

STATE AND COMPARATIVE CONSTITUTIONAL LAW PERSPECTIVES ON A POSSIBLE POST-*ROE* WORLD

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INTRODUCTION

In his Childress Lecture and the published Article based on it, Richard Fallon has provided a characteristically systematic, rigorous, and lucid analytical account of the constitutional landscape if the Supreme Court were to overrule *Roe v. Wade*.¹ The focus of his analysis is on identifying and correcting four common fallacies about the constitutional consequences of such a decision, because the decision-makers and the rest of us should have a “clear-eyed view”² ahead of time of what those consequences would be. These fallacies are: that it would (1) wipe the legal slate clean for new state statutes regulating abortion, (2) necessarily return responsibility for whether abortion is permitted or forbidden to the states, (3) end federal court involvement in the abortion wars, and (4) be a self-contained decision with no ripple effects on the rest of fundamental rights jurisprudence.³ Professor Fallon states that overall, he is most concerned with the third fallacy, the one he describes as “perhaps the most important fallacy.”⁴

In my comments, I will primarily be underscoring and supplementing what Professor Fallon says about the first and third fallacies, by providing what I hope are some helpful and interesting details from the fields of state and comparative constitutional law, respectively.

The first fallacy identified by Professor Fallon is that overruling *Roe* would hand the entire responsibility for framing abortion policy to current and future

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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. *Id.* at 653.

3. *Id.* at 611–14.

4. *Id.* at 612.

state legislatures.⁵ In his words, it “would essentially wipe the legal slate clean and frame only prospective issues about whether the states should adopt new statutes regulating abortion.”⁶ In explaining why this proposition is “false,” Professor Fallon points to the many states in which pre-*Roe* statutes remain on the books and would again become operative and enforceable unless repealed.⁷ In this context, he also mentions that some state constitutions may recognize abortion rights that the federal Constitution would cease to protect.⁸ In Part I, I will elaborate on this statement by providing some details about existing state constitutional treatment of abortion, both protective and restrictive, that (unless amended) would take the issue away from state legislatures altogether in the event that *Roe* were overruled.

The third, and “perhaps most important,” fallacy identified and corrected by Professor Fallon is that no significant federal constitutional issues about state power to regulate abortion would remain if *Roe* were overruled.⁹ Consequently, the federal courts would be out of the “abortion wars.”¹⁰ By contrast, he argues, a host of important and complex constitutional issues about state power would arise in the likely event that at least some pro-life states seek to prevent their citizens from obtaining lawful abortions in pro-choice states.¹¹ For example, a pro-life state may ban the advertising or counseling within its borders of legal abortions in a pro-choice state, or prevent its citizens from traveling to obtain legal out-of-state abortions.¹² In Part II, I underscore Professor Fallon’s argument by providing examples from comparative constitutional law in which foreign courts have already been presented with similar issues and have found them difficult to resolve.

I. STATE CONSTITUTIONAL LAW ON ABORTION

As Professor Fallon discusses, it is sometimes suggested that if *Roe* were overruled, the issue of abortion would be returned not simply to the states but specifically to the majoritarian processes of state legislatures.¹³ A normative argument involving an appeal not just to federalism but to democracy sometimes accompanies this descriptive claim: the abortion issue should be decided by voters and their representatives and not by judges. In fact, under

5. *Id.* at 611–12.

6. Fallon, *supra* note 1, at 611.

7. *Id.* at 611–12.

8. *Id.* at 616 (“One obvious question for state courts would be whether their state constitutions possibly recognize abortion rights that the federal Constitution would cease to protect if *Roe* were overruled.”).

9. *Id.* at 612.

10. *Id.*

11. Fallon, *supra* note 1, at 612–13.

12. *Id.* at 613.

13. *Id.* at 614.

existing state constitutional law, in many states the issue will not be decided by state legislatures but by state judges, and in most cases this will happen without the benefit of express constitutional provision on abortion one way or the other.

To flesh out this latter point first, currently no state constitution expressly grants a right to abortion. Indeed, only three state constitutions overtly refer to abortion in any way, and two do so to deny such a right. Thus, the Arkansas Constitution states that “[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution.”¹⁴ In addition, it states that “[n]o public funds will be used to pay for any abortion, except to save the mother’s life.”¹⁵ The Rhode Island Constitution contains the following sentence at the very end of the section setting out its Due Process and Equal Protection Clauses: “Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof.”¹⁶ Finally, Colorado also expressly bans the public funding of abortions.¹⁷

Notwithstanding this absence of any express right, we will see in a moment that ten state supreme courts have held that their state constitutions contain an independent right to abortion.¹⁸ But let us briefly stand back and view the spectrum of positions that states could in principle take in their constitutional treatment of abortion. Quite generally, there are three possible positions. First, a state constitution may contain language that, in the event of *Roe*’s overruling, would prohibit abortions—or at least those consistent with the new federal constitutional minimum.¹⁹ In this situation, currently illustrated most clearly by Arkansas, the issue of abortion would be decided by the state constitution and not the legislature. Second, state constitutions may take no independent constitutional position on abortion. This could be either because

14. ARK. CONST. amend. 68, § 2.

15. *Id.* at § 1.

16. R.I. CONST. art. I, § 2.

17. COLO. CONST. art. V, § 50 (“No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly or indirectly, any person, agency or facility for the performance of any induced abortion.”).

18. These ten are: Alaska, California, Florida, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, Tennessee, and West Virginia. *See* Valley Hosp. Ass’n v. Mat-Su Coal. for Choice, 948 P.2d 963 (Alaska 1997); *Comm. to Defend Reprod. Rts. v. Myers*, 625 P.2d 779 (Cal. 1981); *N. Fla. Women’s Health & Counseling Servs., Inc. v. Florida*, 866 So. 2d 612 (Fla. 2003); *Planned Parenthood League of Mass., Inc. v. Att’y Gen.*, 677 N.E.2d 101 (Mass. 1997); *Women of Minn. v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *Armstrong v. State*, 989 P.2d 364 (Mont. 1999); *Right to Choose v. Byrne*, 450 A.2d 1995 (N.J. 1982); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000); *Women’s Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658 (W. Va. 1993).

19. Such as a required exception for the life, and probably also the health, of the mother.

abortion is not protected (though also not prohibited) by the state constitution at all, as currently seen in Rhode Island, or because state constitutional protection of abortion is coextensive with the federal Constitution. In either case, in the event that *Roe* is overruled, the issue would then be up to state legislatures (subject to any preexisting state statutes on the subject). Third, state constitutions may provide independent and stronger constitutional protection for abortion than the federal Constitution, in which case they rather than state legislatures would determine abortion rights in the event of *Roe*'s overruling. This would, of course, be an example of the familiar but important phenomenon of the ability of states to offer greater constitutional rights than the federal minimum.

Currently, ten state supreme courts clearly fall into this third category because they have held that their state constitutions contain an independent right to abortion.²⁰ Of these ten, four have done so on the basis of an express right of privacy that they have interpreted to include choosing abortion.²¹ The other six implied the independent right to abortion from the state's due process or equal protection clause, supplemented in some cases by one or more other clauses.²²

Moreover, most of these ten state supreme courts have explicitly held that state constitutional protection of abortion is, even now, greater than federal protection, at least in certain respects.²³ They did so in the course of openly rejecting specific U.S. Supreme Court case law for state constitutional purposes, specifically *Planned Parenthood of Southeastern Pennsylvania v. Casey*²⁴ and/or *Harris v. McRae*.²⁵ Thus, in interpreting the scope of their independent rights to abortion, the three supreme courts of Alaska, Florida, and Tennessee each expressly rejected *Casey*'s undue burden standard in favor of strict scrutiny under a fundamental rights analysis.²⁶ Interestingly, they echoed Justice Scalia's dissent in *Casey* by variously criticizing the undue burden

20. For the list, see *supra* note 18.

21. These four are: Alaska, California, Florida, and Montana. See *Mat-Su Coal. for Choice*, 948 P.2d 963; *Comm. to Defend Reprod. Rts.*, 625 P.2d 779; *N. Fla. Women's Health & Counseling Servs.*, 866 So. 2d 612; *Armstrong*, 989 P.2d 364.

22. Thus, the Minnesota Supreme Court relied on three provisions in the state constitution as the source of the right to privacy (and, thereby, abortion): the rights and privileges provision (MINN. CONST. art. I, § 2), the due process provision (MINN. CONST. art. I, § 7), and the prohibition against unreasonable search and seizure (MINN. CONST. art. I, § 10). *Gomez*, 542 N.W.2d 17.

23. Several of them relied on their express rights of privacy to justify stronger state than federal protection. See *supra* note 21 and accompanying text.

24. 505 U.S. 833 (1992).

25. 448 U.S. 297 (1980).

26. *Mat-Su Coal. for Choice*, 948 P.2d at 971; *N. Fla. Women's Health & Counseling Servs.*, 866 So. 2d at 625–26; *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 15–17 (Tenn. 2000).

standard as “inherently ambiguous” and “subjective,” rather than directly as too low.²⁷ The Minnesota Supreme Court has also protected the right to abortion with a strict scrutiny standard post-*Casey*, but without expressly rejecting or even discussing its undue burden standard.²⁸ Five other state supreme courts have expressly rejected *Harris v. McRae* and held that a selective decision to provide public funding for childbirth but not for abortions interferes with and violates the state constitutional right to abortion, even if not the federal constitutional right.²⁹

In addition to these ten states, there are nine other states in which either (a) a court lower than the state supreme court has recognized an independent state constitutional right to abortion, or (b) a state supreme court has recognized a state constitutional right to privacy in other contexts but has not yet ruled on whether this includes abortion.³⁰ The best known examples of this latter position are probably Georgia and Kentucky, where during the reign of *Bowers v. Hardwick*³¹ and prior to *Lawrence v. Texas*,³² the state supreme courts held that the state due process clause grants a right of privacy that includes homosexual sodomy.³³

On the other hand, as we have seen, only one state, Arkansas, currently seems to occupy the first position: that abortion would be constitutionally prohibited in the event that *Roe* is overruled.³⁴ Three additional state supreme courts have explicitly held that there is no independent or greater protection for abortion under the state constitution than the federal.³⁵ That is, the two are coextensive so they would follow an overruling of *Roe*.

In sum, currently there are at least eleven, and possibly as many as twenty, states in which the legislatures' hands would be tied on the abortion issue by

27. *Casey*, 505 U.S. at 983–91 (Scalia, J., dissenting).

28. *Women of Minn. v. Gomez*, 542 N.W.2d 17, 31–32 (Minn. 1995).

29. These states are: California, Massachusetts, New Jersey, New Mexico, and West Virginia. See, e.g., *Comm. to Defend Reprod. Rts. v. Myers*, 625 P.2d 779 (Cal. 1981); *Planned Parenthood League of Mass., Inc. v. Att’y Gen.*, 677 N.E.2d 101 (Mass. 1997); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998); *Women’s Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658 (W. Va. 1993).

30. These nine states are: Arizona, Connecticut, Georgia, Hawaii, Illinois, Indiana, Kentucky, Oregon, and Vermont. CTR. FOR REPROD. RTS., WHAT IF *ROE* FELL?: THE STATE-BY-STATE CONSEQUENCES OF OVERTURNING *ROE* V. *WADE* 12 & n.37 (2004), http://www.crlp.org/pdf/bo_whatifroefell.pdf.

31. 478 U.S. 186 (1986).

32. 539 U.S. 558 (2003).

33. *Powell v. State*, 510 S.E.2d 18, 25–26 (Ga. 1998); *Commonwealth v. Wasson*, 842 S.W.2d 487, 501–02 (Ky. 1992).

34. See *supra* notes 14–15 and accompanying text.

35. These states are: Ohio, Pennsylvania, and Texas. *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993); *Fischer v. Dep’t of Pub. Welfare*, 482 A.2d 1148 (Pa. Commw. Ct. 1984), *aff’d* 502 A.2d 114 (Pa. 1985); *Bell v. Low-Income Women of Tex.*, 95 S.W.3d 253 (Tex. 2002).

their state constitutions in the event that *Roe* is overruled—nineteen actually or potentially granting abortion rights and one in which abortion is prohibited.

II. COMPARATIVE CONSTITUTIONAL LAW PERSPECTIVES

In this section, I discuss a fairly well-known series of events in comparative constitutional law to underscore Professor Fallon's point, in correcting the third fallacy, that there will still be difficult and complex federal constitutional issues for courts to resolve concerning state power to regulate abortion even if *Roe* is overruled.³⁶ Such issues, he argues, would be raised by likely attempts on the part of some pro-life states to seal their borders and prevent their citizens from learning about, or traveling to, abortions in pro-choice states.³⁷

As these constitutional issues only arise where there are different abortion laws in different states, they are premised on regulatory federalism regarding abortion policy—even where their resolution is a matter of individual rights rather than constitutional federalism. To the best of my knowledge, none of these issues has in fact been, or is likely to be, raised in any of the best known domestic federalism systems abroad: Germany, Canada, Switzerland, and Australia. Before turning to the two other federal systems that do provide a parallel, it might be helpful briefly to explain why this is.

In the Federal Republic of Germany, the general issue of abortion has raised enormously important and well-known constitutional issues, so much so that the contrast in approach between the U.S. Supreme Court and the German Federal Constitutional Court (FCC) is a standard topic in comparative constitutional law courses and casebooks.³⁸ It even occasionally makes its way into first year Constitutional Law classes.³⁹ Indeed, at first blush, the “anti-*Roe*” quality of the FCC's *First Abortion* decision in 1975⁴⁰ might be assumed to have established in fact the hypothetical world upon which Professor Fallon's lecture has focused us. In reality, however, the sort of federalism-related constitutional issues that he persuasively argues would likely arise in a post-*Roe* world did not arise in Germany for two structural reasons that differentiate German and U.S. constitutional law.

36. Fallon, *supra* note 1, at 612–13.

37. *Id.* at 613.

38. For example, both the first and second editions of Vicki Jackson and Mark Tushnet's casebook, *Comparative Constitutional Law*, discuss this contrast at length in the opening chapter. See, e.g., VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 1–142 (1999).

39. Such as those of my colleagues Professors Ken Karst and Bill Rubenstein.

40. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.); see also Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 605 (1976) (translating the FCC's decision).

First, the FCC has interpreted Germany's Basic Law to include several positive or "protective" constitutional duties on the part of the state. By contrast, it is generally understood to be an axiomatic feature of the U.S. Constitution that its rights provisions impose only negative duties on the state.⁴¹ One of the most famous of these positive duties was announced in the *First Abortion* decision of 1975 leading to the conclusion that not only was criminalization of abortion constitutionally *permitted* (the issue in *Roe*) but it was constitutionally *required*—as the only acceptable means by which the state could fulfill its constitutional duty to protect all life, including that of the fetus.⁴² Accordingly, the scope for differences among state abortion laws that underlies Professor Fallon's argument does not exist in the German case, where the constitution was held to mandate the opposite uniform federal rule than in *Roe*.

The second reason is the different nature of German federalism. Although the FCC has arguably been more successful than the U.S. Supreme Court in protecting remaining state sovereignty against the forces of centralization,⁴³ it started from a position in which the constitutional text unambiguously left far less to protect. The total list of enumerated federal legislative powers—exclusive, concurrent, and "framework"—is very long by U.S. standards. Abortion regulation is, and always has been, understood to be within the general field of criminal law, all of which (under Article 74 of the Basic Law⁴⁴) is within the enumerated concurrent power granted to the federal legislature. This power has been continuously exercised (thus preempting the states from the field), and it was the liberalizing 1974 federal legislation⁴⁵ that was successfully challenged in the *First Abortion* case⁴⁶ and then amended. Following unification with East Germany, new federal legislation was enacted,

41. For an interesting and thoughtful discussion of the differences between the two systems on this score, see David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

42. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.); see also Jonas & Gorby, *supra* note 40, at 605–06, 609–10.

43. See DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 36–37 (1994) ("A few [decisions of the FCC interpreting the provisions granting exclusive federal legislative authority] are of significant interest, not least because they reflect a sensitivity toward reserved state authority that has been conspicuously missing from decisions of our Supreme Court for the past fifty-five years").

44. Grundgesetz für die Bundesrepublik Deutschland [GG] (Federal Constitution) art. 74 (F.R.G.).

45. Fünftes Strafrechtsreformgesetz vom [Fifth Statute to Reform Penal Law], June 18, 1974, BGBl. I at 1297, § 218 (F.R.G.).

46. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.).

successfully challenged in part in the second FCC abortion decision of 1993,⁴⁷ and amended two years later.⁴⁸ But the presence (and probably the requirement under the positive duty) of uniform national legislation on the topic means that the kind of differences in state law on which Professor Fallon's post-*Roe* constitutional issues are premised do not exist.⁴⁹

This second reason also applies to Canadian federalism, although in a slightly different way that has come to have enormous practical implications. Here too, abortion regulation is conceived of, and has in fact been, a species of criminal law, which under Section 91(27) of the Constitution Act of 1867—the relevant constitutional text—is a field under *exclusive* federal jurisdiction.⁵⁰ This obviously creates an even stronger contrast with the U.S. situation in which state legislative competence over abortion is at least concurrent with that of Congress—and has long been primary in both fact and theory.⁵¹ Unlike, Germany, however, there is at present essentially no federal law on abortion in Canada.⁵² This is because in 1988 the Canadian Supreme Court struck down the main part of the 1969 federal abortion law, Section 251 of the Criminal Code,⁵³ as inconsistent with Section 7 of the new Charter of Rights and Freedoms,⁵⁴ and ever since then, the federal parliament has not been willing or

47. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 203 (F.R.G.).

48. For discussion of the new unified abortion law of 1995, see Rosemarie Will, *German Unification and the Reform of Abortion Law*, 3 CARDOZO WOMEN'S L.J. 399 (1996).

49. Professor Fallon argues, in correcting what he identifies as the second fallacy (that the issue of abortion would necessarily be returned to the states), that Congress could regulate the whole field—either permitting or prohibiting abortion—under current understandings of the scope of its Commerce Clause power, and therefore take the issue away from the states altogether. Fallon, *supra* note 1, at 621–25. If so, the U.S. would in this respect be in the same position as Germany and the differing state laws raising the difficult constitutional issues (in his discussion of the third fallacy) would be preempted.

50. Constitution Act, 1867, 30 & 31 Vict. Ch. 3, § 91 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985).

51. It is concurrent if Professor Fallon is correct (as I think he is) that abortion regulation would be within the scope of Congress's commerce power as currently understood; otherwise, state power would be exclusive.

52. This would almost certainly not be possible in Germany because of the positive constitutional duty imposed on the federal government to protect the life of the fetus in some constitutionally acceptable manner. See *supra* notes 42, 48; see, e.g., Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273, 275 (1995).

53. *R. v. Morgentaler*, [1988] 1 S.C.R. 30. Section 51 of the Criminal Code created an exception to the criminal nature of abortion, under which women could obtain legal abortions if a hospital's three-doctor "therapeutic abortion committee" decided that the continuation of the pregnancy would be likely to endanger the mother's life or health. See *id.*

54. Canadian Charter of Rights and Freedoms as Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 7 (U.K.) ("Everyone has the right to life, liberty

able to enact new legislation. The attempt of one province, Nova Scotia, to step in and criminalize abortions performed outside hospitals was also struck down by the Canadian Supreme Court, on the federalism ground that the provinces lack competence to enact criminal laws.⁵⁵

Switzerland offers a slight variation on the theme in that although legislating about abortion is a federal matter, Swiss federalism grants the cantons not only the power and duty to administer most federal law (including this), but also significant freedom to interpret and apply it differently.⁵⁶ Thus, more liberal and conservative cantons interpreted the exception for the health of the mother contained in the long-surviving 1937 federal law⁵⁷ in quite different ways, resulting in some “abortion-tourism.” This interpretive freedom, however, does not extend to imposing new substantive restrictions of the sort Professor Fallon hypothesizes in a post-*Roe* world, and none have been imposed or adjudicated. The 1937 federal law was replaced by a far more liberal one as a result of a referendum in 2002.⁵⁸

Closer to home, legally if not geographically, is Australia. For here, regulation of abortion, unlike in Germany, Canada, and Switzerland, is reserved (exclusively) to the eight states and territories.⁵⁹ Each does in fact have different laws on abortion.⁶⁰ Accordingly, the sort of post-*Roe* interstate constitutional issues would be possible, but in actual fact they have not arisen. Although different, the laws of the various states and territories are nowhere near as different as they would likely be in a post-*Roe* United States, largely for matters of underlying political and religious culture. While abortion is undoubtedly a controversial topic, it is not as controversial as in the U.S. and, moreover, supporters of both sides are more evenly spread as compared with the very marked regional/state differences in the U.S. The net result is that

and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”).

55. *R v. Morgentaler*, [1993] 3 S.C.R. 463.

56. See UNITED NATIONS POPULATION DIV. OF DEP'T OF ECON. & SOC. AFF., ABORTION POLICIES: A GLOBAL REVIEW 117 (2002), available at www.un.org/esa/population/publications/abortion/doc/switzerland.doc.

57. Schweizerisches Strafgesetzbuch [StGB], Code pénal suisse [Cp], Codice penale svizzero [Cp] [Criminal Code] Dec. 21, 1937, SR 311.0 (1938), art. 119 ¶ 2 (Switz.).

58. Schweizerisches Strafgesetzbuch [StGB], Code pénal suisse [Cp], Codice penale svizzero [Cp] [Criminal Code] Dec. 21, 1937, 54 AS at 757 (1938), as amended by Mar. 23, 2001, AS 2989 (2002), art. 119 ¶ 2 (Switz.); see also Julia L. Ernst et al., *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 762 (2004).

59. Criminal law is not among the enumerated powers granted to the federal government in Sections 51–52 of the Australia Constitution. Accordingly, its criminal law powers are interstitial and incidental in nature and do not include the regulation of abortion. AUSTL. CONST. § 51–52.

60. See, e.g., Jenny Stokes, *Abortion—The Law in Australia*, <http://www.saltshakers.org.au/html/P/5/B/99/> (last visited Mar. 28, 2007).

abortion is legally available throughout Australia, with the major differences relating to the degree and necessary proof of maternal health risk involved.⁶¹ No state or territory has enacted the type of bans on advertising or travel that would likely raise the difficult constitutional issues in the U.S.

Comparative constitutional law, however, does offer at least one close and relevant analogy to these potential post-*Roe* situations, although it involves not a domestic federal system but two transnational ones. These are the European Union (EU) and the European Convention on Human Rights (ECHR), both of which have increasingly taken on the features of full-blown federal constitutional structures.⁶² In the early 1990s, the highest courts of each institution struggled to resolve the complex interstate constitutional issues raised by Ireland's attempts to prevent its citizens from traveling to the United Kingdom for legal abortions.

Both the EU and ECHR grant a substantial number of rights to individual citizens of the respective member states that their governments are legally bound to respect. Articles 2 to 13 of the ECHR, together with several subsequent protocols, contain a list of enumerated rights, including, *inter alia*, the rights to life, liberty and security, a fair trial, respect for private and family life, and freedom of thought and expression.⁶³ The Treaty of Rome,⁶⁴ often referred to as "the constitution of the EU," contains in its original parts the so-called "four freedoms" of free movement of goods, services, capital, and labor that structure the common or single market, together with the general right against discrimination on the grounds of nationality and the right of women to equal pay for equal work.⁶⁵ The European Court of Human Rights (ECtHR)

61. *Id.*

62. The ECHR is an international treaty that all members of the Council of Europe (now, essentially all countries in Europe) are required to ratify as a condition of membership. *See, e.g.,* Vessela V. Stoyanova, *The Council of Europe's Monitoring Mechanisms and Their Relation to Eastern European Member States' Noncompliance*, 45 SANTA CLARA L. REV. 739, 747 (2005). The Council of Europe is a broader inter-governmental organization that is quite distinct from, and predates, the European Union. The latter is a smaller, supranational organization constituted and governed by the Treaty of Rome, now comprising twenty-seven member states with the admission of ten from central and eastern Europe in 2004. It started in 1957 with six original member-states, and then grew to nine with admission of Ireland, U.K., and Denmark in 1973, and twelve in 1986. *See The History of the European Union*, EUROPA, http://europa.eu/abc/history/index_en.htm (last visited Mar. 28, 2007).

63. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 1, 1998, Europ. T.S. 155.

64. Treaty Establishing the European Economic Community (Treaty of Rome), Mar. 25, 1957, 298 U.N.T.S. 3.

65. Each of these is contained in separate Articles: Article 12 (discrimination on grounds of nationality), Article 23 (goods), Article 39 (labor), Article 49 (services), Article 56 (capital), Article 141 (equal pay for male and female workers for equal work). *See Consolidated Version of the Treaty Establishing the European Community*, Dec. 24, 2002, 2002 OJ (C 324) 33 [hereinafter EC Treaty]. Over the years, several additional rights have been added to the Treaty,

and the European Court of Justice (ECJ), respectively the highest courts of the ECHR and the EU, enforce these rights and interpret the treaties, which have both taken on many features of domestic federal constitutions.

Despite the existence of such individual rights, neither court has found a right to abortion in its constitutive treaties. Moreover, in the EU at least (the Council of Europe has no legislative powers), and unlike in Germany, Canada, and Switzerland, abortion is generally understood to be a subject within member state and not federal legislative competence.⁶⁶ Accordingly, both the ECHR and the EU are, very broadly speaking, in the position that would hold in the United States were *Roe* overruled—a system of constitutional federalism enforced by courts but without a federal constitutional right to abortion. Despite the absence of such a right, however, member state laws regulating abortion have raised some very difficult federal constitutional issues for both courts, just as Professor Fallon predicts would be the case in the United States if *Roe* were overruled.⁶⁷ As testament to their difficulty, both courts have been divided over, and punted, the relevant issues wherever possible—even without having the U.S. Supreme Court’s discretionary power to pick and choose its cases.

In the early 1990s, the two courts were faced with the issue of the validity of Irish laws that regulated abortion in similar ways to the hypothetical, pro-life state of “Utah” in Professor Fallon’s Article. Here, a brief recounting of the factual and legal background is necessary.

Article 40.3.3 of the Irish Constitution provides that “[t]he State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.”⁶⁸ This provision has been held by the Irish Supreme Court to outlaw all abortions except where there is real and substantial risk to the life of the mother that only abortion can prevent.⁶⁹

In a unanimous 1988 decision, the Irish Supreme Court also held that Article 40.3.3 prohibits a private, not-for-profit health organization from

including the rights attached to being a citizen of the Union, *inter alia*, the right to move and reside freely within the territory of the member states, and the right to vote in elections in the state of residence. See EC Treaty, *supra*. The EU’s Charter of Fundamental Rights and Freedoms is not yet in effect, having been caught up in the rejection of the new EU Constitution by referenda in France and the Netherlands.

66. See, e.g., Chad M. Gerson, *Toward an International Standard of Abortion Rights: Two Obstacles*, 5 CHI. J. INT’L L. 753, 754 (2005).

67. See Fallon, *supra* note 1.

68. Ir. CONST., 1937, art. 40.3.3, available at <http://www.taoiseach.gov.ie/index.asp?docID=243>.

69. See, e.g., Att’y Gen. v. X & Others, [1992] 2 CMLR 277; see also Shannon Renton Wolf, *Making Waves: Circumventing Domestic Law on the High Seas*, 14 HASTINGS WOMEN’S L.J. 109, 111 (2003).

counseling women about the availability of legal abortion services in the United Kingdom (where most Irish women go for abortions), even where it does so in a “non-directive” manner; i.e., it does not prescribe or advise abortions but provides requested information.⁷⁰ It therefore upheld the injunction issued by a lower court in the constitutional tort proceedings brought by the Society for the Protection of Unborn Children (SPUC).⁷¹ And, in a separate case the following year, it similarly upheld a lower court injunction obtained by SPUC against a student organization for disseminating names and addresses of abortion providers in the United Kingdom.⁷² In a third case in 1992, a lower court also issued an injunction preventing a rape victim from traveling to the United Kingdom for an abortion.⁷³ This decision was, however, overruled by the Supreme Court on the basis of the exception for risk to the mother’s life⁷⁴—but by implication, absent such serious risk, the Constitution prohibited traveling abroad to obtain an abortion.

The injunction against counseling in the first case, *Open Door*, was appealed by the defendant health organization from the Irish Supreme Court to the ECtHR on the basis that it violated the organization’s right to freedom of expression under Article 10 of the ECHR, as well as the right to respect for private life under Article 8.⁷⁵ The injunction against the student organization in the second case, *Grogan*, was the subject of a preliminary reference to the ECJ⁷⁶ on the question of whether the distribution of information about abortion

70. Soc’y for the Prot. of Unborn Children Ir. Ltd. (SPUC) v. Open Door Counselling Ltd. & Dublin Wellwoman Ctr. Ltd., [1988] I.R. 593, 626–27 (Ir.). It needs to be noted that in Ireland, (a) constitutional provisions may bind private actors, and (b) courts are included in the state institutions whose actions are bound to respect Article 40.3.3. *See id.*

71. *Id.* at 619.

72. Soc’y for the Prot. of Unborn Children Ir. Ltd. (SPUC) v. Grogan, [1989] I.R. 753 (Ir.).

73. *See* Att’y Gen. v. X & others, [1992] 2 C.M.L.R. 277 (Ir.).

74. *Id.* The Court accepted that there was reason to believe the girl would kill herself if prevented from having an abortion. *Id.*

75. *Open Door Counselling & Dublin Well Woman v. Ireland*, 15 Eur. Ct. H.R. 244, 257 (1992). As the ECtHR noted, no doubt to its relief, the defendants did not claim there was a right to choose an abortion under the ECHR that Ireland infringed. *Id.* at 270.

76. A preliminary reference under Article 234 of the Treaty of Rome is a procedure whereby a national court may, and sometimes must, seek a ruling from the European Court of Justice on a question of the interpretation of EU law that arises in a case before it:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaty;

...

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

services outside Ireland was protected by EU law and, in particular, by the fundamental principle of freedom to supply services.⁷⁷

In *Open Door*, the ECtHR found that the Irish ban on counseling about the availability of legal abortions in the United Kingdom did indeed violate the defendant's right to freedom of expression under Article 10 of the ECHR.⁷⁸ Although Article 10 permits freedom of expression to be limited if "necessary in a democratic society" for one of the specified legitimate aims (which include the protection of morals),⁷⁹ the ECtHR, applying its standard test of "proportionality," found the injunction to be disproportionate.⁸⁰ Relevant factors for the ECtHR were the absolute and perpetual nature of the injunction, its ineffectiveness in preventing abortions in the UK, and the fact that the information was available elsewhere, albeit from sources less protective of women's health.⁸¹ Nonetheless, the court was unusually divided, splitting by fifteen votes to eight.⁸² Moreover, in addition to the opinion for the court, there were seven separately published dissenting, partly dissenting, "separate," or concurring opinions, a rare occurrence reflecting the sensitivity and perceived difficulty of the issue.⁸³ Having found for the defendant on the Article 10 claim, the ECtHR declined to consider the Article 8 privacy claim.⁸⁴

In *Grogan*, the ECJ held that Ireland had not violated the defendants' freedom to provide services under EU law.⁸⁵ In so doing, however, it answered only the narrowest question raised by the facts—whether these particular students had a relevant right under EU law.⁸⁶ Thus, on the one hand,

EC Treaty, *supra* note 65, at art. 234.

77. This principle of EU law covers similar ground to the Dormant Commerce Clause in the U.S. that Professor Fallon argues would possibly be violated by some of the state laws he discusses under the third fallacy. See Fallon, *supra* note 1, at 636–38.

78. *Open Door Counselling*, 15 Eur. Ct. H.R. at 268.

79. Convention for the Protection of Human Rights and Fundamental Freedoms, Eur., Sept. 21, 1970, Europ. T.S. 45, art. 10(2).

The exercise of these freedoms [freedom of expression], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are *necessary in a democratic society*, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, *for the protection of health or morals*, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Id. (emphases added).

80. *Open Door Counselling*, 15 Eur. Ct. H.R. at 268.

81. *Id.* at 266–67.

82. *Id.* at 270.

83. *Id.* at 270–84.

84. *Id.* at 268.

85. Case C-159/90, Soc'y for Prot. of Unborn Children v. Grogan (SPUC), 1991 E.C.R. I-4685, 3 C.M.L.R. 849 (1991).

86. *Id.* at 890.

the ECJ held that where provided in return for remuneration, and where legal, abortion was indeed a “service” and so is protected under the fundamental principle of freedom to provide services.⁸⁷ On the other hand, it held that Ireland had not violated this principle here, because the student organization issuing the information was not itself providing a service or closely connected to those who were.⁸⁸ It was simply exercising freedom of expression.⁸⁹ Accordingly, the ECJ did not give general guidance on the issue of the ability of State A, in which abortion is illegal, to ban distribution of information about lawfully operating abortion clinics in State B.

The third case of *Attorney General v. X*⁹⁰ would have directly involved the right to travel to obtain an abortion and whether Ireland’s constitutional ban would violate either or both the ECHR and EU law. But with the Irish Supreme Court’s somewhat surprising decision in favor of the teenage rape victim, no case before either court has squarely raised the issue. Arguably the answer for the EU follows from what the ECJ did say about services in *Grogan*, as freedom to provide services likely includes or requires the freedom to obtain them. Under the ECHR, the question would most likely be a difficult one about the proportionality of such a measure.⁹¹

Finally, and this may be relevant to the issue of how likely the sort of laws that Professor Fallon discusses with respect to the third fallacy would be in practice if *Roe* were overruled, the Irish Constitution was amended following the above three cases. According to the express terms of the amendments approved by two-to-one popular majorities in the November 1992 referendum, there is now both a right to travel outside Ireland for abortion purposes and a right to supply and receive information on abortion services lawfully available in other countries.⁹² So as of now, no country in western Europe has the type of restrictive interstate laws that raise difficult questions of constitutional federalism, even though most (for one reason or another) do not recognize a

87. *Id.* This provides comparative support for Professor Fallon’s view that abortion would be considered a service in both the Commerce Clause and Dormant Commerce Clause contexts.

88. *Id.* at 893.

89. *Id.* at 891. The ECJ also held there was no free speech violation because, under its standard threshold doctrine, autonomous national laws are not subject to its “fundamental rights” jurisprudence, which bind only EU laws and member-state laws that implement or are otherwise connected to EU laws. *Id.*

90. See *supra* notes 73–74 and accompanying text.

91. For another discussion of this trilogy of Irish cases, see Bryan Mercurio, *Abortion in Ireland: An Analysis of the Legal Transformation Resulting from Membership in the European Union*, 11 TUL. J. INT’L & COMP. L. 141, 177 (2003).

92. Ir. CONST., 1937, art. 40.3.3, available at <http://www.taoiseach.gov.ie/index.asp?docID=243> (“This subsection shall not limit freedom to travel between the State and another state. . . . This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.”).

constitutional right to abortion. If these constitutional issues are ever resolved, it seems more likely that the trigger for doing so will come from the new member states of both organizations in central and eastern Europe, where popular and religious opposition to abortion is stronger.

