Gender, Abortion, and Travel After Roe’s End

by

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Susan Frelich Appleton*

This essay responds to Professor Richard Fallon’s _If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World_. Professor Fallon’s paper exposes as fallacies four popular beliefs about the legal landscape after _Roe_’s end, 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,” 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.

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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* Lemma Barkeloo & Phoebe Couzins Professor of Law, Washington University School in St. Louis – with thanks to Professors Samuel W. Buell, Herma Hill Kay, Laura A. Rosenbury, and Margo Schlanger for helpful comments on earlier drafts; to the other participants in the Childress Lecture events at St. Louis University School of Law for the stimulating conversation; to the members of the Board of Directors of Planned Parenthood of the St. Louis Region and Washington University’s Law Students for Choice for the engaging discussions; and to my students in Conflict of Laws (fall 2006) for their thoughtful responses over the numerous occasions that I raised this issue in class.


3 Fallon, _supra_ note 1, at 19-50.

4 _Id._ at 39-50.
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 nonnormative position. Instead, I express my opposition to overruling Roe, situating this opposition in a long line of important choice-of-law cases about 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. And it provides one illustration of the oft-cited slogan of federalism that looks to experimentation conducted “within the ‘laboratory’ of the States” for successful resolution of contentious issues of social policy.

Yet, just as before Roe, women with sufficient resources and determination might well travel from their homes in restrictive states to more

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5 Id. at 30.
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 abortions of fetuses conceived within the regulating state.” In fact, over and over he writes about citizens pregnant with fetuses conceived locally, 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. . . .

Professor Fallon’s paper does not explain his emphasis on the location

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7 In perhaps the most publicized pre-Roe case of extraterritorial 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).
8 Fallon, supra note 1, at 22.
9 Id. at 21, 22, 26, 29, 30, 31, 38, 39.
10 Id. at 31.
of conception. 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 problems, I conclude that Professor Fallon’s emphasis on the place of conception is not only unnecessarily difficult and obsfuscatory; it is altogether unnecessary.

The practical problems stem from both the 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. 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* and recently reinvigorated by *Lawrence v. Texas* survives the hypothesized overruling of *Roe*, then investigations of the place of conception would prove highly problematic.

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

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11 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 extraterritorial abortion. See infra notes 94-96 and accompanying text.
13 381 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?”).
14 539 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.”).
15 Professor Fallon considers this issue in his analysis of the “fourth fallacy,” the erroneous view that “a Supreme Court opinion overruling *Roe v. Wade* would, or at least could, be so written that the rest of constitutional jurisprudence involving fundamental rights would survive unaltered.” Fallon, supra note 1, at 50.
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, then don’t have sex here.” This message would give an entirely new meaning to the term “fertility tourism,” which now refers to travel to undertaken for access to assisted reproductive technologies!16 More significantly, this “no-sex-here” message would raise right-to-privacy problems under precedents like Griswold and Lawrence.17

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,18 even Roe itself acknowledged “embryological data...
that purport to indicate that conception is a ‘process’ over time, rather than an event. . . .”\textsuperscript{19} As a result, participants and prosecutors alike would have difficulty in pinpointing the location of conception, whether trying to escape a law that covers only 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 clears the way to reveal 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,\textsuperscript{20} nonetheless, for example, application of a state’s child abuse laws does not depend on the place of a 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.\textsuperscript{21} 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 that state.\textsuperscript{22}

Moreover, the doctrinal importance of the parent’s domicile helps

\textsuperscript{20} 410 U.S. at 161.
\textsuperscript{22} \textit{See infra} notes 88-101 and accompanying text.
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,” 23 Professor Fallon implies that abortion bans principally 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.

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 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. 24 She demonstrates that, instead, it is “a social process, occurring in and governed by culture” 25 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.” 26

23 Fallon, supra note 1, at 31 (quoted supra in text accompanying note 10).
25 Id. at 267.
26 Id.
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. . . .”27 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.”28 Many others share this basic perspective, including Professors Sylvia Law, 29 Frances Olsen, 30 and Donald Regan, 31 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. Casey32 upheld a mandatory waiting period and state script to “inform” individual abortion 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.33 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.34 Quoting the now much more significant words of then-Judge Alito of the U. S. Court of Appeals for the

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27 Id. at 357-58.
28 Id. at 277.
31 Donald H. Regan, Rewriting Roe v. Wade, 77 M ICH. L. REV. 1569 (1979) (analyzing how abortion restrictions single out pregnant women to be samaritans).
33 Id. at 880-87 (joint opinion). Cf. Kenneth L. Karst, Justice O’Connor and the Substance of Equal Citizenship, 2003 SUP. CT. REV. 357, 424-26 (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”).
34 505 U.S. at 887-898 (opinion of the Court).
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.’”35 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.”36 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,37 in which a majority struck down a Nebraska statute, several of the opinions note that the law, which contained no exception for the woman’s health, would not prevent a woman from terminating a pregnancy so long as she used a different method or procedure.38 Against this

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35 Id. at 974-75 (Rehnquist, C.J., dissenting) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 947 F.2d 682, 726 (3d Cir. 1991) (Alito, J., concurring in part and dissenting in part)).
38 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 observes:

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,
background, Nebraska’s stated legislative interests invite close analysis. According to the state’s brief, quoted by the Court, the law “‘shows concern for the life of the unborn,’ ‘prevents cruelty to partially born children,’ and ‘preserves the integrity of the medical profession.’”39 In his *Stenberg* dissent, Justice Kennedy describes the law as the reflection of the state’s finding of “a consequential moral difference” between abortion methods.40

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.41 But, even if one does not accept this characterization, at the very least it is clear that state’s goals do

39 530 U.S. at 930-31 (quoting petitioner’s brief, with some internal quotation marks omitted).
40 Id. at 962 (Kennedy, J., dissenting).
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*,\(^{42}\) identifies a similar balance of interests. Again, official efforts to jettison protection for a 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.\(^{43}\) 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,\(^{44}\) 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,”\(^{45}\) 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

\(^{42}\) 413 F.3d 791 (8th Cir. 2005), *cert. granted*, 126 S.Ct. 1324 (2006).
\(^{44}\) 410 U.S. at 163-64.
\(^{45}\) 505 U.S. at 872 (joint opinion of O’Connor, Kennedy, and Souter, JJ.).
except when the pregnancy endangers the woman’s life or results from rape or incest.46 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.47 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.”48 This approach to abortion regulation reveals that fetal protection is really not the overriding objective.49 Rather, abortion prohibitions seek to compel that women’s (voluntary) sexual activities always have consequences – motherhood or at least the risk of motherhood.50

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

48 Senate Debate; Missouri Incumbent Jim Talent vs. Democrat Claire McCaskill, MEET THE PRESS, NBC, Oct. 8, 2006, available at http://www.lexis.com/research/retrieve/frames?_m=dced0b9a52d702784d5d89bb24474be9&csvc=bl&form=boolean&_fmtstr=XCITE&docnum=1&_startdoc=1&wpchp=dGLbVtz-zSkAW&_md5=ee292098b0b411385a7cfda580dd0b9b1.
49 I don’t 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) (prohibition designed to take effect upon reversal of Roe v. Wade).
50 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. OF 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, THE NEW YORKER, Mar. 13, 2006, at 58.
victim. Although we might suppose that post-*Roe* bans will have difficulty addressing this issue, given modern sex-equality jurisprudence, existing evidence suggests that the understanding of woman-as-victim will persist. The federal “Partial-Birth Abortion Ban Act of 2003” exempts the woman from prosecution for a conspiracy or the substantive offense. South Dakota’s recently enacted in-your-face challenge to the Supreme Court, a statute that would ban all but life-saving abortions and that the citizens of the state rejected at the ballot box, provides that “Nothing 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.” The Louisiana ban – poised to spring into effect upon *Roe*’s burial – contains identical language.

A law designed principally to achieve fetal protection would seek to

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54 18 U.S.C. §1531(e) (2006) (“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.”).


58 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.”).
maximize deterrence of abortion, punishing both the woman and the provider.59 By contrast, the exemption of the woman in the federal, South Dakota, and Louisiana laws sends a different message. It indicates legislative purposes to deny women’s agency and decisionmaking competence and, through paternalism, to perpetuate gender inequality. It constructs women as objects of state control through others, here abortion providers.60

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. 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 the meaning of motherhood.”61 In particular, “[p]ro-life activists believe that motherhood – the raising of children and families – is the most fulfilling role that women can have.”62 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. . . .”63 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,”64 including traditional norms


60 This inference does not purport to rest on a discovery of legislative motive. See infra notes 88-90 and accompanying text.

61 KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 193 (1984) (italics in original omitted). 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.

62 Id. at 160.

63 Id. at 215.

governing sexuality, child-rearing, and employment.65

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.66 Put differently, a state cannot seek to protect fetuses without first making a value judgment about women67 or exhibiting a “disparate regard”68 for women, as compared to men. Against this theoretical background, the practical problems entailed by making the place of conception an element of the crime of extraterritorial abortion fade in importance, because the place of conception becomes irrelevant 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.69 And I confess that I shared this resistance until researching this issue many years ago in the context of a different contretemps

65 Id. at 304-05.
66 See supra note 28 and accompanying text.
67 At the very least, a state decision to protect fetuses reflects a policy choice to devalue women. See Olsen, supra note 30, at 126.
68 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).
69 See infra notes 82-87 and accompanying text.
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– the question of how a state seeking to restrict surrogacy arrangements in the wake of the notorious In re Baby M70 might effectuate this project.71 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”72 and the resulting penal-law exception in the traditional choice-of-law regime,73 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;74 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.

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 interests analysis75 inform the way many courts choose the

70 537 A.2d 1227 (N.J. 1988).
71 See Appleton, supra note 16, 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).
74 See Symeon C. Symeonides, Choice of Law in the American Courts in 2005: Nineteenth Annual Survey, 53 Am. J. Comp. L. 559, 577 (2005) (“the 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 135-38 and accompanying text (discussing Massachusetts’s approach to nondomiciliaries’ attempt to celebrate same-sex marriages there).
applicable law in modern multijurisdictional cases. 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.

Third, the application of United States statutes to offenses committed abroad challenges a purely territorial understanding of criminal law. Of course, one can find several distinctions between these cases and the scenario proposed by Professor Fallon. For example, overarching federal principles, such as the full faith and credit obligation and the right to travel, 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 of broad bases of legislative jurisdiction assume that the conduct is barred both in the United States and in the country where it takes place.

In any event, these introductory observations should, at least, unsettle

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76 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, 52 AM. J. COMP. L. 919, 944 (2004).
77 MODEL PENAL CODE §1.03 (1)(f) (1985).
81 See Yunis, 681 F. Supp. at 900-01 (discussing Universal principle).
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 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.\(^{82}\) 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.\(^{83}\) Of course, none of the states today strictly follows interest analysis as Currie outlined it.\(^{84}\) Nonetheless, Currie’s intellectual legacy shines through in popular methodologies like that of the Restatement (Second) of

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\(^{82}\) See Currie, supra note 75, at 183-84. See also Kay, supra note 75, at 50-58, 105-06, 110, 123, 127 (explaining how Currie distinguished policies from interests); id. at 75 (noting that Currie later eliminated the first step, specifying that forum law provides the presumptive starting point).

\(^{83}\) Currie, supra note 75, at 184.

\(^{84}\) 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 76, at 944. But even courts in these states have strayed from strict adherence to 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); Jaffee 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’”); Warriner v. Stanton, 2005 U.S. Dist. LEXIS 11465 (D. N.J. 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 75, at 181-82 (rejecting judicial “weighing” of competing interests).
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Conflict of Laws’s “most-significant-relationship” test, which instructs courts to consider “the relevant policies of the forum” and “the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue.”

As I explained earlier, abortion restrictions seek to control the conduct of women. A state enacting a criminal ban does so for policy reasons inescapably related to women. This conclusion does not purport to rest upon a discovery of legislative motive. Indeed, the clues that I examined before do not necessarily disclose legislative motives either individually or collectively. Rather, these clues help us use the ordinary processes of construction and interpretation that Currie commended.

If we assume, at least provisionally, that the state has its own women in mind, as Currie theorized and the Restatement (Second) assumes, 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. For now, however, I simply note that, if a restrictive state is

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85 RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). According to Professor Symeonides, 22 American jurisdictions use this approach for torts cases and 24 do so for contracts cases. Symeonides, supra note 76, at 944.
86 RESTATEMENT (SECOND), supra note 85, at §6 (2) (b).
87 Id. at §6 (2) (c).
88 See supra notes 24-68 and accompanying text.
89 See id.
90 See Currie, supra note 75, at 182-83. See also Kay, supra note 75, at 52 (noting how Currie recognized that sometimes a legislature will conceal the underlying policy).
92 Several sections of the Restatement (Second) make the parties’ domiciles contacts to be considered in determining the jurisdiction with the most significant relationship. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, supra note 85, at §§145, 188.
93 See infra notes 106-08 and accompanying text.
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. If he simply meant that the principal policy underlying the state’s law is fetal protection, I have already indicated my disagreement. 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.

If, on the other hand, Professor Fallon meant to 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 and Full Faith and Credit 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. These

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95 See supra notes 24-68 and accompanying text.
97 U.S. CONST. amend. XIV, §1.
98 U.S. CONST. art. IV, §1.
99 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
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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 aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”100 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.101 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 international criminal context provides a reinforcing response to concerns about arbitrariness or unfairness.102 Finally, any remaining gap would be filled

101 See supra note 22 and accompanying text.
102 True, some of the bases of extraterritorial legislative jurisdiction in the international context contemplate conduct that is prohibited everywhere. See Yunis, 681 F. Supp. at 900-02; supra note 81 and accompanying text. But the case law contains ample evidence that this limitation does not inevitably apply. See 681 F. Supp. at 902 n.10. Further, the Restatement’s balancing test presumably would incorporate the permissibility of the
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. 103

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 Currie’s point of departure in his formulation of interest analysis104 – a point of departure that, in turn, has evoked charges of unconstitutionality under the Privileges and Immunities Clause.105 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 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 Ely thought this general situation, a state policy not limited to its domiciliaries, would probably often arise.106

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.107 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

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103 See supra note 77 and accompanying text.
104 See supra note 91 and accompanying text.
106 Ely, supra note 105, at 193-94.
107 See, e.g., Shutts, 472 U.S. at 822. See also supra note 99 and accompanying text.
of the patient’s domicile.\textsuperscript{108} 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\textsuperscript{109} reveals and as Professor Fallon’s own paper 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\textsuperscript{110} and the Fourteenth Amendment’s Privileges or Immunities Clause\textsuperscript{111} – 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.”\textsuperscript{112} 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.”\textsuperscript{113} Professor Fallon follows suit, using as his starting point the punishment of the

\textsuperscript{108} 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).


\textsuperscript{110} U.S. Const. art. I, §8.

\textsuperscript{111} U.S. Const. amend. XIV, §1.

\textsuperscript{112} Rosen, supra note 108, at 964 (emphasis added).

\textsuperscript{113} Id. at 926.
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.”114 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.115

Two difficulties emerge from this position. First, as I explained earlier, American abortion prohibitions do not work this way.116 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.117 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.118

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.119 As a result, then, the right of national citizenship might acquire a diminished meaning for women, compared to men.120 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;121 here, by contrast, the law might frustrate women’s ability to travel for certain purposes, as he explains.

114 Fallon, supra note 1, at 30.
115 Id.
116 See supra notes 52-58 and accompanying text.
117 See id.
119 Fallon, supra note 1, at 29-32, 37-40.
120 See id. at 50.
121 See supra notes 15-17 and accompanying text.
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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*, 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 poor women fleeing domestic violence in their previous home states, remind us that even facially neutral laws can have particularly harsh effects for some individuals, usually those from groups already most marginalized and vulnerable. Thus, in addition to the lens of gender, through which we readily view abortion restrictions, we must also consider class and race. Indeed, data show that the current abortion population disproportionately consists of poor women and African-American and Hispanic women. 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. This Clause,

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123 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.”).
124 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.” Guttmacher Institute, *Facts on Induced Abortion in the United States, In Brief*, 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.
125 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 (1935), overruled five years later by *Madden v. Kentucky*, 309 U.S. 83 (1940).
which the Court almost never uses, crystalizes 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. . . .126

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 abortions. 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.127

As Professor Fallon notes, cases establishing the first of these components128 might or might not be interpreted to preclude a restrictive state’s effort to ban out-of-state abortions by its citizens.129 And just as *Roe*’s companion case, *Doe v. Bolton*,130 recognized the second of these components

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526 U.S. at 511 (Rehnquist, C.J., dissenting).
126 U.S. CONST. amend. XIV, §1 (emphasis added).
127 526 U.S. at 500.
129 Fallon, supra note 1, at 37-38.
in invoking the Privileges and Immunities Clause of Article IV to invalidate Georgia’s residency requirement for abortions. 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. He concludes that the constitutionality of his hypothetical law thus remains debatable. 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,” 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’s current treatment of same-sex marriage by nondomiciliaries. Following the state’s own “marriage evasion law,” Massachusetts officials may marry same-sex couples with a domiciliary connection to Massachusetts or to any other state that does not have prohibition against same-sex marriage. Travelers from states with prohibitions against same-sex marriages, however, may not celebrate such marriages in Massachusetts.

Although the federal Defense of Marriage Act 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 prohibitionsextraterritorially. 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.

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131 Id. at 200.
132 Fallon, supra note 1, at 32-33.
133 Id.
134 526 U.S. at 500.
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 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. Accordingly, whether embodied in an 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.

138 The Massachusetts approach resembles a solution offered by Currie and co-author Professor Herma Hill Kay (then Herma Hill Schreter, one of Currie’s students). Brainerd Currie & Herma Hill Schreter, Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities, in SELECTED ESSAYS, supra note 75, 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 75, at 62-63, 145-46. Cf. id. at 172-75 (developing concept of toleration of another state’s law).

Dean Ely rejected this approach as inconsistent with the Court’s cases on Article IV. Ely, supra note 105, at 185-86. Further, Saenz, 526 U.S. 489, 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. 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. Some past cases evaluated such distinctions between long-term domiciliaries and new domiciliaries under the Fourteenth Amendment’s Equal Protection Clause. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969); Sosna v. Iowa, 419 U.S. 393 (1975).

The Privileges and Immunities Clause of Article IV is the second component of the right to travel explicated in Saenz. See supra note 127 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).
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.

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. Foster139 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 damage 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

139 244 F.3d 405 (5th Cir. 2001) (en banc).
abortion procedure.  

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. 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. 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, and then detail all of these possibilities in the pre-abortion consent form, presenting a “parade of horribles” – 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!)

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” escapes federal court review, under Article III’s case-or-controversy requirement and the Eleventh Amendment’s immunity for state officials. Yet, the hypothesized overruling of Roe takes the wind out

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140 Id. at 409 (describing Louisiana’s Act 825).
142 Okpalobi v. Foster, 981 F. Supp. 977, 986 (E.D. La. 1998), rev’d en banc, 244 F.3d 405 (5th Cir. 2001).
143 Abortion opponents often assert that patients suffer a host of post-abortion harms, including emotional distress. See, e.g., chapters 7-9 in The Cost of Choice: Women Evaluate the Impact of Abortion (Erika Bachiochi ed., 2004).
145 Borgmann, supra note 141, at 757.
146 U.S. CONST. art. III, §2.
147 U.S. CONST. amend. XI.
of the primary criticism of Okapalobi – 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.\footnote{148}

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,\footnote{149} a court in the restrictive state could apply its own law to


\footnote{149} 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. \textit{Compare} Kulko v. Superior Ct., 436 U.S. 84, 93-94 (1978) (articulating and interpreting requirement of purposeful availment), \textit{with} Burnham v. Superior Ct., 495 U.S. 604 (1990) (constitutionally validating principle of personal jurisdiction based
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this true conflict. Such tort litigation, so commonplace in the conflict of 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.

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, 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. A trial court upheld the law against constitutional

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151 See Burnham, 495 U.S. 604.


153 The statute provides:

§ 188.250. 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.

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.


abortion counseling of the law’s uncertain sweep. 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 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.

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. 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, the removal of constitutional protection for abortion would change the reasoning and outcome of such cases. 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,

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155 See Matthew Franck, Abortion, Free Speech at Issue in High Court, ST. LOUIS POST-DISPATCH, Nov. 16, 2006, at C1.
156 See id.
157 Now, an each employee or volunteer at Planned Parenthood of the St. Louis Region follows a script when addressing young women under 18, 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.” Likewise, information about abortions in states without parental consent laws has been removed the organization’s website and from links to other websites. E-mail from Paula Gianino, President & CEO, Planned Parenthood of the St. Louis Region, to Professor Susan Frellich Appleton (Nov. 27, 2006, at 9:17 a.m.).

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).
160 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. 525 N.E.2d at 613.
provided the parties involved had had their day in court and were subject to the enjoining court’s jurisdiction.161

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 casting a wider net 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

161 As the Supreme Court explains in Baker v. General Motors Corp., 522 U.S. 222 (1998):

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 (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 (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).

Id. at 234-35.
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.\(^{162}\) 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”\(^{163}\)

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 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.\(^{164}\) 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 wellbeing – 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.\(^{165}\) We should hope that new developments in choice of law do not depend on newly imposed forms of gender oppression.

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164 Appleton, *supra* note 50.
165 See *supra* note 96 and accompanying text.