Leaves Legislature Quietly—For Now*, S.D. ARGUS LEADER, Mar. 4, 2007, at 8A.

59. S.D. CODIFIED LAWS § 22-17-10 (2006).

60. LA. REV. STAT. ANN. § 40:1299.30(H) (2006) (“Nothing in this Section may be construed to subject the pregnant mother upon whom any abortion is performed or attempted to any criminal conviction and penalty.”). Mississippi has also enacted an abortion ban designed to go into effect once *Roe* is overruled; it too excepts the woman from liability. S.B. 2391, § 2(4), 2007 Leg., Reg. Sess. (Miss. 2007) (signed by Gov. Haley Barbour on Mar. 22, 2007).

61. 18 U.S.C. § 1531(e) (Supp. IV 2004) (“A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense . . . based on a violation of this section.”).

62. Of course, I do not advocate any anti-abortion laws, much less laws like those in Nicaragua and El Salvador that prescribe prison terms for women and abortion providers alike. *See supra* note 54; *infra* text accompanying notes 170–71; *cf., e.g.,* Michael M. v. Superior Ct., 450 U.S. 464, 493–94 (1981) (Brennan, J., dissenting) (contending that a gender-neutral law prohibiting statutory rape would deter more effectively than a law punishing the male participant but not the underage female “victim”).

63. This inference does not purport to rest on a discovery of legislative motive. *See infra* notes 93–95.

64. *See* Siegel, *supra* note 37.

Professor Kristen Luker's empirical study of the deep division of public opinion on whether the law should permit abortion found that, at bottom, the opposing camps regard the issue as "a referendum on the place and meaning of motherhood."<sup>65</sup> In particular, "pro-life activists believe that motherhood—the raising of children and families—is the most fulfilling role that women can have."<sup>66</sup> Luker found, moreover, that pro-life activists, like their pro-choice counterparts, have fought so fiercely for their views to become law because "should 'the other side' win, [they] will see the very real devaluation of their lives and life resources . . . ."<sup>67</sup> Historian Linda Gordon reaches a similar conclusion, attributing the strength of the anti-abortion movement to an understanding of abortion freedom as "a multidimensional attack on the 'traditional' family and gender system,"<sup>68</sup> including traditional norms governing sexuality, child-rearing, and employment.<sup>69</sup>

In sum, a wide array of evidence—scholarly analyses, case law, statutes, and empirical data—supports the thesis that abortion bans embody policies and purposes directed at the behavior and roles of women. To the extent that fetal protection is invoked, it simply allows the gender regulation to remain unacknowledged, as Professor Siegel explains.<sup>70</sup> Put differently, a state cannot seek to protect fetuses without first making a value judgment about women<sup>71</sup> or exhibiting a "disparate regard"<sup>72</sup> for women, as compared to men. And occasionally the gender-based rationale becomes more explicit, as in the materials used by the South Dakota legislature.<sup>73</sup> Under either approach, the practical problems entailed by making the place of conception an element of

65. KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 193 (1984) (emphasis removed). Luker collected her data by reviewing literature published by organizations taking positions on the abortion-rights debate, interviews with 212 activists on both sides of this debate, and observations at meetings of groups active on both sides. *Id.* at 247–56.

66. *Id.* at 160.

67. *Id.* at 215.

68. LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* 304 (2002).

69. *Id.* at 304–05.

70. *See supra* note 29 and accompanying text.

71. At the very least, a state decision to protect fetuses reflects a policy choice to devalue women. *See Olsen, supra* note 31, at 126.

72. Professor Margo Schlanger proposed this term, to express Professor David Strauss's suggestion, in writing about laws with a racially disparate impact, that we "reverse the groups" and ask:

[S]uppose the adverse effects of the challenged government decision fell on whites instead of blacks, or on men instead of women. Would the decision have been different?

If the answer is yes, then the decision was made with discriminatory intent.

David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 957 (1989); *see Note, Underenfranchisement: Black Voters and the Presidential Nomination Process*, 117 HARV. L. REV. 2318, 2338 & n.104 (2004).

73. *See supra* notes 55–59 and accompanying text.

the crime of extraterritorial abortion fade in importance, because the place of conception becomes irrelevant—as a matter of theory—to a state's woman-focused policy.

### C. *Criminal Abortion as a Choice-of-Law Problem*

Despite our intuitive resistance to the notion that a state can stretch its criminal prohibitions beyond its borders to reach conduct that is lawful where performed, legal authority does not conclusively bear out the underlying intuitions. My students in Conflict of Laws voice this resistance when confronting hypotheticals about extraterritorial criminal laws, well after they have accepted (with enthusiasm) the insights of modern policy-based approaches to choice of law.<sup>74</sup> And I confess that I shared this resistance until researching this issue many years ago in the context of a different contretemps—the question how a state seeking to restrict surrogacy arrangements in the wake of the notorious *In re Baby M*<sup>75</sup> might effectuate this project.<sup>76</sup> I shall not restate here the analysis that leads Professor Fallon to identify this as an exceedingly hard, but open, question that the Supreme Court might well need to address after *Roe*'s demise. Rather, I express my agreement with his assessment, offering a few prefatory highlights to introduce the particular nuances that I want to examine.

First, despite the old slogan that “the courts of no country execute the penal laws of another”<sup>77</sup> and the resulting penal-law exception in the traditional choice-of-law regime,<sup>78</sup> the rule does not capture the situation hypothesized by Professor Fallon. A permissive state would not be executing the criminal law of a restrictive state;<sup>79</sup> instead, the restrictive state would apply its own law to conduct in the permissive state. Nonetheless, the slogan and the related exception might help explain why criminal law has customarily remained immune from scrutiny through a choice-of-law lens.

74. See *infra* notes 87–92 and accompanying text.

75. 537 A.2d 1227 (N.J. 1988).

76. See Appleton, *supra* note 17, at 444–52. For a contemporary case in which a multistate surrogacy arrangement was designed to trigger the application of favorable law, see *Hodas v. Morin*, 814 N.E.2d 320 (Mass. 2004).

77. *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825).

78. See, e.g., DAVID P. CURRIE, HERMA HILL KAY, LARRY KRAMER & KERMIT ROOSEVELT, *CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS* 79–80 (7th ed. 2006).

79. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2005: Nineteenth Annual Survey*, 53 AM. J. COMP. L. 559, 577 (2005) (“[T]he principle means only that the forum does not *directly* apply (‘execute’) foreign penal laws or *enforce* foreign penal judgments; the forum may choose to rely, for its own purposes, on foreign penal laws or judgments.”). Thus, permissive states might choose to respect the laws of restrictive states. See *infra* notes 141–44 and accompanying text (discussing Massachusetts’ approach to nondomiciliaries’ attempt to celebrate same-sex marriages there).

Second, the territorial mindset from which this slogan first emerged no longer prevails in conflict of laws. Across many substantive areas—from torts to contracts and beyond—approaches based on Professor Brainerd Currie’s governmental interest analysis<sup>80</sup> inform the way many courts choose the applicable law in modern multi-jurisdictional cases.<sup>81</sup> True, courts have not explicitly undertaken such analysis in criminal cases, but that simply might demonstrate that lawmakers remain “stuck” in the same territorial intuitions that make Professor Fallon’s hypothetical seem so unthinkable at first blush. Yet, even the Model Penal Code’s section on jurisdiction acknowledges the authority of a state to reach conduct elsewhere when

the offense is based on a statute of this State that expressly prohibits conduct outside the State, when the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows or should know that his conduct is likely to affect that interest.<sup>82</sup>

Third, the application of United States statutes to offenses committed abroad challenges a purely territorial understanding of criminal law.<sup>83</sup> Of course, one can find several distinctions between such cases and the scenario proposed by Professor Fallon. For example, overarching federal principles, such as the full faith and credit obligation<sup>84</sup> and the right to travel,<sup>85</sup> which organize the relations among states, do not apply in the international context. In addition, in contrast to the restrictive and permissive regimes hypothesized by Professor Fallon, in the international context many broad bases of legislative jurisdiction assume that the conduct is barred both in the United States and in the country where it takes place.<sup>86</sup>

In any event, these introductory observations should, at least, unsettle any certainty that territorial sovereignty necessarily and inevitably limits a state’s criminal authority. They also pave the way for the sorts of departures from

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80. See, e.g., Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 177 (1963); see also Herma Hill Kay, *A Defense of Currie’s Governmental Interest Analysis*, RECUEIL DES COURS, Vol. 215(III), at 9.

81. For a recent tabulation of the choice-of-law approaches used throughout the American states, see Symeon C. Symeonides, *Choice of Law in the American Courts in 2004: Eighteenth Annual Survey*, 52 AM. J. COMP. L. 919, 944 (2004).

82. MODEL PENAL CODE § 1.03(1)(f) (1962).

83. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *United States v. Yunis*, 681 F. Supp. 896 (D.D.C. 1988), *aff’d*, 924 F.2d 1086 (D.C. Cir. 1991); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

84. U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”); 28 U.S.C. § 1738 (2000); see *infra* notes 103–13 and accompanying text.

85. See *Saenz v. Roe*, 526 U.S. 489 (1999); see *infra* notes 125–43 and accompanying text.

86. See *Yunis*, 681 F. Supp. at 900–01 (discussing Universal principle).

territoriality, common to modern choice-of-law approaches, that inform Professor Fallon's analysis.

In place of territorial boundaries, modern choice-of-law approaches emphasize the policies of the jurisdictions involved in each case. As Professor Brainerd Currie initially formulated governmental interest analysis, beyond a presumption that the forum would apply its own law absent a reason to displace it, the critical question is whether a state's policies would be advanced by the application of its law to the facts of the case.<sup>87</sup> When more than one state's policies can be advanced and no more moderate and restrained interpretation will eliminate the resulting "true conflict," then the forum should apply its own law.<sup>88</sup> Of course, today none of the states strictly follows interest analysis as Professor Currie outlined it.<sup>89</sup> Nonetheless, Professor Currie's intellectual legacy shines through in popular methodologies like that of the Restatement (Second) of Conflict of Laws's "most-significant-relationship" test,<sup>90</sup> which instructs courts to consider "the relevant policies of the forum"<sup>91</sup> and "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue."<sup>92</sup>

As I explained earlier, abortion restrictions seek to control the conduct of women.<sup>93</sup> A state enacting a criminal ban does so for policy reasons

87. See Currie, *supra* note 80, at 183–84; see also Kay, *supra* note 80, at 50–58, 105–06, 110, 123, 127 (explaining how Professor Currie distinguished policies and interests); *id.* at 75 (noting that Professor Currie later eliminated the first step, which specified that forum law provides the presumptive starting point).

88. Currie, *supra* note 80, at 184.

89. Professor Symeonides lists California, the District of Columbia, and New Jersey as jurisdictions that use interest analysis for torts, although not for contracts. Symeonides, *supra* note 81, at 944. But even courts in these states have strayed from strict adherence to Professor Currie's methodology. See, e.g., *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006) (illustrating how California has engrafted the "comparative impairment" approach onto interest analysis); *Jaffe v. Pallotta TeamWorks*, 374 F.3d 1223, 1227 (D.C. Cir. 2004) (stating that the District of Columbia "follows the 'substantial interest' position of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) § 145, under which the court will balance the competing interests of the two jurisdictions, and apply the law of the jurisdiction with the more 'substantial interest' in the resolution of the issue" (quoting *Lamphier v. Wash. Hosp. Ctr.*, 524 A.2d 729, 731 (D.C. 1987))); *Warriner v. Stanton*, No. 03-2211, 2005 WL 1397015 (D.N.J. June 14, 2005) (invoking New Jersey's governmental interest analysis but balancing interests to choose Delaware's statute of limitations because of "the extensive connections of Delaware to all parties in this case, and the paramount interest of Delaware in regulating the medical care offered within its borders"); cf. Currie, *supra* note 80, at 181–82 (rejecting judicial "weighing" of competing interests).

90. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). According to Professor Symeonides, twenty-two American jurisdictions use this approach for torts cases and twenty-four do so for contracts cases. Symeonides, *supra* note 81, at 944.

91. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(b).

92. *Id.* § 6(2)(c).

93. See *supra* notes 25–73 and accompanying text.

inescapably related to women. This conclusion does not purport to rest upon a discovery of legislative motive. Indeed, the clues that I examined before<sup>94</sup> do not necessarily disclose legislative motives either individually or collectively. Rather, these clues help us use the ordinary processes of construction and interpretation that Professor Currie commended.<sup>95</sup>

If we assume, at least provisionally, that the state has its own women in mind, as Professor Currie theorized<sup>96</sup> and the Restatement (Second) assumes,<sup>97</sup> then the restrictive state has a policy at stake whenever a female domiciliary seeks to terminate a pregnancy, regardless of the place of conception and regardless of place of the abortion. Now, I do not mean to suggest that a restrictive state would so exclusively focus on its own domiciliaries and so wholeheartedly abandon territoriality that it would willingly permit abortions within its borders so long as the women came from other states—and I shall consider this point more later.<sup>98</sup> For now, however, I simply note that, if a restrictive state is going to attempt to address the travel “loophole,” as Professor Fallon hypothesizes, this state would do so without regard to the place where the local woman conceived.

Professor Fallon indicated informally that he thought that place of conception might prove important in determining whether the restrictive state has a sufficient interest to apply its own law to the out-of-state abortion.<sup>99</sup> If he simply meant that the only policy underlying the state’s law is fetal protection, I have already indicated my disagreement.<sup>100</sup> Indeed, the invisibility of gender regulation in Professor Fallon’s thought experiment continues a long tradition in choice of law, in which noteworthy cases and commentary often analyzed rules enacted at women’s expense without questioning the merits.<sup>101</sup> If, on the other hand, Professor Fallon meant to

94. *See id.*

95. *See Currie, supra* note 80, at 182–83; *see also Kay, supra* note 80, at 51–52 (noting how Professor Currie recognized that sometimes a legislature will conceal the underlying purpose).

96. Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, in CURRIE, *supra* note 80, at 77, 85–86.

97. Several sections of the Restatement (Second) recognize the parties’ domiciles as contacts to be considered in determining the jurisdiction with the most significant relationship. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188 (1971).

98. *See infra* note 113 and accompanying text.

99. Conversation with Richard H. Fallon, Jr., Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School, in St. Louis, Mo. (Oct. 13, 2006).

100. *See supra* notes 25–73 and accompanying text.

101. *E.g.*, *Milliken v. Pratt*, 125 Mass. 374 (1878) (concerning contractual incapacity of married women); *Univ. of Chi. v. Dater*, 270 N.W. 175 (Mich. 1936) (concerning contractual incapacity of married women); *Mertz v. Mertz*, 3 N.E.2d 597 (N.Y. 1936) (concerning interspousal tort immunity); *Erwin v. Thomas*, 506 P.2d 494 (Or. 1973) (concerning loss of consortium actions not available to wives, but available to husbands); *Haumschild v. Cont’l Cas. Co.*, 95 N.W.2d 814 (Wis. 1959) (concerning interspousal tort immunity); *see also Saenz v. Roe*,



anticipate possible arguments that, without a locally conceived fetus, the restrictive state would lack a sufficient interest to satisfy the constitutional tests for applying its law, then a more fine-grained analysis becomes necessary.

The woman's domicile alone would easily satisfy the very loose outer limits imposed by the Due Process<sup>102</sup> and Full Faith and Credit<sup>103</sup> Clauses on a restrictive state's application of its own law to the true conflict presented by an abortion performed on one of its domiciliaries in a permissive state.<sup>104</sup> These outer limits require only "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."<sup>105</sup> The woman's domicile is a significant contact, and it creates an interest on the part of the restrictive state, as I have shown.

In fact, even if I were to agree with Professor Fallon that the restrictive state's policy seeks to protect fetuses, rather than to control women, the fetuses presumably within this sphere of concern would be those conceived (anywhere) by local women. This is so because, as noted earlier, an infant takes the domicile of the parent by operation of law, wherever the infant might have been born or has lived.<sup>106</sup> A restrictive state that treats an embryo or fetus as an "unborn infant" would apply this rule accordingly. Hence, the pregnant woman's domicile does all the necessary work; it becomes the critical element regardless whether the state's policy is woman-focused or fetus-focused.

This domiciliary contact and the resulting interest go a long way toward foreclosing possible assertions of arbitrariness or unfairness. The approach evident in American cases using extraterritorial legislative jurisdiction in the

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526 U.S. 489 (1999) (discussed *infra* notes 128–40 and accompanying text). Professor Currie used *Milliken v. Pratt* and married women's contractual incapacity in his pathbreaking essay introducing interest analysis. Currie, *supra* note 96.

102. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

103. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

104. The constitutional test is not very demanding, as applied to recognition of another state's law. See, e.g., *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003). The hypothesized case embodies a true conflict because the woman's domicile has an anti-abortion policy aimed at her but the abortion takes place in a state that has made a policy choice in favor of abortion freedom. This latter policy might rest on the permissive state's views about physicians' professional obligations, their freedom of conscience, or even the commercial value of traveling patients. To the extent that the permissive state's policy reflects exclusively a preference for women's autonomy and gender equality, however, such policy would not create a true conflict, under Professor Currie's typical analysis, because the case does not concern a woman domiciled in the permissive state. See *supra* note 96 and accompanying text.

105. *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality opinion)).

106. See *supra* note 23 and accompanying text.

international criminal context provides a reinforcing response to concerns about arbitrariness or unfairness.<sup>107</sup> Finally, any remaining gap would be filled by a law drafted in accord with the Model Penal Code's section on prohibitions of conduct outside the state, which requires "a reasonable relation to a legitimate [state] interest" and the actor's culpability with respect to that interest.<sup>108</sup>

So far, I have assumed that an abortion-banning state's focus on women would target pregnant women domiciled in that state. Certainly, this sort of assumption provided Professor Currie's point of departure in his formulation of interest analysis<sup>109</sup>—a point of departure that, in turn, has evoked charges of unconstitutionality under the Privileges and Immunities Clause.<sup>110</sup> With abortion bans, however, a different issue might well arise. Often anti-abortion views reflect such deep ideological convictions that a legislator supporting a ban might well offer an expansive answer to Professor Currie's question about an enacting state's sphere of concern, with claims that the goal is—insofar as possible—to halt all abortions sought by all women everywhere. Indeed, Dean John Hart Ely thought this general situation, a state policy *not* limited to its domiciliaries, would probably often arise.<sup>111</sup>

In this context, then, the very loose limits of the Due Process and Full Faith and Credit Clauses on choice of law would have some meaningful work to do, preventing such a capacious policy goal from application in cases with which the enacting state has no contact and in which it has no interest.<sup>112</sup> Thus, the restrictive state could apply its law to abortions performed on its own domiciliaries, wherever they might travel to terminate their pregnancies, and also to anyone performing an abortion within the restrictive state, regardless of

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107. True, some of the bases of extraterritorial legislative jurisdiction in the international context contemplate conduct that is prohibited everywhere. See *United States v. Yunis*, 681 F. Supp. 896, 900–02 (D.D.C. 1988); *supra* note 86 and accompanying text. But the case law contains ample evidence that this limitation does not inevitably apply. See *Yunis*, 681 F. Supp. at 902 n.10. Further, the Restatement's balancing test presumably would incorporate the permissibility of the conduct where performed as a factor to be weighed against other considerations. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402–03 (1987).

108. MODEL PENAL CODE § 101(1)(f) (1962).

109. See *supra* note 96 and accompanying text.

110. U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); see, e.g., John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

111. Ely, *supra* note 110, at 193–94.

112. See, e.g., *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 822 (1985); see also *supra* notes 102–05 and accompanying text.

the patient's domicile.<sup>113</sup> Both situations satisfy the minimal constitutional requirements. Abortions performed elsewhere involving no domiciliaries, however, would lie beyond the restrictive state's reach, no matter how expansive or deeply ideological its anti-abortion policy.

In sum, although the conclusion is not free from controversy—as the scholarly literature<sup>114</sup> reveals and as Professor Fallon's own Article demonstrates—I find in the Due Process and Full Faith and Credit Clauses no insurmountable obstacles to a restrictive state's law banning abortions performed elsewhere on its traveling domiciliaries.

Nonetheless, difficulties under other constitutional constraints—specifically the Commerce Clause<sup>115</sup> and the Fourteenth Amendment's Privileges or Immunities Clause<sup>116</sup>—loom larger. As Professor Mark Rosen's earlier examination of such issues concludes, “extraterritorial powers are not precluded by the Dormant Commerce Clause, so long as the regulations are not species of economic protectionism and are directed primarily to the *state's own citizens*.”<sup>117</sup> He reaches this conclusion in part because “[a]ll the Dormant Commerce Clause cases have struck down statutes in which the extraterritorial regulations applied primarily to *noncitizens* of the regulating State.”<sup>118</sup> Professor Fallon follows suit, using as his starting point the punishment of the traveling woman, while observing that “it is not obvious that [the restrictive state] should be able to apply its law to one party to the transaction but not to the other . . . .”<sup>119</sup> In any event, Professor Fallon's analysis makes clear that he envisions the conduct of the traveling woman to constitute the principal offense, with the liability of the abortion provider only a secondary matter based on his or her role as an accomplice.<sup>120</sup>

113. Of course, the latter situation—applying the restrictive state's ban to all abortions performed within the state—presents our usual understanding of criminal laws that apply to conduct within the enacting state's boundaries. Further, I agree with Professor Mark Rosen that a state may rely on domicile as the connecting factor in some cases and the place of conduct in others, without creating constitutional problems. Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 934–41 (2002).

114. Compare *id.*, with Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873 (1993), and Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992) [hereinafter Kreimer, *The Law of Choice and Choice of Law*], and Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973 (2002).

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

116. U.S. CONST. amend. XIV, §1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”).

117. Rosen, *supra* note 113, at 964 (emphasis added).

118. *Id.* at 926 (emphasis added).

119. Fallon, *supra* note 1, at 633.

120. *Id.*

Two difficulties emerge from this position. First, as I explained earlier, most American abortion prohibitions do not work this way.<sup>121</sup> Even recently enacted laws—the federal Partial Birth Abortion Ban Act of 2003 and new legislation passed in South Dakota and Louisiana in 2006—all would punish the abortion provider while explicitly exempting the woman from all liability.<sup>122</sup> Hence, for a state to take the bold action of extending its ban to out-of-state abortions without offending the Commerce Clause would require an even more paradigm-shifting move, enacting a law directing prosecution and punishment of the abortion patient. The political viability of this move remains in doubt,<sup>123</sup> especially given modern anti-abortion strategies that emphasize the protection of women.<sup>124</sup>

Second, as Professor Fallon recognizes, a law punishing the woman would raise serious issues about the right to travel and would require deciding whether the rights of national citizenship trump the obligations of state citizenship.<sup>125</sup> As a result, then, the right of national citizenship would acquire a diminished meaning for women, compared to men.<sup>126</sup> As I suggested earlier, Professor Fallon's emphasis on the place of conception might impose on women the extra burden of leaving restrictive states to engage in sexual relations;<sup>127</sup> here, by contrast, the law would frustrate women's ability to travel for certain purposes, as he explains.

In my view, however, Professor Fallon's acknowledgment of the difficulty fails to go quite far enough. I would add some analysis of the Court's admittedly unusual decision in *Saenz v. Roe*,<sup>128</sup> which successfully challenged a California residency requirement for California-level welfare benefits.

Several facets of *Saenz* prove instructive. *Saenz*'s facts, including the identity of the three plaintiffs, all women fleeing domestic violence in their previous home states,<sup>129</sup> remind us that even facially neutral laws can have particularly harsh effects for some individuals, usually those from groups already marginalized and vulnerable. Thus, in addition to the lens of gender, through which we might readily view abortion restrictions, we must also consider class and race. Indeed, data show that the current abortion population

121. See *supra* notes 52–64 and accompanying text.

122. See *id.* The South Dakota law was overturned by a voters' referendum, and the legislature has not yet passed a revised statute. See *supra* note 58.

123. See Samuel W. Buell, Op-Ed., *Abortion Law's Criminal Loophole: Who Would Go to Jail in South Dakota? Not Women, and It's All Because of Politics*, L.A. TIMES, Mar. 11, 2006, at B17.

124. See Siegel, *supra* note 37; *supra* notes 55–59 and accompanying text.

125. Fallon, *supra* note 1, at 632–34, 638–40.

126. See *id.* at 647–48.

127. See *supra* notes 16–18 and accompanying text.

128. 526 U.S. 489 (1999).

129. See *id.* at 494 (“Each plaintiff alleged that she had recently moved to California to live with relatives in order to escape abusive family circumstances.”)

disproportionately consists of poor women and African American and Hispanic women.<sup>130</sup> As a result, all post-*Roe* restrictions will have a corresponding disproportionate impact.

Doctrinally, *Saenz* is important too because it rescued from oblivion the Fourteenth Amendment's Privileges or Immunities Clause.<sup>131</sup> This Clause, which the Court almost never uses, crystallizes the tension inherent in Americans' dual citizenship, because it provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are *citizens of the United States and of the State wherein they reside*. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .<sup>132</sup>

Although the Court emphasized the right to travel from one state to another as a privilege of national citizenship, its taxonomy of the components of this right does not unequivocally address the precise situation presented by out-of-state abortion. More specifically, a restrictive state's punishment of out-of-state abortion does not necessarily implicate any of the following guarantees articulated in *Saenz*:

the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.<sup>133</sup>

As Professor Fallon notes, cases establishing the first of these components<sup>134</sup> might or might not be interpreted to preclude a restrictive state's effort to ban out-of-state abortions by its citizens.<sup>135</sup> And just as *Roe*'s companion case, *Doe v. Bolton*,<sup>136</sup> recognized the second of these components

130. According to the Guttmacher Institute,

[t]he abortion rate among women living below the federal poverty level (\$9,570 for a single woman with no children) is more than four times that of women above 300% of the poverty level (44 vs. 10 abortions per 1,000 women).

*Facts on Induced Abortion in the United States*, IN BRIEF (Guttmacher Inst., New York, N.Y.), June 2006, at 1, available at [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.pdf](http://www.guttmacher.org/pubs/fb_induced_abortion.pdf). Further, "Black women are almost four times as likely as white women to have an abortion, and Hispanic women are 2.5 times as likely." *Id.*

131. As Chief Justice Rehnquist recounted in his *Saenz* dissent,

The Court today breathes new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment—a Clause relied upon by this Court in only one other decision, *Colgate v. Harvey*, 296 U.S. 404, 56 S. Ct. 252 (1935), overruled five years later by *Madden v. Kentucky*, 309 U.S. 83, 60 S. Ct. 406 (1940).

*Id.* at 511 (Rehnquist, C.J., dissenting).

132. U.S. CONST. amend. XIV, §1 (emphasis added).

133. *Saenz*, 526 U.S. at 500.

134. See, e.g., *United States v. Guest*, 383 U.S. 745 (1966).

135. Fallon, *supra* note 1, at 638–39.

136. 410 U.S. 179 (1973).

in invoking the Privileges and Immunities Clause of Article IV to invalidate Georgia's residency requirement for abortions,<sup>137</sup> Professor Fallon accurately describes the usual application of this Clause to discrimination practiced *against nondomiciliaries*, rather than to efforts by a state to ensure that its own domiciliaries are everywhere governed by its own laws.<sup>138</sup> He concludes that the constitutionality of his hypothetical law thus remains debatable.<sup>139</sup> Finally, Saenz's list claims not to be exclusive; it says that the "right to travel" recognized in case law "embraces *at least* three different components,"<sup>140</sup> thus leaving room for the subsequent recognition of other components of the right.

One variation that Professor Fallon does not consider is suggested by Massachusetts' current treatment of same-sex marriage by nondomiciliaries. Following the state's own "marriage evasion law,"<sup>141</sup> Massachusetts officials may marry same-sex couples with a domiciliary connection to Massachusetts or to any other state that does not have a prohibition against same-sex marriage. Travelers from states with prohibitions against same-sex marriages, however, may not celebrate such marriages in Massachusetts.<sup>142</sup>

Although the federal Defense of Marriage Act<sup>143</sup> adds an element to this analysis that the abortion hypothetical does not include, the Massachusetts approach shows how permissive states might well try to help restrictive states enforce their abortion prohibitions extraterritorially. For example, permissive states might regulate their own abortion providers so that they may accept patients only from states without abortion prohibitions. With such gestures of interstate respect, a restrictive state's criminal prohibition, even if applied directly only to local abortions, would accomplish wider goals.

Yet, while perhaps less controversial than a ban on out-of-state abortions, the Massachusetts approach would probably not altogether avoid the complex, difficult, and rarely explored questions about the resulting clash between the traveling woman's right to equal treatment under Article IV's Privileges and Immunities Clause and the elusive mandate of interstate respect under the Article IV's Full Faith and Credit Clause.<sup>144</sup> Accordingly, whether embodied

137. *Id.* at 200.

138. Fallon, *supra* note 1, at 635.

139. *Id.*

140. Saenz v. Roe, 526 U.S. 489, 500 (1999) (emphasis added).

141. MASS. GEN. LAWS ch. 207, §§ 11–13 (LexisNexis 2003 & Supp. 2006).

142. Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623 (Mass. 2006). After remand, the Superior Court determined that same-sex marriage is not prohibited in Rhode Island, so that Rhode Island domiciliaries may celebrate such marriages in Massachusetts, in contrast to domiciliaries of New York, which prohibits such marriages. Cote-Whitacre v. Dep't of Pub. Health, No. 04-2656, 2006 WL 3208758 (Mass. Super. Ct. Sept. 29, 2006).

143. 28 U.S.C. §1738C (2000); *see also* 1 U.S.C. §7 (2000).

144. The Massachusetts approach resembles a solution offered by Professor Currie and co-author Professor Herma Hill Kay (then Herma Hill Schreter, one of Professor Currie's students). Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws*:

in a criminal prohibition designed to reach out-of-state abortions or in one confined to local cases but respected in other states, a rule making access to abortion dependent solely on one's domicile raises the stakes of both national and state citizenship; the resulting face-off between these two constitutional principles would become especially intense, suffused as it necessarily would be with differing value judgments about gender norms, maternal health, local physicians' professional obligations, freedom of conscience, and other similarly contentious matters.

All of these uncertainties and contested claims accumulate to add force to Professor Fallon's central argument about the third fallacy as well as the other three: After *Roe*'s end the Court will confront new constitutional problems under the Fourteenth Amendment's Privileges or Immunities Clause, Article IV's Privileges and Immunities Clause, and Article IV's Full Faith and Credit Clause, among others. And these problems promise to prove no less vexing than the difficult questions raised in *Roe* and later abortion cases.

## II. LESS CONTROVERSIAL, EQUALLY CHILLING: TORT LIABILITY AND INJUNCTIVE RELIEF

But wait. The conceit animating the third fallacy is an extraterritorial *criminal prohibition*—a law sufficiently unfamiliar that it strains, without clearly contravening, both conventional choice-of-law analysis and established constitutional interpretations. If a restrictive state could prevent out-of-state terminations of its domiciliaries' pregnancies without resorting to criminal law, then some of the difficulties examined earlier might dissipate. Here, two alternatives merit consideration.

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*Privileges and Immunities*, in CURRIE, *supra* note 80, at 445. They propose, in some cases, applying forum law to nondomiciliaries whose homes states have similar laws. *See id.* at 504–07; *see also* Kay, *supra* note 80, at 62–63, 145–46; *cf. id.* at 172–75 (developing the concept of toleration of another state's law).

Dean John Hart Ely rejected this approach as inconsistent with the Court's cases on Article IV. Ely, *supra* note 110, at 185–86. Further, *Saenz* suggests additional doubts about this approach. There, the Court invalidated California's law that would have given new arrivals in California the same welfare benefits they would have received in the states they had left, with benefits at California's level available only after one year's wait. *Saenz*, 526 U.S. at 510–11. Thus, the unconstitutional California law treated *former* (not present) out-of staters as they would have been treated at their previous homes, creating a distinction between two classes of California domiciliaries. *Id.* Some past cases evaluated such distinctions between long-term domiciliaries and new domiciliaries under the Fourteenth Amendment's Equal Protection Clause. *See, e.g.,* *Sosna v. Iowa*, 419 U.S. 393 (1975); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

The Privileges and Immunities Clause of Article IV is the second component of the right to travel explicated in *Saenz*. *See supra* note 133 and accompanying text. For some of the sparse commentary on the relationship between the Privileges and Immunities Clause and the Full Faith and Credit Clause, see Currie & Schreter, *supra*; Mark P. Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893 (1988).

Tort liability, a staple of choice-of-law cases over the years, offers one path—as developments even before the end of *Roe* demonstrate. For example, *Okpalobi v. Foster*<sup>145</sup> examined a Louisiana statute that the court described as follows:

Act 825 provides to women who undergo an abortion a private tort remedy against the doctors who perform the abortion. It exposes those doctors to unlimited tort liability for any damages caused by the abortion procedure to both mother and “unborn child.” Damages may be reduced, but not eliminated altogether (and perhaps not at all with respect to any damages asserted on behalf of the fetus), if the pregnant woman signs a consent form prior to the abortion procedure.<sup>146</sup>

It takes little imagination to see that laws giving specific individuals a cause of action for damages against abortion providers chill the practice of abortion.<sup>147</sup> The district court in *Okpalobi* determined that the Louisiana statute had the purpose and effect of chilling the exercise of constitutionally protected rights and placed an unconstitutional undue burden on a woman’s right to abortion.<sup>148</sup> A risk-averse abortion provider would need to anticipate all possible reasons an abortion patient might choose to sue later, including the possibility of subsequent emotional difficulties,<sup>149</sup> and then detail all of these possibilities in the pre-abortion consent form, presenting a “parade of horrors”<sup>150</sup>—if the provider continued to practice at all under these onerous circumstances, given that a suit for “reduced” damages could nevertheless follow. (Imagine, among other problems, the increased difficulties and costs of obtaining professional insurance!)

145. 244 F.3d 405 (5th Cir. 2001) (en banc).

146. *Id.* at 409.

147. See Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753 (2006); A.J. Stone, III, *Consti-tortion: Tort Law as an End Run Around Abortion Rights After Planned Parenthood v. Casey*, 8 AM. U. J. GENDER SOC. POL’Y & L. 471 (2000).

148. *Okpalobi v. Foster*, 981 F. Supp. 977, 986 (E.D. La. 1998), *rev’d en banc*, 244 F.3d 405 (5th Cir. 2001).

149. Abortion opponents often assert that patients suffer a host of post-abortion harms, including emotional distress. See, e.g., Angela Langranchi, *The Abortion-Breast Cancer Link: The Studies and the Science*, in THE COST OF “CHOICE”: WOMEN EVALUATE THE IMPACT OF ABORTION 72 (Erika Bachiochi ed., 2004) [hereinafter THE COST OF “CHOICE”]; Elizabeth M. Shadigian, *Reviewing the Evidence, Breaking the Silence: Long-Term Physical and Psychological Health Consequences of Induced Abortion*, in THE COST OF “CHOICE”, *supra*, at 63. The South Dakota legislature considered such claims before enacting a ban on abortions. See Siegel, *supra* note 37; see also Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES, Jan. 21, 2007, § 6 (Magazine), at 40.

150. See *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 445 (1983), *overruled* by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883 (1992).



Ultimately, however, the *Okpalobi* challenge was dismissed by the United States Court of Appeals for the Fifth Circuit, sitting en banc, because—in effect—such “self-enforcing state legislation that infringes on constitutional rights”<sup>151</sup> escapes federal court review, under Article III’s case-or-controversy requirement<sup>152</sup> and the Eleventh Amendment’s immunity for state officials.<sup>153</sup> Yet, the hypothesized overruling of *Roe* takes the wind out of the primary criticism of *Okpalobi*—the federal courts’ asserted inability to stop state legislation enacted with the purpose and effect of eliminating abortion, in spite of its constitutionally protected status. After *Roe*’s end, this particular problem will no longer exist.

Another illustration of a civil cause of action for damages appears in the federal Partial Birth Abortion Ban Act of 2003, which includes the following language:

(c)(1) The father, if married to the mother at the time she receives a partial-birth abortion procedure, and if the mother has not attained the age of 18 years at the time of the abortion, the maternal grandparents of the fetus, may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff’s criminal conduct or the plaintiff consented to the abortion.

(2) Such relief shall include—(A) money damages for all injuries, psychological and physical, occasioned by the violation of this section; and (B) statutory damages equal to three times the cost of the partial-birth abortion.<sup>154</sup>

Certainly after *Roe*’s end, if not before, a restrictive state might enact legislation along the lines of these examples, and a court in a restrictive state should have no problem in applying this law in a suit brought there seeking to recover damages for an abortion performed on a domiciliary who has traveled to a permissive state. Assuming it could obtain personal jurisdiction over the abortion provider,<sup>155</sup> a court in the restrictive state could apply its own law to this true conflict.<sup>156</sup> Such tort litigation, so commonplace in the conflict of

151. Borgmann, *supra* note 147, at 757.

152. U.S. CONST. art. III, §2.

153. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States . . .”).

154. 18 U.S.C. §1531(c) (Supp. IV 2004).

155. Even if the provider failed to satisfy the constitutional requirement of purposeful availment of the benefits of the forum, here the restrictive state, he might be personally served while present in the state. Compare *Kulko v. Super. Ct.*, 436 U.S. 84, 93–94 (1978) (articulating and interpreting requirement of purposeful availment), with *Burnham v. Super. Ct.*, 495 U.S. 604, 619 (1990) (constitutionally validating principle of personal jurisdiction based on personal service while present).

156. See *supra* notes 87–97 and accompanying text; cf. *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973) (applying New York law on damages to a medical malpractice case brought in New York seeking recovery for a New York patient’s death against a Massachusetts physician

laws, would avoid both the novelty and its choice-of-law consequences presented by Professor Fallon's hypothesized extraterritorial criminal ban. Much more significantly, however, even before a lawsuit is filed, the availability of the civil remedy would effectively deter the provision of abortion services elsewhere to domiciliaries of the restrictive state. A risk-averse abortion provider in a permissive state must turn away patients from any state with such legislation or else avoid all travel there, where service of process during transient presence would confer jurisdiction over the tort suit.<sup>157</sup>

A Missouri statute now before the state supreme court exemplifies the effectiveness of such civil remedies in targeting abortions to be performed across state lines. The statute, enacted to halt the practice of abortions on Missouri minors in Illinois, which unlike Missouri has no parental involvement requirement,<sup>158</sup> provides a civil remedy for parents against anyone who intentionally causes, aids, or assists a minor in obtaining an abortion without complying with Missouri's parental consent requirement or the alternative of a judicial bypass.<sup>159</sup> A trial court upheld the law against constitutional

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who performed surgery in Massachusetts), *abrogated by* *Barkan v. Gen. Admin. of Civ. Aviation of The People's Repub. of China*, 923 F.2d 957, 963 (2d Cir. 1991). *But see* *Warriner v. Stanton*, No. 03-2211, 2005 WL 1397015 (D.N.J. June 14, 2005) (invoking New Jersey's governmental interest analysis but applying Delaware's statute of limitations to a malpractice action brought by a New Jersey domiciliary against a Delaware physician for treatment provided in Delaware).

157. *See Burnham*, 495 U.S. at 619.

158. A parental notification requirement and waiting period enacted in Illinois in 1995, never enforced because of judicial obstacles, may become operative soon. *See* Kevin McDermott, *State Court's Action Revives Illinois Abortion Law*, ST. LOUIS POST-DISPATCH, Sept. 20, 2006, at B3.

159. The statute provides:

Causing, aiding, or assisting a minor to obtain an abortion prohibited, civil penalty—impermissible defenses—court injunction authorized, when.—

1. No person shall intentionally cause, aid, or assist a minor to obtain an abortion without the consent or consents required by section 188.028.

2. A person who violates subsection 1 of this section shall be civilly liable to the minor and to the person or persons required to give the consent or consents under section 188.028. A court may award damages to the person or persons adversely affected by a violation of subsection 1 of this section, including compensation for emotional injury without the need for personal presence at the act or event, and the court may further award attorneys' fees, litigation costs, and punitive damages. Any adult who engages in or consents to another person engaging in a sex act with a minor in violation of the provisions of chapter 566, 567, 568, or 573, RSMo, which results in the minor's pregnancy shall not be awarded damages under this section.

3. It shall not be a defense to a claim brought under this section that the abortion was performed or induced pursuant to consent to the abortion given in a manner that is otherwise lawful in the state or place where the abortion was performed or induced.

4. An unemancipated minor does not have capacity to consent to any action in violation of this section or section 188.028.

challenge, while identifying particular constructions that could create a violation of the First Amendment's protection of speech.<sup>160</sup> The oral arguments in the Missouri Supreme Court also emphasized the implications for abortion counseling of the law's uncertain sweep.<sup>161</sup> In the meantime, the law has already had the undoubtedly desired chilling effect, with Illinois abortion clinics now requiring Missouri minors to comply with Missouri's requirements before obtaining abortions there<sup>162</sup> and Missouri organizations, such as Planned Parenthood of the St. Louis Region, deciding that the law makes too risky continuing to provide any information at all about Illinois abortions or the absence of a parental-involvement requirement there.<sup>163</sup>

This Missouri statute also suggests a second path that would avoid the complexities engendered by extraterritorial criminal bans. It permits a court to enjoin conduct that would contravene the statute.<sup>164</sup> Pursuant to this model, courts in restrictive states might enjoin local women from obtaining an abortion in a permissive state. Although under the *Roe* regime such suits for injunctive relief typically failed,<sup>165</sup> the removal of constitutional protection for

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5. A court may enjoin conduct that would be in violation of this section upon petition by the attorney general, a prosecuting or circuit attorney, or any person adversely affected or who reasonably may be adversely affected by such conduct, upon a showing that such conduct:

- (1) Is reasonably anticipated to occur in the future; or
- (2) Has occurred in the past, whether with the same minor or others, and that it is not unreasonable to expect that such conduct will be repeated.

MO. REV. STAT. §188.250 (Supp. 2005).

160. *Planned Parenthood of Kan. and Mid-Mo., Inc. v. Nixon*, No. 0516-CV25949, 2005 WL 3707407, at \*8, \*16 (Mo. Cir. Nov. 18, 2005).

161. *See* Matthew Franck, *Abortion, Free Speech at Issue in High Court*, ST. LOUIS POST-DISPATCH, Nov. 16, 2006, at C1.

162. *See id.*

163. Now, each employee or volunteer at Planned Parenthood of the St. Louis Region follows a script when addressing young women under eighteen, stating that "due to a recent law passed in Missouri, I am unable to give you information about abortion care in states that do not require parental consent[;] you will, unfortunately have to get that information on your own." E-mail from Paula Gianino, President & CEO, Planned Parenthood of the St. Louis Region, to Susan Frelich Appleton, Professor of Law, Washington University School of Law (Nov. 27, 2006, at 09:17:00 CST) (on file with author). Likewise, information about abortions in states without parental consent laws have been removed from the organization's website and from links to other websites. *Id.*

A proposed federal law, the so-called "Child Custody Protection Act," would criminalize helping a minor go out of state to evade a parental involvement law. S. 403, 109th Cong. (2006).

164. MO. REV. STAT. §188.028-2(5) (2000).

165. *See, e.g., Doe v. Smith*, 486 U.S. 1308 (1988); *Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App. 1988), *aff'd*, 526 N.E.2d 958 (Ind. 1988), *cert. denied*, 488 U.S. 955 (1988).

abortion would change the reasoning and outcome of such cases.<sup>166</sup> And once a restrictive state enjoined a particular abortion, then that decree would be entitled to Full Faith and Credit elsewhere, including the permissive state, provided the parties involved had their day in court and were subject to the enjoining court's jurisdiction.<sup>167</sup>

Again, multistate civil cases in which a court grants injunctive relief would certainly not make all controversy evaporate. And, injunctive relief would have a narrow scope, most likely applying to one abortion and one woman at a time—rather than producing a more far-reaching chill, as the availability of tort remedies would. Nonetheless, injunction cases would present the contested issues in a form far more familiar to the conflict of laws than the innovative criminal statute hypothesized by Professor Fallon.

### III. CONCLUSION

Professor Fallon has insisted that his “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.”<sup>168</sup> And, consistent with this disclaimer, I have taken a doctrinal excursion through what Professor Seth Kreimer has unforgettably named “the law of choice and choice of law.”<sup>169</sup>

Yet, behind Professor Fallon's analysis and despite the disclaimer, a normative message emerges: The Court should not overturn *Roe* because doing so would require the Court to confront excruciatingly challenging

166. For example, in *Conn*, the court found “dispositive” *Roe* and *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976), which relied on *Roe* to invalidate Missouri's spousal consent requirement. *Conn*, 525 N.E.2d at 613.

167. As the Supreme Court explained in *Baker v. General Motors Corp.*:

The Court has never placed equity decrees outside the full faith and credit domain. Equity decrees for the payment of money have long been considered equivalent to judgments at law entitled to nationwide recognition. See, e.g., *Barber v. Barber*, 323 U.S. 77, 65 S. Ct. 137, 89 L.Ed. 82 (1944) (unconditional adjudication of petitioner's right to recover a sum of money is entitled to full faith and credit); see also A. Ehrenzweig, *Conflict of Laws* § 51, p. 182 (rev. ed. 1962) (describing as “indefensible” the old doctrine that an equity decree, because it does not “merge” the claim into the judgment, does not qualify for recognition). We see no reason why the preclusive effects of an adjudication on parties and those “in privity” with them, i.e., claim preclusion and issue preclusion (*res judicata* and collateral estoppel), should differ depending solely upon the type of relief sought in a civil action. Cf. *Barber*, 323 U.S. at 87, 65 S. Ct. at 141–142 (Jackson, J., concurring) (Full Faith and Credit Clause and its implementing statute speak not of “judgments” but of “judicial proceedings” without limitation”); Fed. Rule Civ. Proc. 2 (providing for “one form of action to be known as ‘civil action,’” in lieu of discretely labeled actions at law and suits in equity).

522 U.S. 222, 234–35 (1998).

168. Fallon, *supra* note 1, at 633.

169. See Kreimer, *The Law of Choice and the Choice of Law*, *supra* note 114.

constitutional issues. In one sense, Professor Fallon goes too far with this implication. In my view, some of the difficulties he imagines (at least in the third fallacy) rest on the hypothesis that a restrictive state committed to deterring out-of-state abortions by its domiciliaries would enact an extraterritorial criminal ban. As I have indicated, however, civil remedies might prove equally effective and far less provocative.

In another sense, however, Professor Fallon does not go far enough. I would stake out a normative position more explicitly, and—as I have explained elsewhere—this position would oppose overturning *Roe* because of the official gender hierarchy that this reversal would both signal and endorse.<sup>170</sup> And, I would emphasize that the doctrinal and theoretical intricacies above, including the prospect of a gendered right to travel, should not eclipse the much more down-to-earth issues, specifically the very real threats to women's health and well-being—not to mention their family autonomy and equal citizenship and the especially harsh impact on poor and minority women.

Some of the most famous cases and commentary in the evolution of new choice-of-law approaches concerned rules that subordinated women and denied their agency.<sup>171</sup> We should hope that new developments in choice of law do not depend on newly imposed forms of gender oppression.

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170. Appleton, *supra* note 51.

171. *See supra* note 101.

