STEPPING OUT OF PROFESSOR FALLON'S PUZZLE BOX: A RESPONSE TO "IF *ROE* WERE OVERRULED"

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INTRODUCTION

In "If *Roe* Were Overruled: Abortion and the Constitution in a Post-*Roe* World,"[1] Professor Fallon has presented us with a series of knotty legal problems that could conceivably arise if *Roe v. Wade* were overturned. Assigned the task of responding to this piece, I feel a little frustrated by the constraint imposed by the structure of his Article, which lays out a wide array of hypothetical legal issues. Instead of using my few pages here to work at solving the problems he has raised (or marveling at their hopeless difficulty), I want to step out of his puzzle box and assess this scholarly project from the outside.

I. WHY COLLECT POTENTIAL POST-*ROE* PROBLEMS?

Professor Fallon assures us that he does not mean to make an argument about whether *Roe v. Wade* should be overruled. Indeed, he asserts that he has never publicly expressed an opinion on the subject.[2] He offers his enumeration of potential legal problems in a neutral voice, as if he were simply, perhaps out of curiosity, engaging in an interesting hypothetical, performing an academic exercise. But *Roe v. Wade* is *the* central legal problem of our time. It has had an astoundingly powerful effect on American politics, influencing presidential elections and overwhelming the consideration of Supreme Court nominees.[3] The project of amassing all the legal problems that could conceivably arise if

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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. I am reminded of the assertion made by Clarence Thomas, during his confirmation hearings, when asked "Have you ever, private gatherings or otherwise, stated whether you felt that [*Roe v. Wade*] was properly decided or not?," that he did not recall ever "commenting one way or the other." *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 222 (1991). Justice Thomas's assertion is widely disbelieved. *See, e.g.*, Jack Newfield, *The Right's Judicial Juggernaut*, THE NATION, Oct. 7, 2002, at 11, 13.

3. *See* Jeffrey Rosen, *The Day After Roe*, ATLANTIC MONTHLY, June 2006, at 56.

Roe v. Wade were overturned cannot stand apart from the endless political debate about whether it *should* be overturned. Whether the author intends it or not, marshalling the evidence that there are enumerable, perplexing problems implicitly makes an argument that it would be unwise to overrule *Roe*. To portray the post-*Roe* landscape as a minefield is to say—implicitly—*don't go there*.

Those who think *Roe* is pernicious tend to see something else. They peer out on their own imaginary post-*Roe* landscape and think it looks sunnily inviting. To overrule *Roe* would set off a salutary political process—the people, whose voices have been squelched for three decades, will finally be free to debate with each other, to work through their disagreements, and to express their values in statutory form. In this sunny vision, the states regain control of the difficult policy decisions that have burdened the courts for three decades, and can, as laboratories of democracy,[4] use their newfound power to please local majorities, tailoring their legislation to local conditions and preferences,[5] and individuals sufficiently discomfited by the political expression of their fellow citizens can migrate to those places in the country that share their conception of the good.

I am bothered equally by the sanguine optimism of those who would like *Roe* overruled and the risk-aversion that Professor Fallon's project seems to reflect. Personally, I want to see *Roe* kept in place not because I am worried about the elaborate legal problems that could plague the Court if it is overruled, but because I believe women have a right to make decisions about what happens inside their own bodies. I want to preserve the right to privacy, a deeply significant matter about which Professor Fallon's scholarly project has nothing to say. Professor Fallon's project also says nothing about what inspires the passion of *Roe*'s opponents, the belief in the unborn human being's right to life.[6] His is an austerely legalistic project. Because it does not own up to a real commitment to abortion rights, his long enumeration of legal problems seems to express timidity, risk-aversion, and a fear of democracy. One suspects that he really supports abortion rights but thinks—perhaps correctly—that the law professor wields a stronger power by standing aloof from political preferences and deploying the sort of expert knowledge that

4. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

5. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1485 (1987).

6. During the final question session at the Childress Lecture, a lone gentleman who had sat through the day rose and spoke passionately about the right to life and the unsettling feeling he had listening to people talking about abortion all day without expressing any regard for the unborn child. From inside Professor Fallon's puzzle box, the man had no point at all. His was a naïve layman's point to be heard out politely, and then ignored as the professionals turned their eyes back to the serious, lawyerly project.

makes the voices of those who speak with passion about rights and democratic choice seem naïve and almost irrelevant.

This professorial restraint, like its close cousin judicial restraint, can be powerful. It can disarm critics. Not only does it seem disconnected from policy preferences, but it also displays dazzling scholarly expertise, expounding on doctrinal matters as arcane as desuetude, overbreadth, and choice of law. Professor Fallon asks us to be skeptical of the call for judicial restraint and to think in a sophisticated way about whether it is possible for the Court to get out of "the abortion-umpiring business"[7]—as Justice Scalia has recommended. And this is indeed an important message. Yet, just as we should be skeptical of the idea that judges can rid themselves of the abortion matter, we should be skeptical of whether Professor Fallon has overstated the complexity of the post-*Roe* travails.

II. WOULD OVERRULING *ROE* UNLEASH DECENTRALIZED DEMOCRACY?

There is some point in trying to detail all the legal problems that *could* arise. Surely, it is a mistake to focus on the goal of overturning *Roe* without anticipating the various consequences. Nevertheless, we should also resist the assumption that majoritarian politics will unleash a spate of unstoppable legal problems. Even if constitutional rights no longer brake the political process, the human actors who drive it will observe the effect of their actions and respond to the changed circumstances. To illustrate what I mean, let me focus on just one of the problems Professor Fallon has raised, the federalism question. It is commonly assumed that if *Roe v. Wade* were overturned, the states would regain control over abortion issues.[8] But Congress would also be tempted to legislate, either to limit abortion or to protect abortion rights. If it did, the Court would need to examine whether constitutional power supports that legislation, an inquiry that—as Professor Fallon notes—would almost certainly concentrate on the Commerce Clause.[9]

7. Fallon, *supra* note 1, at 613 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part)).

8. *See, e.g.*, Clark D. Forsythe & Stephen B. Presser, *The Tragic Failure of* Roe v. Wade*: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85 (2005).

9. The prospect of exercising power under Section Five of the Fourteenth Amendment is dim, as Professor Fallon notes. Fallon, *supra* note 1 at 622. Unless the Court were to overrule *Roe v. Wade* by finding the unborn to be persons within the meaning of Section One of the Amendment, legislation limiting abortion could not be portrayed as a "congruent and proportional" remedy for the violation of Section One rights, as required by current doctrine. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (noting that any remedy imposed by Congress for a violation of the Fourteenth Amendment must be "congruent and proportional to the targeted violation"). There is some potential to portray legislation protecting abortion rights as a "congruent and proportional" remedy for the violation of Section One Equal Protection rights against discrimination based on sex, but it seems quite unlikely that the Court that would overrule *Roe* would look for clever ways to characterize abortion rights as a remedy for sex discrimination,

Professor Fallon thinks that Congress's power is fairly clear—providing abortions is a commercial matter, and thus, under existing doctrine, it is enough that the activity to be regulated, taken in the aggregate, has a substantial effect on interstate commerce.[10] There might be some difficulty if providers were to offer their services for free, but Professor Fallon asserts that this situation would fall within the doctrine articulated in the recent case of *Gonzales v. Raich*,[11] which upheld Congress's power to regulate homegrown, home-consumed marijuana.[12] I do not think *Raich* applies so easily, because in that case, the Court emphasized Congress's interest in controlling the market, down to its smallest components, including a substance that only had *potential* to flow into the market.[13] But this concept does not apply to services. An abortion provided free of charge is not a marketable commodity that can be taken somewhere else and sold. More importantly, as Professor Fallon recognizes, "a 'conservative' Supreme Court that was prepared to overrule *Roe* might also be prepared to redefine and limit Congress's commerce power to avoid this conclusion."[14]

To think about what the Court would do with respect to the Commerce Clause question, we need to think about what the states and Congress might do. Consider the permutations. Congress might hold back and do nothing, or it might rush into the newly opened field and pass preemptive legislation. If it does pass legislation, it might either ban abortion, regulate it in some more or less severe way, or protect abortion rights (perhaps completely reinstating what is now seen as a matter of constitutional right). The states, for their part, would have the same options, either to ban or restrict abortion or to protect abortion rights to one degree or another. The federalism questions that would face the Court would depend on what these different institutions did, when

despite the stretching to use the heightened scrutiny of sex discrimination to find Section Five power supporting the Family and Medical Leave Act in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 728–29 (2003). *See* Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745 (2004) (demonstrating how much the Court stretched in *Hibbs*). There, the Court saw Congress as quite broadly empowered to eliminate sex stereotypes in the workplace, but this was not because Congress was easing family burdens that make it harder for women to participate equally in the workplace; it was because employers, relying on stereotypes about how often men and women take on various family responsibilities, treated men and women differently in deciding how much family leave to offer. *Hibbs*, 538 U.S. at 728–29. In any case, if the Court is inclined to support post-*Roe* abortion regulation at the federal level, the commerce power is a much simpler, more direct approach. The question of whether there is Section Five power should therefore only arise if there is an effort to abrogate state sovereign immunity to provide for retrospective relief against the state.

10. Fallon, *supra* note 1 at 622–23.
11. 545 U.S. 1 (2005).
12. Fallon, *supra* note 1, at 623.
13. *Raich*, 545 U.S. at 15–22.
14. Fallon, *supra* note 1 at 624.

they chose to act, and what the real-world effects of their actions would be. I tend to think that the answers the Court would give about the scope of Congress's power would depend on this context, particularly to the degree that its own step of overruling *Roe* rested on a belief in the salutary effect of returning the abortion matter to the political processes of the states.

Did Congress jump in early and prevent those processes from taking place? Or did Congress—demonstrating some wisdom about the value of federalism[15]—leave room for the states to have the political debates that *Roe* preempted long ago? And if Congress did hold back, what did the states do? Did the states win respect with lucid political debate and careful legislation, or did they devolve into petty political squabbling and poorly drawn or repressive statutes? Did Congress observe the development of legislation in the states and only go forward with preemptive federal law at a point where the political activity in the states had proven dysfunctional or where a clear majority of the states had found good answers to difficult problems and where the remaining states had begun to look retrograde and backward?

One might look at these permutations and conclude that *Roe* should not be overruled. The consequences are disturbingly unpredictable. This is the implicit theory, I believe, of Professor Fallon's article. But we ought to see that this potential could be a positive thing. We would learn something valuable, where now we simply wonder and make assertions about what would happen. And there would be numerous institutions in play to control excessive or abusive behavior. Ideally, the states would act without interference from Congress and would finally work through the bitter divisions that *Roe* prevented from being the subject of political debate and compromise. But if Congress activated itself too early and short-circuited the process, the Court would be in a position to do something with the constitutional law of federalism. It could use commerce power doctrine to preserve the separate functioning of the state. The doctrine established in *United States v. Lopez*[16] and *United States v. Morrison*[17]—crafted by the now departed Chief Justice William H. Rehnquist—is murky and unstable and could be reworked by the new Supreme Court to express more clearly normative values of federalism. If Congress, on the other hand, holds back while the states perform adequately or until bad effects emerge at the state level, the Court may be expected to defer to Congress in the way that the existing doctrine easily permits.

15. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985) (expressing deference to Congress as the best judge of what the division of power between the states and federal government ought to be).

16. 514 U.S. 549 (1995).

17. 529 U.S. 598 (2000).

CONCLUSION

Professor Fallon presents the post-*Roe* world as a series of perplexing and unpredictable legal problems that would trouble the Court, but I think it would be more accurate to visualize political processes, long stopped up and finally unlocked. Political actors would begin to make their moves, met by responses from other political actors, and, at length, by the courts. It is surely true that we would trade one set of legal problems for another, and that the dream of excluding the courts from the abortion matter is just a dream, but the question is whether there is reason to prefer the new set of problems. In the end, one's answer to this question is likely to replicate one's policy preference about abortion. Just as, I suspect, Professor Fallon's project is motivated by a support for abortion rights, I think those who oppose abortion will see his collection of legalistic problems as long and complicated but not nearly as troublesome as the questions about the scope of constitutional rights that have burdened the courts for so long.