

FOREWORD

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Few cases in American history have engendered such controversy as has the Supreme Court's decision in *Roe v. Wade*.¹ Since its issuance in January 1973, scholars in various disciplines, as well as lay people, have subjected the decision to vigorous debate. That discussion continues in a host of fora, but not in the pages which follow in this volume.

Instead, the 2006 Childress Lecture addressed a related, though relatively ignored, topic. It imagined that the Court overturned *Roe v. Wade* and asked what the legal and constitutional consequences of that result would be. Would such a decision wipe the slate clean or would it revive pre-*Roe* state laws? Would questions regarding abortion disappear from the docket of the federal courts in a post-*Roe* world? Would these questions return to the political process? And, if they did, would they move to the political process of the states as opposed to that of the federal government? And, would a state be able to regulate abortions only within the state or extraterritorially, too? Would overturning *Roe* leave constitutional law otherwise intact, or would such a decision send waves which would displace other legal doctrine?

These and other related questions pose some vexing academic puzzles which furnish intellectual exercise for scholars of constitutional law, criminal law, and conflicts of law among other disciplines. The issues are not simply of esoteric interest. On the contrary, they also would assume practical importance in a post-*Roe* world. Yet prior to this year's Childress Lecture few had journeyed very far down these paths to explore the legal and constitutional landscape of a post-*Roe* world.

This year's Childress Lecturer, Professor Richard H. Fallon, Jr., suggested that these largely neglected questions would reward investigation. Accordingly, what follows is his Article on which his Childress Lecture was based and the responses of seven diverse scholars who were invited to comment on his discussion.

It is not surprising that Professor Fallon would identify for us an important and challenging topic which others have overlooked. Ever since he joined the academy in 1982 with his initial appointment to the Harvard Law School

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

faculty, he has made a habit of anticipating emerging issues in the law and of exploring intricate issues which others overlook. Now, a quarter-century later, Professor Fallon is the Ralph S. Tyler Professor of Constitutional Law at Harvard, the chair previously held by the late John Hart Ely and by Laurence Tribe, two of the foremost constitutional scholars of the prior generation. Professor Fallon's scholarly writings are too many to catalogue here. They include leading casebooks in federal courts² and constitutional law,³ two outstanding explanatory books about constitutional law and the work of the Supreme Court,⁴ and scores of scholarly articles on a variety of subjects relating to constitutional law and the work and jurisdiction of the federal courts. Professor Fallon's work is characterized by the intellectual honesty it brings to the task and by the new light it invariably shines in important, but previously ignored areas, as well as in places many others have visited without illuminating the treasures he finds.

Professor Fallon's eminence makes him a worthy successor to those who have previously delivered the Childress Lecture: Professor Jerold H. Israel, Dean Harold Hongju Koh, Professor Thomas Merrill, Professor William E. Nelson, Professor (and former Solicitor General) Drew S. Days III, and Professor Carol Rose. In each case, the lecturers have produced a major article for the *Saint Louis University Law Journal* on an important legal problem which has engendered academic discussion by other scholars in that issue of the *Law Journal* as well as elsewhere.

The Article which follows is no exception. In it, Professor Fallon seeks to expose a number of fallacies he identifies regarding a post-*Roe* world. He suggests that the overruling of *Roe* would present courts with a series of vexing questions and that such a decision would not necessarily return abortion to the state political process to work from a clean slate as some have suggested. The issues Professor Fallon identifies should provoke thought and discussion by those on all sides of the debate over *Roe*, not necessarily over its merits, a normative subject outside Professor Fallon's present interest, but over the consequences his analysis reveals and the preferred methods for addressing them.

The seven commentators are all distinguished legal scholars and teachers. They approach the questions Professor Fallon raises from different legal

2. RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. 2003).

3. JESSE H. CHOPER, RICHARD H. FALLON, JR., YALE KAMISAR & STEVEN H. SHIFFRIN, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS (10th ed. 2006); JESSE H. CHOPER, RICHARD H. FALLON, JR., YALE KAMISAR & STEVEN H. SHIFFRIN, LEADING CASES IN CONSTITUTIONAL LAW (forthcoming 2007).

4. RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW (2004); RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001).

disciplines and with different perspectives on law. A brief identifying introduction of the seven commentators suggests the diverse backgrounds and insights they brought to the symposium.

Professor Ann Althouse, the Robert W. & Irma M. Arthur-Bascom Professor of Law at University of Wisconsin-Madison School of Law, is an expert on constitutional law and federal courts, an expertise she shares not only in her writings in conventional venues but also on her popular blog at <http://althouse.blogspot.com/>. In fact, while Professor Fallon and the commentators were speaking, Professor Althouse simultaneously made reports of our symposium available to the readers of her blog. Professor Susan F. Appleton, the Lemma Barkeloo & Phoebe Couzins Professor of Law at Washington University School of Law in St. Louis, is a leading scholar in the areas of family law and conflicts of law. Professor Anthony J. Bellia, Jr. joined the faculty at Notre Dame School of Law two years after completing a term as law clerk to Justice Antonin J. Scalia; he teaches Federal Courts among other subjects and has established himself as an emerging scholar regarding federalism in his brief time in the academy. Dr. Michael S. Greve, a political scientist, is the John G. Searle Scholar at the American Enterprise Institute in Washington, D.C. He directs AEI's Federalism project, having previously founded, and served as the Executive Director of, the Center for Individual Rights, a conservative public interest group. Professor Stephen A. Gardbaum is a political scientist as well as a lawyer and teaches and writes about comparative constitutional law and federalism at U.C.L.A. School of Law. He is one of the nation's foremost experts on state constitutional law and comparative law, and he lent his expertise in both areas to the questions Professor Fallon raised. Professor Alan J. Howard has been a popular faculty member of Saint Louis University School of Law for thirty years during which time he has established his expertise in all areas of constitutional law. Finally, Professor Mark D. Rosen teaches and writes about constitutional law and conflicts of law at Chicago-Kent School of Law. Although he began his academic career less than a decade ago, he has established himself as a prolific scholar who has written leading articles considering the extent to which states can regulate matters outside their borders. He begins with one distinctive advantage—he was Professor Fallon's student some years ago.

It is, of course, uncertain whether the Supreme Court will overrule *Roe* or not. It is clear that such an event would be a unique event. To be sure, the Court has, on occasion, overruled other controversial decisions. It is hard to recall an instance in which the Court overruled a precedent which had engendered the same degree of division in society, as well as in the academy, as *Roe* and replaced its national constitutional norm with an invitation to state and/or political processes to regulate with a substantial degree of independence

instead.⁵ The distinctive nature of the issue does not dictate against overruling *Roe* if *Roe* is inconsistent with constitutional norms. It does suggest that if the Court does overturn *Roe* the legal regime will encounter new and challenging issues. We trust that Professor Fallon's Article, and the comments which follow it, will provoke thought about those questions which can only help those interested in the rule of law better understand the consequences of such a decision and formulate just and thoughtful responses to the issues raised.

5. The demise of *Lochner v. New York*, 198 U.S. 45 (1905), is perhaps the closest such analogue, yet it had not proven as contentious in society as has *Roe*.