

**FUNDAMENTAL RIGHTS VERSUS FUNDAMENTAL WRONGS:
WHAT DOES THE U.S. CONSTITUTION SAY ABOUT STATE
REGULATION OF OUT-OF-STATE ABORTIONS?**

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I.

At the center of Professor Richard Fallon's Childress Lecture¹ is a brilliant and provocative insight. Later in this brief response I will explain why I think the insight is incorrect. But first, I should note that all of the legal analyses in Professor Fallon's lecture, including the brilliant insight at its core, are conditioned on the occurrence of two developments in the real world; one is merely unlikely, while the other is quite implausible. These two developments are: First, the U.S. Supreme Court would have to overrule *Roe v. Wade*.² This is plausible, but it is not likely, so long as Justices Stevens, Souter, Breyer, Ginsburg, and Kennedy are on the Court.³ But second, and far less likely, is

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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. 410 U.S. 113 (1973).

3. Each of these five Justices has written, as well as joined pro-choice opinions. None has indicated in any opinion that he or she might consider changing his or her mind. Justice Stevens has authored several opinions endorsing constitutional protection for a woman's right to choose to terminate her pregnancy. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 946 (2000) (Stevens, J., concurring); *Mazurek v. Armstrong*, 520 U.S. 968, 977 (1997) (Stevens, J., dissenting); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 911 (1992) (Stevens, J., concurring in part and dissenting in part); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 560 (1989) (Stevens, J., dissenting). Justices Kennedy and Souter (along with Justice O'Connor) authored the so-called "joint opinion" in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in which they concluded that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." 505 U.S. at 846. As for Justices Breyer and Ginsburg, both joined Justice Stevens's pro-choice dissent in *Mazurek v. Armstrong*. 520 U.S. at 977. Later, Justice Breyer wrote for the majority in *Stenberg v. Carhart*, striking down Nebraska's "Partial Birth Abortion" law, finding the law to unconstitutionally burden the woman's right to choose to terminate her pregnancy. 530 U.S. 914. Justices Stevens, Souter, and Ginsburg joined Justice Breyer's majority opinion. *Id.* at

that, if *Roe v. Wade* is overruled, an anti-abortion state would have to pass a law forbidding its citizens from traveling to a pro-choice state to have an abortion. Even before *Roe v. Wade* was decided, even when significant numbers of women traveled from anti-abortion states to pro-choice states for an abortion,⁴ no state adopted such a law, and I suggest that it is not likely now⁵ even if *Roe* is reversed.⁶ But the point is this—unless both of these

919. In *Stenberg*, Justices Stevens and Ginsburg each authored concurring opinions joined by the other Justice that endorsed a woman's right to choose. *Id.* at 946 (Stevens, J., concurring); *id.* at 951 (Ginsburg, J., concurring).

4. Professor Fallon notes that approximately forty percent of women who obtained abortions in the year before *Roe v. Wade* traveled to another state to have the abortion. Fallon, *supra* note 1, at 626–27.

5. Professor Fallon, however, thinks otherwise. Early in his lecture, he speculates that “[i]t is likely, however, that some states would impose further restrictions, including prohibitions against travel by their citizens for the purpose of obtaining out-of-state abortions.” *Id.* at 613. He repeats this prediction later in the lecture. He writes that “[i]f *Roe* were overruled, it thus seems likely, and is surely possible, that at least some states that prohibited abortion within their borders might attempt to use one or another regulatory tool to stop their citizens from traveling out of state to procure abortions of fetuses conceived within their territory.” *Id.* at 627. Nowhere in his lecture, however, does Professor Fallon offer any empirical evidence supporting his prediction as to the likelihood, should *Roe* be overruled, that any state will enact such legislation.

The one state law of which I am aware that is somewhat analogous to one that would make it a crime for a resident to travel out of state to obtain an abortion is the Missouri law popularly known as the Parental Consent for Aiding and Assisting Mandate (PCAAM), which creates a civil cause of action against any person who intentionally assists a minor in traveling to another state with the intent that the minor obtain an abortion in circumvention of Missouri's parental consent law. MO. REV. STAT. § 188.250 (2005). In an unpublished opinion handed down on November 18, 2005, the Circuit Court of Missouri at Kansas City issued an order prohibiting enforcement of the law until the Missouri Supreme Court could hear arguments on appeal on various constitutional challenges to the law. *Planned Parenthood of Kan. v. Nixon*, No. 0516-CV25949, 2005 WL 3707407, at *16 (Mo. Cir. Nov. 18, 2005). The Missouri law is narrow in scope. It does not prohibit a pregnant minor who is in compliance with the state's parental consent law from procuring an out-of-state abortion. *See* § 188.250. In fact it does not attempt to regulate the activities of pregnant women at all. It only reaches the conduct of third parties who intentionally assist a minor to obtain an abortion in circumvention of Missouri's parental consent law. *Id.*

6. During the question and answer session following Professor Fallon's lecture, a member of the audience questioned the plausibility of his prediction by pointing out that since no state had enacted such a law prior to *Roe*, it was unclear to the questioner why Professor Fallon thought it likely that one or more states would do so should *Roe* be overruled. In response, Professor Fallon conceded that he based his prediction mainly on his hunch that the legal and political culture had changed from the time of *Roe*, so that today he believes there is now a greater likelihood that a pro-life state might enact such a law.

What I understand Professor Fallon to be suggesting is that the politically potent pro-life movement has become even more driven, so that should the movement succeed in getting the Court to overrule *Roe*, it may not be content merely to have pro-life states protect fetuses within their borders, but in furtherance of its larger agenda to outlaw abortion everywhere, the pro-life

developments occur, most of the themes in Professor Fallon's lecture, including what I consider his central insight, would simply not apply.

II.

Let's now turn to the problem that the brilliant, provocative insight is wrong. Professor Fallon suggests that, if the Supreme Court reverses *Roe v. Wade*, and if a state then passes a law restricting travel to other states for an abortion, then federal courts will still ultimately be forced to confront the profound legal, moral, and philosophical question which made *Roe v. Wade* one of the most difficult and controversial cases in constitutional history.⁷ That question is, what is the legal status of a fetus?⁸ As I will explain later, I think this insight is false because, even if a state enacts a law described by Professor Fallon, I think the most likely legal basis for striking down the law will involve federal constitutional law that need not require an inquiry into the legal status of a fetus.

In addition to his assertion about the return to the courtroom of the question of the status of a fetus, Professor Fallon emphasizes two other themes in his lecture: (1) if *Roe* is overruled, it would not mean—as many claim⁹—that federal courts would no longer have to review challenges to state abortion regulations,¹⁰ and (2) federal courts, in reviewing state abortion laws, would find themselves arbitrating between competing claims of state and national citizenship.¹¹ Like the primary insight, these two themes depend on a state's

movement will get one or more pro-life states to restrict the ability of state residents to travel to a pro-choice state to obtain an abortion.

7. See generally John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

8. Professor Fallon seems to recognize that his insight is dependent on one or more states enacting a law banning out-of-state abortions by residents. He argues that if a state should enact such a law, then “very serious constitutional questions would arise—and, somewhat ironically, a central issue for the Supreme Court would likely be whether the states’ interest in preserving fetal life is weighty enough to justify them in regulating abortions that occur outside their borders.” Fallon, *supra* note 1, at 613.

9. Among those to whom Professor Fallon attributes this view is Justice Scalia. *Id.* at 612–13, 613 n.5.

10. Professor Fallon views this assumption to be “perhaps the most important fallacy about the consequences of a decision to overrule *Roe*,” and it is the one with which he is most concerned. *Id.* at 612.

11. Both at the beginning of his lecture and in his conclusion, Professor Fallon emphasizes these two themes. Near the beginning of his lecture, Fallon writes:

In exploring widespread but by no means ubiquitous misunderstandings about the effects of a possible Supreme Court decision to overrule *Roe v. Wade*, I shall develop two principle themes. First, as I have asserted already, an overruling of *Roe* would not withdraw abortion-related questions from the courts, but instead would present the Court with a new set of morally freighted questions to replace the older set that has now grown familiar. Second, among the constitutional issues that would emerge in the wake of an

enacting a statute restricting out-of-state travel for an abortion. But contrary to Professor Fallon's view that it is likely that a state will pass such a law, I expect every state—pro-life and pro-choice states alike—simply to continue their historic policies of confining their regulation of abortion to those performed within their own borders. In that case, federal courts will not have grounds to review many, if any, state abortion laws, let alone grapple with tensions between state and federal citizenship or the profound question of the legal status of a fetus. It will be unnecessary for federal courts to do so because most state abortion laws would be immunized from constitutional challenge under the reasoning the Court most likely would have employed in its decision overruling *Roe v. Wade*.¹²

overruling of *Roe v. Wade* would be acute and sensitive ones involving the respective meanings of state and national citizenship as state efforts to stop abortion bumped up against freedoms long associated with unitary nationhood.

Id. at 614. Professor Fallon starts the conclusion to his lecture by re-emphasizing the same two themes. *Id.* at 652–53.

12. Professor Fallon seems to reach this same conclusion. He writes, “[i]f *Roe* were overruled, it is true that there would be little doubt about the states’ power to prohibit abortions within their territorial jurisdictions.” *Id.* at 613. Of course, as Professor Fallon himself observes, even after *Roe* was overruled, a federal judge would likely conclude that it would violate the Due Process Clause of the U.S. Constitution for a state or Congress to ban abortions under any circumstance, including those in which the continuation of the pregnancy of the woman would threaten her life. *Id.* at 625. Although no state to date has gone so far, the South Dakota legislature in March 2006 did pass, and the Governor signed, a broad anti-abortion law that did not contain any exceptions to protect the woman’s health or to allow for abortions where the pregnancy was the result of rape or incest. S.D. CODIFIED LAWS §§ 22-17-7–12 (2006). But even the South Dakota law included an exception for abortions necessary to save the life of the mother: “No licensed physician who performs a medical procedure designed or intended to prevent the death of a pregnant mother is guilty of violating § 22-17-8.” *Id.* § 22-17-10. On November 7, 2006, South Dakota voters in a statewide referendum voted to overturn the South Dakota law. See, e.g., Thomas Frank, *South Dakota Voters Axe Restrictive Abortion Law; 5 States Pass Same-Sex Marriage Bans as Culture-War Issues Inundate Ballots*, USA TODAY, Nov. 8, 2006, at 11A.

Nonetheless, in the unlikely circumstance that a pro-life state would enact an anti-abortion law that did *not* include an exception for life-saving abortions, I would expect a federal court to find the law unconstitutional in violation of a substantive due process right that any person, including a pregnant mother, has to be able to obtain medical treatment (including an abortion) that would be needed to save the life of the individual. Although I sense that Professor Fallon likewise thinks such a law *would* violate the constitutional right of individuals to receive life-saving care, he does not come out and say so but avoids offering his own assessment and is content simply to indicate that “not all would necessarily reach the same conclusion,” and that “[i]t is . . . quite imaginable that the Supreme Court would need to determine the constitutionality of abortions necessary to save the life of a mother.” Fallon, *supra* note 1, at 626. Although while again one can imagine such a law, it is worth pointing out that no state ever has enacted such a law. Also, it should be remembered that the Texas anti-abortion law that the Court struck down in *Roe* allowed abortions where necessary to save the life of the mother. See *Roe v. Wade*, 410 U.S. 113, 117 n.1 (1973).

It is, however, pointless for Professor Fallon and me to debate whether this sort of anti-travel, anti-abortion law will ever be enacted. Law professors have no expertise in the field of predicting what laws legislatures will enact. Such predictions are best left to political scientists, who, while probably no more likely to guess correctly, at least presume to claim such expertise.¹³ But since law professors do love to think about hypothetical questions, I will accept Professor Fallon's assumption about the passage of such a law for the sake of discussion; that is, for the sake of discussing what legal analyses would apply to a judicial review of such a law.

III.

In Professor Fallon's hypothetical legal dispute, one state, State A, has a law allowing abortions.¹⁴ Another state, State B, has a law forbidding its citizens from traveling to State A for an abortion.¹⁵ A citizen of State B challenges the prohibition in federal court, arguing that it unconstitutionally restricts her right to travel to State A for an abortion. How does a federal court decide this case? Professor Fallon suggests that a federal court would decide this case by analyzing what federal common law and the U.S. Constitution say about conflicts between the laws of two states and conflicts between a state law and the federal rights of U.S. citizens. But Professor Fallon treads very modestly through this field in which he has expertise; too modestly, in my opinion. Professor Fallon only suggests certain doctrines which he proposes the courts will employ in analyzing these questions. I wish Professor Fallon

13. To be fair to Professor Fallon, he is not the only law professor who has ventured to make predictions about the politics of abortion regulation should *Roe* be overruled. See Jeffrey Rosen, *The Day After Roe*, ATLANTIC MONTHLY, June 1, 2006, at 56.

14. Several states not only do not have anti-abortion laws on the books but, as Professor Fallon observes, nineteen states have gone further by providing explicit constitutional protection for abortion rights. Fallon, *supra* note 1, at 616 n.19. In his *Atlantic Monthly* article, Professor Rosen states that according to the Center for Reproductive Rights the number is now up to twenty-three states that protect abortion. Rosen, *supra* note 13, at 59. Professor Rosen lists six states—California, Connecticut, Maine, Maryland, Nevada, and Washington—where the state legislatures have passed laws protecting abortions. *Id.* He identifies ten states—Alaska, California, Florida, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, Tennessee, and West Virginia—where state courts have ruled that the state constitution protects abortion rights. *Id.*; see also Stephen Gardbaum, *State and Comparative Constitutional Law Perspectives on a Possible Post-Roe World*, 51 ST. LOUIS U. L.J. 685, 687–88, (2007). Accordingly, even if the Supreme Court would overrule *Roe*, residents (and I think nonresidents as well) could continue to procure abortions within these states. It is also imaginable that some states that now do not have laws or constitutional provisions protecting abortion rights would pass such laws or provisions should the Supreme Court overrule *Roe*. Professor Rosen lists seven candidates—Hawaii, Iowa, New Hampshire, New York, Oregon, Vermont, and Wyoming. Rosen, *supra* note 13, at 59.

15. Again, to date no state has ever sought to do so. See *supra* note 5.

had gone further, bit the bullet, and offered his legal opinion as to how the Court would decide these questions.

IV.

I will end this short response by offering my own legal opinion as to how the Court would (and should) decide these questions. Without getting into the complex details, let me simply summarize that Professor Fallon suggests courts will tackle these cases by applying as many as five constitutional provisions, those being the Due Process Clause,¹⁶ the Full Faith and Credit Clause,¹⁷ the

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

Professor Fallon points out that in *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Supreme Court in dictum indicated that no state could impose criminal sanctions on their residents who traveled to another state to engage in an activity that was legal in the other state. Fallon, *supra* note 1, at 628–29. Because the Court did not identify what provision or provisions in the Constitution prohibited states from extending their criminal laws beyond their borders, Professor Fallon suggests that the Court might have assumed that either the Due Process or Full Faith and Credit Clauses would bar such state laws. *Id.* at 627. Professor Fallon questions the Court’s reliance on either of these two clauses as well as the Court’s “categorical claim that states may never enact or enforce extraterritorial criminal legislation.” *Id.* at 629. To the contrary, he discusses several cases, ones that the Court in *Bigelow* failed to cite, where the Court found no due process or full faith and credit bar to various attempts by states to apply their civil and criminal laws extraterritorially. *Id.* at 629–31. Professor Fallon reads these cases as holding that for a state to do so, it might be sufficient for due process and full faith and credit purposes for the state simply to claim an interest in its residents and their well-being. *Id.* at 630. In addition to these Due Process Clause and Full Faith and Credit Clause precedents, Professor Fallon also cites to other legal authorities such as the Restatement (Second) of Conflicts of Law and the Model Penal Code as further support for the authority of states to regulate the out-of-state conduct of their residents. *Id.* at 631 nn.84, 86. Although he refrains from giving his opinion as to how the U.S. Supreme Court would come out on the question of whether either the Due Process Clause or the Full Faith and Credit Clause would preclude states from making it a crime for their citizens to obtain out-of-state abortions (“I would not pretend to pronounce a confident judgment on whether, following the overruling of *Roe v. Wade*, the Due Process and Full Faith and Credit Clauses would permit a pro-life state to make it a crime for its citizens to procure abortions in other states.”), he states, however, that he has “no hesitation in concluding that this question would be a difficult one that is not clearly resolved in the negative by the Supreme Court’s past decisions.” *Id.* at 632. He does go on, however, to offer a partial if incomplete answer to the “difficult” issue:

In assessing whether a state could regulate its citizens’ efforts to procure out-of-state abortions, the Court might possibly hold categorically that states can always deploy their criminal law to regulate their citizens’ out-of-state conduct. Or the Court might hold that the Due Process and Full Faith and Credit Clauses always bar state criminal prosecutions based on out-of-state occurrences. Or, what seems to me most likely, the Court might hold that a state can regulate its citizens’ out-of-state conduct only insofar as it has some further impact on the state’s interests or policies that reverberate within the regulating state. If so, the Court would need to determine whether the states have a sufficient interest in the lives of fetuses conceived by their citizens within their borders to justify the

Commerce Clause,¹⁸ the Sixth Amendment,¹⁹ and finally the Privileges and

exercise of extraterritorial regulatory jurisdiction. Framed within the conceptual apparatus of conflict of laws, the question would be whether a regulating state had “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law [would be] neither arbitrary nor fundamentally unfair.”

Id. at 632 (quoting *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981))).

It is uncertain, however, how analogous the abortion context is to those cases that Professor Fallon identifies as ones where the Court found no due process or full faith and credit bar to states either enforcing or applying their laws to the out-of-state conduct of their residents. As Professor Fallon observes, in the cases in which the Court has rejected due process and full faith and credit challenges to state extraterritorial regulatory jurisdiction, the “Supreme Court has said repeatedly that an important consideration . . . is whether one of its citizens was involved.” *Id.* at 629–30. The courts have underlined the importance of residency, as Professor Fallon also points out, because of their recognition that “a state has an enduring contact with its citizens and an interest in their well-being.” *Id.* at 630. It should be noted, however, that while the woman whose out-of-state abortion the state is seeking to ban is a resident of the state, it is not true that the state’s primary justification for restricting her actions can be understood in terms of protecting her well-being. Presumably courts would find that women know better than their home state what is in their best interest, and obviously those women who choose to have an abortion believe that having the abortion is in their best interest. Rather, in its effort to ban its residents from procuring out-of-state abortions, as Professor Fallon seems to acknowledge, the state’s primary justification is not to protect the well-being of its female residents but to protect the well-being of the *fetus*. Since it is unlikely that the Court will find a fetus to be a person in the constitutional sense, an outcome that Professor Fallon also sees as unlikely, *id.* at 622, it would follow logically as well that the Court likewise would not find a fetus to be a resident.

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

Professor Fallon observes that while the Due Process and Full Faith and Credit Clauses “otherwise have quite different functions, the Supreme Court has generally assumed that they impose identical restrictions on states’ choice-of-law decisions about whether to apply their laws to events occurring out of state.” Fallon, *supra* note 1, at 628; *see also supra* note 16.

18. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”)

Professor Fallon asserts that “[a]mong the most serious challenges to the constitutionality of states’ efforts to stop their citizens from obtaining out-of-state abortions would involve the Dormant Commerce Clause.” Fallon, *supra* note 1, at 636. Such an attempt by a state to ban its residents from procuring an out-of-state abortion, or so it could be argued, impacts adversely on the interstate abortion services market because it would prohibit residents in one state from purchasing a medical service offered in another state. Professor Fallon notes, however, that most of the state laws which the Court has struck down under its Dormant Commerce Clause doctrine are ones that either facially discriminated against interstate commerce or involved laws whose purpose the Court found to be “protection[ist].” *Id.* at 637. Professor Fallon speculates about, but is not prepared to conclude, that if the Court would confine its enforcement of the Dormant Commerce Clause solely to laws falling within these two categories, then the Court might conclude that a pro-life state law banning residents from procuring an abortion from an abortion provider located in a pro-choice state would *not* run afoul of the Dormant Commerce Clause since the challenged law would be seen as neither facially discriminatory against interstate commerce nor protectionist. *Id.* at 638.

But Professor Fallon goes on to argue that the Court would probably subject such a state law to the balancing test that the Court fashioned in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which test the Court purports to apply in those Dormant Commerce challenges where the Court finds that the challenged state law, while impacting adversely on interstate commerce, does not discriminate against out-of-state competitors. Fallon, *supra* note 1 at 637. Were it to do so, Professor Fallon observes that, in applying its balancing test to a pro-life state law that banned its residents from obtaining an abortion from an abortion provider located in a pro-choice state, the Court “would need to assess the strength of a state’s interest in preserving fetal life within a balancing calculus.” *Id.* Professor Fallon’s point once again is that, in the same way that the Court could not avoid grappling with the issue of the legal status of the fetus should it analyze the constitutionality of such a state extraterritorial abortion regulation under either the Due Process Clause or the Full Faith and Credit Clause, so too, the Court could not avoid assessing the legal status of the fetus were it to review the constitutionality of such a law under its Dormant Commerce Clause jurisprudence. If Professor Fallon is right that the Court in its review of challenges to the constitutionality of states’ efforts to stop their citizens from obtaining out-of-state abortions brought under any one of these three provisions would need to consider the legal status of the fetus, then Professor Fallon also is right that it is a fallacy to assume, as many do, that the “overruling of *Roe v. Wade* would spare the courts from needing to make such assessments.” *Id.* *But see infra* note 34 and accompanying text.

Finally, Professor Fallon observes that there exists a line of Dormant Commerce Clause cases where the Court seemed to hold that it is a per se violation of the Dormant Commerce Clause for a state to engage in extraterritorial regulation of commercial activity. Fallon, *supra* note 1, at 638. If the Court in fact has adopted a categorical rule against extraterritorial regulation of commercial activity, then any attempt by a pro-life state to stop its residents from purchasing abortion services in a pro-choice state would be unconstitutional. Once more, however, Professor Fallon notes that most of these cases involved laws that the Court saw as “protection[ist].” *Id.* Professor Fallon speculates that, were the Court to limit its prohibition against extraterritorial state legislation to “efforts by one state to shield an in-state group or industry from out-of-state competition,” then the prohibition would not apply to state anti-abortion legislation since “[w]hatever other objections state anti-abortion legislation might invite, it would obviously not be “protectionist” in this distinctively economic sense.” *Id.* In the end, however, Professor Fallon once again punts. *See id.* (“I do not know whether the Supreme Court would accept this argument.”). In lieu of offering his opinion on how the Court would or should come out on the question of whether the Dormant Commerce Clause would bar “state statutes that regulate out-of-state transactions by their citizens in order to promote non-economic goals (such as the preservation of fetal life),” Professor Fallon is willing simply to proclaim that “[o]nce again, however, it seems plain that the overruling of *Roe v. Wade* could easily confront the Court with a difficult, currently unresolved issue about the constitutional permissibility of state anti-abortion legislation.” *Id.*

19. U.S. CONST. amend. VI. In relevant part, the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .” (emphasis added). *Id.*

Professor Fallon notes that some commentators have argued that it would violate the “vicinage requirement” of the Sixth Amendment for a pro-life state to prosecute a resident who procured an abortion outside of the territorial boundary of the state. Fallon, *supra* note 1, at 635–36. But Professor Fallon goes on to point out that the Supreme Court has not yet incorporated the vicinage requirement into the Fourteenth Amendment so as to make the vicinage requirement applicable to the states. *Id.* at 636. And he further notes that, to date, more courts, including

Immunities Clause of Article IV.²⁰ Although he does not indicate the constitutional provision that would be the source of this right,²¹ Professor

every federal appellate court that has considered the question, have ruled that the vicinage requirement does not apply to state prosecutions. *Id.* Accordingly, should the Supreme Court likewise hold that the Fourteenth Amendment does not incorporate the vicinage requirement, then the requirement would not serve as a bar to a pro-life state prosecuting one of its residents for procuring an abortion outside of the state. Professor Fallon flags the incorporation issue without offering his opinion on how the Court would or should decide the question. *Id.*

Professor Fallon does go on to speculate further that even if the Supreme Court decided to incorporate the Sixth Amendment vicinage requirement into the Fourteenth Amendment and thereby find that state prosecutions were subject to the requirement, it is still conceivable, or so Professor Fallon surmises, that some states might be able to find creative ways to get around the requirement. *Id.* Thus Professor Fallon suggests one or more pro-life states might try “to redefine the crime that they wished to prohibit so that it occurred within the state,” even though the abortion itself was performed outside the state. *Id.* As examples of such laws, Professor Fallon states that “a state might make it unlawful for any women to engage in intrastate travel for the purposes of obtaining an abortion, or it might forbid conspiracy to cause the destruction of a fetus, regardless of whether the actual destruction occurred in state or out of state.” *Id.* While it is imaginable that a pro-life state might adopt one or more of these legislative ploys as a means by which to avoid having to comply with the vicinage requirement, the likelihood that one or more pro-life states would actually do so is another matter.

20. U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States”).

Professor Fallon points out that scholars disagree over whether the Court would construe the Privileges and Immunities Clause of Article IV to bar a pro-life state from making it a crime for its residents to travel to a pro-choice state to procure an abortion. Fallon, *supra* note 1, at 635. Professor Fallon identifies Professor Seth F. Kreimer as perhaps the leading proponent for finding such a bar. *See id.* (citing Seth F. Kreimer, “*But Whoever Treasures Freedom . . .*”: *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907 (1993)); *see also* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992). As Professor Fallon notes, Professor Kreimer reads the language of the Privileges and Immunities Clause of Article IV as establishing that a resident of a pro-life state who travels to a pro-choice state is entitled to the privileges and immunities enjoyed by the citizens of the pro-choice state including any privileges and immunities involving abortion. Fallon, *supra* note 1, at 635. Professor Fallon adjudges Professor Kreimer’s argument, which rests largely on the language of the Clause, as “plausible.” *Id.* Two other constitutional scholars who appear to read the Privileges and Immunities Clause of Article IV the same way are Peter J. Rubin and Laurence H. Tribe. *See, e.g., The Child Custody Protection Act: Protecting Parents’ Rights and Children’s Lives: Hearing on S. 851 Before the S. Comm. on the Judiciary*, 108th Cong. 14–16 (2004) [hereinafter *Hearing on S. 851*] (statement of Peter J. Rubin, Professor of Law, Georgetown University); Laurence H. Tribe, *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 150–52 (1999).

On the other side, Professor Fallon identifies Professor Mark D. Rosen as the leading proponent for reading the Privileges and Immunities Clause of Article IV to find that the Clause “does not limit the obligations that a state can impose on its *own* citizens when they travel out of state.” Fallon, *supra* note 1, at 635; *see, e.g.,* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855 (2002); *see also* *Child Custody Protection Act: Hearing on H.R. 1755 Before the Subcomm. on the Constitution of the H. Comm.*

on the Judiciary, 108th Cong. 8–17 (2004) [hereinafter *Hearing on H.R. 1755*] (testimony and prepared statement of Mark D. Rosen, Associate Professor, Chicago-Kent College of Law). Another scholar who sides with Professor Rosen is Richard S. Myers. See, e.g., Richard S. Myers, *The Public Policy Doctrine and Interjurisdictional Recognition of Civil Unions and Domestic Partnerships*, 3 AVE MARIA L. REV. 531 (2005); Richard S. Myers, *Same-Sex “Marriage” and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45 (1998).

As Professor Fallon observes, Professor Rosen bases his interpretation of the Clause largely on Supreme Court case law. Fallon, *supra* note 1, at 635 n.99. Professor Fallon adjudges Professor Rosen’s interpretation to be no less plausible than that of Professors Kreimer, Rubin, and Tribe. *Id.* As between the two, Professor Fallon is unwilling to pick one over the other, and once more is content simply to write that “[i]f *Roe v. Wade* were overruled, efforts by pro-life states to prohibit their citizens from procuring out-of-state abortions could thus force the Supreme Court to choose between dueling interpretations of the Privileges and Immunities Clause.” *Id.*

Although Professor Fallon leaves unanswered the question of which of the dueling combatants would prevail, when the smoke had cleared, I would place money on Professor Rosen as the one still standing. The problem with Professor Kreimer’s interpretation of the Clause, as Professor Rosen points out, is that it is at odds with how the Court consistently has read the Clause. In all of its decisions applying the Privileges and Immunities Clause of Article IV, the Court has made clear that it sees the Clause as a limitation solely on the regulatory power of host states and not home states. See, e.g., *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274 (1985); *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208 (1984). Also relevant are the *Slaughter-House Cases*, in which the Court, in discussing the Privileges and Immunities Clause of Article IV, stated that the Clause does not “profess to control the power of the State governments over the rights of its own citizens.” 83 U.S. (16 Wall.) 36, 77 (1872). Thus all of the Court’s precedents support Professor Rosen’s understanding of the Clause as having fashioned an anti-discrimination principle that “limits the extent to which the *visiting* state can treat *visitors* differently from its own citizens, but it in no way affects the *home* state’s power to regulate its *own* citizens when they go out-of-state.” *Hearing on H.R. 1755, supra*, at 16 (emphasis added).

Therefore I would disagree, for example, with the statement by Professor Rubin that “[u]nder Article IV, neither Virginia nor Congress could, for example, prohibit residents of Virginia, where casino gambling is illegal, from traveling interstate to gamble in a casino in Nevada.” *Hearing on S. 851, supra*, at 15. Putting to the side whether the Court would find such an anti-travel, anti-gambling law to be unconstitutional, I believe that Professor Rubin is wrong to claim that the law would violate the Privileges and Immunities Clause of Article IV. Like Professor Kreimer, Professor Rubin mistakenly has assumed that the Clause limits the regulatory authority of home states over their own citizens, an assumption that, as Professor Rosen points out, is contradicted by Supreme Court precedent. Rosen, *supra*, at 900–03.

Accordingly, I agree with Professor Rosen that a pregnant woman who is a resident of a pro-life state could *not* maintain an Article IV Privileges and Immunities Clause challenge to a law enacted by her home state barring her from traveling to a pro-choice state to procure an abortion. But I disagree with his conclusion that, therefore, it is likely that the law would withstand constitutional attack. Rather, I agree with Professors Kreimer, Rubin, and Tribe that it *would* violate the Constitution for a pro-life state to subject to criminal prosecution one of its residents upon returning home to her pro-life state for having gone to a pro-choice state to have an abortion. As noted above, my quarrel with these scholars is not with their conclusion but with their reliance on the Privileges and Immunities Clause of Article IV as the basis upon which to rest their finding of unconstitutionality. As I argue later in this response, I would identify the Privileges or Immunities Clause and/or the Citizenship Clause of the Fourteenth Amendment as

Fallon also surmises that challengers to his hypothetical law might rely on the long recognized constitutional right to travel.²² But, regrettably, Professor

the appropriate textual sources for the constitutional principle that the Court would apply in striking down a pro-life state law banning residents of the pro-life state from traveling to a pro-choice state to procure an abortion. Besides my disagreement with Professors Kreimer, Rubin, and Tribe over the appropriate provision in the Constitution on which to rest what I, too, see as a right that U.S. citizens have against their home state, I also believe that these scholars have defined the scope of the right to interstate mobility too broadly. I understand them to hold that the Constitution bestows on U.S. citizens the right always to be protected from criminal prosecution by their home state for their out-of-state conduct. As Professor Rubin has put it, “[n]either your home State nor Congress may lock you into the legal regime of your home State as you travel across the country.” *See id.* Under such a categorical rule, a pro-life state could not criminally prosecute a resident who traveled to a pro-choice state to have an abortion. As I explain later, while I also believe that such an anti-travel, anti-abortion law violates a right of U.S. citizenship, I would define the right more narrowly than do these scholars. *See infra* note 31.

21. Prior to 1999, the Court had identified both the Equal Protection Clause of the Fourteenth Amendment and the Commerce Clause as the textual source of the “right to travel.” *See, e.g.,* *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Edwards v. California*, 314 U.S. 160, 172 (1941). In *Saenz v. Roe*, the Court reformulated its right to travel jurisprudence by explaining that it now saw the right to travel as consisting of three distinct components, and that it no longer saw either the Commerce Clause or the Equal Protection Clause as the textual source of any one of the three components. 526 U.S. 489 (1999). The Court identified as the first component of the right to travel “the right of a citizen of one State to enter and to leave another State.” *Id.* at 500. The Court refrained from identifying the textual source for this first component, but I would argue that the natural resting place for the right is the Privileges or Immunities Clause of the Fourteenth Amendment and/or the Citizenship Clause of the same amendment. That was the view taken by four Justices—Justices Douglas, Black, Murphy, and Jackson—in *Edwards v. California*. 314 U.S. at 178 (Douglas, J., concurring) (“The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment.”); *id.* at 182 (Jackson, J., concurring). The Court defined the second component of the right to travel as “the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily . . . in the second State.” *Saenz*, 526 U.S. at 500. The Court identified the textual source of the second component of the right to travel to be the Privileges and Immunities Clause of Article IV. *Id.* at 501. Finally, the Court defined as the third component of the right to travel to be “the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State.” *Id.* at 502. The Court identified as the textual sources of this right the Privileges or Immunities Clause of the Fourteenth Amendment along with the Citizenship Clause of the same amendment. *Id.* at 502–03 (“Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases*, it has always been common ground that this Clause protects the third component of the right to travel.” (citation omitted)).

22. Professor Fallon argues that a pregnant woman might contend that it violates her right to travel for her home state to prohibit her from traveling to a pro-choice state to procure an abortion. Professor Fallon observes that the law could be seen as creating “a disincentive to travel.” Fallon, *supra* note 1, at 638. But Professor Fallon goes on to state that “[i]t would probably be a mistake, however, to regard it as simply settled that a state’s prohibition against

Fallon balks at applying these doctrines himself and fails to suggest how the analysis should be conducted or should turn out.²³

While I agree that litigants will argue on the basis of many of the doctrines listed by Professor Fallon, I think it more likely that the Court will rely on different doctrines altogether, especially should it conclude such laws are unconstitutional. I believe a federal court would decide this case under the doctrine of federal citizenship rights under the Citizenship Clause of the Fourteenth Amendment²⁴ or the Privileges or Immunities Clause of the Fourteenth Amendment²⁵ or maybe both. These provisions were largely dormant until 1999,²⁶ when the U.S. Supreme Court in *Saenz v. Roe*²⁷ found in

out-of-state abortions of fetuses conceived within the prohibiting state would always and necessarily violate the right to travel.” *Id.* at 638–39.

He references other state laws that similarly create disincentives to travel that the Court found did not violate the right to travel. *Id.* at 639. For example, Professor Fallon notes that the Supreme Court upheld the authority of a state to make it a crime for a parent to leave the state for the purpose of abandoning a child. *Id.* Professor Fallon reasons that the Court might similarly reject a right to travel challenge to a pro-life state law banning its residents from traveling to a pro-choice state to procure an abortion by drawing an analogy between the anti-travel, anti-abortion law and the anti-child abandonment law. *Id.*

Professor Fallon distinguishes between two situations in which he believes that challengers would make right to travel claims. The first is where a resident of a pro-life state wants to travel to a pro-choice state to have an abortion, but after obtaining the abortion wants to return and continue to reside in the pro-life state. *Id.* The second is where the resident of a pro-life state wants to move to a pro-choice state in part because of the state’s pro-choice abortion policy. *Id.* Professor Fallon suggests that as to both scenarios a pro-life state, in its effort to protect the fetus, might seek to stop its residents from leaving the state out of fear that the resident will have an abortion in another state. *Id.* Once more, however, Professor Fallon declines to say whether or not as to either scenario he thinks the courts would find a violation of the pregnant woman’s right to travel. On the question of whether “one state’s interest in protecting fetal life outweigh[s] a woman’s asserted right, rooted in her national citizenship, to migrate to another state and to enjoy the privileges or immunities of citizenship of that other state,” Professor Fallon is satisfied merely to characterize the question as “hard” and “important.” *Id.* at 639–40.

23. See *supra* note 22.

24. U.S. CONST. amend XIV, § 1 (“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.”).

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

26. Describing the two clauses as “dormant” is an understatement. Prior to *Saenz*, the Court had relied on the Privileges or Immunities Clause of the Fourteenth Amendment only once to invalidate a statute. It had done so in *Colgate v. Harvey*, where the Court had invoked the Privileges or Immunities Clause of the Fourteenth Amendment to strike down a state income tax charged against in-state residents on interest and dividend income earned outside the state. 296 U.S. 404 (1935). Five years later, however, the Court overruled *Colgate* in *Madden v. Kentucky*. 309 U.S. 83 (1940). Accordingly, as of today *Saenz* constitutes the Court’s one (and only) good precedent for invalidating a law under the Privileges or Immunities Clause of the Fourteenth Amendment. As for the Citizenship Clause, prior to *Saenz*, the Court had never utilized the

these sleepy clauses fundamental rights of U.S. citizenship against both state and federal laws.²⁸ In *Saenz*, the Court interpreted these two clauses as establishing for those travelers who elect to become permanent residents “the right to be treated like other citizens of that State.”²⁹ I suggest the Court would be similarly inclined to hold that the same two provisions would protect the right of a U.S. citizen to travel to a state to enjoy the privileges which that state, under the Privileges and Immunities Clause of Article IV, cannot deny to residents of other states.³⁰ The essence of Professor Fallon’s hypothetical case is a state law preventing a citizen of the United States from traveling to another state to exercise fundamental rights that that state grants to its own citizens, and cannot constitutionally deny to newcomers and, as I argue, cannot constitutionally deny to travelers either. This is a true conflict—the same act, getting an abortion, is a fundamental right in one state and a fundamental wrong in another. Does the U.S. Constitution protect a citizen of the state which calls it a wrong when that citizen commits the act in the state in which it is a right? I suggest that under the Privileges or Immunities and Citizenship Clauses of the Fourteenth Amendment, federal law does not allow one state to prevent a citizen of the United States from enjoying the fundamental rights in another state, even if the home state considers it a fundamental wrong.³¹ The

Clause as the basis for setting aside either a state or federal law. Thus, *Saenz* is the Court’s only valid precedent for striking down a law in reliance on the Citizenship Clause.

Before the Court in *Saenz* resuscitated both clauses, the conventional understanding among most constitutional scholars was that it was pretty much a non-starter for a lawyer to rely on either clause in challenging governmental action. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 180 (1990) (“The privileges and immunities clause has remained the cadaver that it was left by the *Slaughter-House Cases*.”); Morton J. Horwitz, *The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 84 (1993) (“Justice Miller’s opinion [in the *Slaughter-House Cases*] . . . virtually emptied the Privileges and Immunities Clause of content . . .”).

27. 526 U.S. 489 (1999).

28. *Id.* at 507–08 (“[T]he protection afforded to the citizen by the Citizenship Clause of [the Fourteenth] Amendment is a limitation on the powers of the National Government as well as the States.”).

29. *Id.* at 500. Professor Tribe defines the third component as the “right, upon arriving in a state and deciding to remain permanently, to be treated at once as a full citizen of that state, no less privileged than those who had been the state’s citizens for years.” Tribe, *supra* note 20, at 126.

30. See *supra* note 20.

31. As I noted earlier, I am not alone in the belief that Congress should recognize that citizens of the United States have the right to limit the extent to which their state of residence can criminally prosecute them for engaging in lawful conduct in another state. Professors Tribe and Ruben (as well as Professor Kreimer) similarly believe that U.S. citizens while visiting another state have a right to engage in conduct lawful in the other state although unlawful in their state of residence. See *supra* note 20. As I argued earlier, my disagreement with these scholars is (1) over what provision in the Constitution should serve as the textual source of the right, and (2) over the scope of the right. *Id.* As I observed earlier, Professors Tribe and Ruben define the right

broadly to find that a state can never criminally prosecute one of its residents while traveling in another state for having engaged in conduct that was legal in the other state but not their home state. *See id.* In arguing in support of such a broad right, Professor Tribe has written:

But may Georgia, or any other state A, in essence saddle its citizens, while traveling in other states, with its *entire* legal system or with large chunks of it, so that those citizens or anyone who helped those citizens to travel to some state B would become subject to criminal prosecution upon returning home to state A for having gone to state B in order, for example, to take a riverboat gambling cruise there, to have an abortion there without complying with state A's parental notification rules, to buy beer on a Sunday there, or to engage in consensual, intimate activity that is legal in state B but not state A? The answer would seem to be a resounding no. In our federal structure, state jurisdiction is territorially defined in such a way that people may vote with their feet not only to make their homes in whichever state's demographic, political, or legal environment accords with their preferences, but also to travel on a transient basis to states whose legal systems they find more to their liking or more in accord with their needs at the time, in order to obtain while there the benefits of those legal systems. No state may enclose its citizens in a legal cage that keeps them subject to the state's rules of primary conduct (at least vis-à-vis the world in general), including rules enforced through criminal prosecution, as they travel to other states in order to satisfy their needs or preferences or simply to sample what the rest of the nation may have to offer.

The conclusion that a state's legal system must not hobble a citizen as she travels from state to state follows from a conception of interstate mobility that entails something more than just a change of scenery. If each state could decide for itself, possibly with some measure of congressional authorization, how much of its legal system its citizens would have to carry around on their backs while seeking to take advantage of the legal environments of other states, then the right to choose which state to enter for any purpose lawful in that state would amount to nothing more than the right to have the physical environment of the states of one's choosing pass before one's eyes in a kind of virtual reality arcade while one remained strapped at all times in a legally fixed and closed environment. Surely, however, more than that is involved in the right of interstate mobility that follows from the basic structure of our federal Union.

Tribe, *supra* note 20, at 151–52 (emphasis added).

In support of the same broad principle, Professor Rubin has testified:

The essence of federalism is that the several states have not only different physical territories and different topographies but also different political and legal regimes. Crossing the border into another state, which every citizen has a right to do, may perhaps not permit the traveler to escape *all* tax or other fiscal or recordkeeping duties owed to the state as a condition of remaining a resident and thus a citizen of that state, but necessarily permits the traveler temporarily to shed her home state's regime of laws regulating primary conduct in favor of the legal regime of the state she has chosen to visit. Whether cast in terms of the destination state's authority to enact laws effective throughout its domain without having to make exceptions for travelers from other states, or cast in terms of the individual's right to travel—which would almost certainly be deterred and would in any event be rendered virtually meaningless if the traveler could not shake the conduct-constraining laws of her home state—the proposition that a state may not project its laws into other states by following its citizen there is bedrock in our federal system.

One need reflect only briefly on what rejecting that proposition would mean in order to understand how axiomatic it is to the structure of federalism. Suppose that your home state or Congress could lock you into the legal regime of your home state as you travel

across the country. This would mean that the speed limits, marriage regulations, restrictions on adoption, rules about assisted suicide, firearms regulations, and all other controls over behavior enacted by the state you sought to leave behind, either temporarily or permanently, would in fact follow you into all 49 of the other states as you traveled the length and breadth of the nation in search of more hospitable “rules of the road.” If your search was for a more favorable legal environment in which to make your home, you might as well just look up the laws of distant states on the internet rather than roaming about in a futile effort at sampling them, since you will not actually experience those laws by traveling there. And if your search was for a less hostile legal environment in which to attend college or spend a summer vacation or obtain a medical procedure, you might as well skip even the internet, since the theoretically less hostile laws of other jurisdictions will mean nothing to you so long as your state of residence remains unchanged.

Unless the right to travel interstate means nothing more than the right to change the scenery, opting for the open fields of Kansas or the mountains of Colorado or the beaches of Florida but all the while living under the legal regime of whichever state you call home, telling you that the laws governing your behavior will remain constant as you cross from one state into another and then another is tantamount to telling you that you may in truth be compelled to remain at home—although you may, of course, engage in simulacrum of interstate travel, with an experience much like that of the visitor to a virtual reality arcade who is trapped into special equipment that provides the look and feel of alternative physical environments—from sea to shining sea—but that does not alter the political and legal environment one iota. And, of course, if home-state legislation, or congressional legislation, may saddle the home state’s citizens with that state’s abortion regulation regime, then it may saddle them with their home state’s adoption and marriage regimes as well, and with piece after piece of the home state’s legal fabric until the home state’s citizens are all safely and tightly wrapped in the straitjacket of the home state’s entire legal regime. There are no constitutional scissors that can cut this process short, no principled metric that can supply a stopping point. . . .

Hearing on S. 851, supra note 20, at 125–26.

I would not read the limitation on state extraterritorial regulation of its residents that I would find protected by the Privileges or Immunities and/or Citizenship Clauses of the Fourteenth Amendment as holding broadly that states only can enact and enforce their own laws governing conduct within their territorial boundaries and that the residents of each of the United States can travel to any state of the Union and avail themselves of that state’s regulatory regime. Such a broadly stated principle is at odds with the Court’s Due Process Clause and Full Faith and Credit Clause decisions. As Professor Fallon has pointed out, the Court has construed both clauses to allow a home state, at least in some circumstances, to project its criminal jurisdiction into another state so as to hold its residents criminally liable. *See supra* note 16. If these laws do not threaten interstate mobility as protected by the Due Process and Full Faith and Credit Clauses, it likewise should follow that those same laws should not be found to violate any right of U.S. citizenship that a resident can enforce against his or her home state’s exercise of extraterritorial criminal jurisdiction.

Whereas Professor Rubin cannot think of “a principled metric that can supply a stopping point,” I can. *See Hearing on S. 851, supra* note 20, at 126. I would define the right that U.S. citizens have against their home state’s exercise of extraterritorial criminal jurisdiction to be limited to the exercise of those fundamental rights that the state of destination grants to its residents under its state constitution. Arguably it is these individual rights—those the state of destination defines as fundamental—that should be made available to all citizens of the United States and not just those residing within the state. Limiting the right of interstate mobility in this

Court has already found that the right to an abortion is a fundamental right of state citizenship under the Privileges and Immunities Clause of Article IV, and therefore it would violate Article IV for a pro-choice state to seek to limit to only its residents the right to procure an abortion.³²

way would allow the Court to distinguish between a pro-life state that sought to ban residents for having abortions in a state that protected abortion rights in its state constitution and an anti-cockfighting state that sought to criminally prosecute one of its citizens for cockfighting who had traveled to a state that allows but does not protect cockfighting. The distinction drawn is that between conduct a state protects under its state constitution and conduct that a state permits only because the state has not yet seen fit to enact a law that makes the conduct illegal. I argue that the Court should define the right that U.S. citizens have not to be subject to their home state's extraterritorial criminal jurisdiction to be that conduct, and only that conduct, that is constitutionally protected by the state in which the resident engaged in the conduct.

Accordingly, I would not define the right more broadly to deny a home state of extraterritorial criminal jurisdiction over its residents as to conduct that the other state has not sought to protect constitutionally.

The more limited scope of protection that I would accord to U.S. citizens to be free from the extraterritorial reach of their home state is consistent with that of Justice Miller's "compromise" interpretation set out in the *Slaughter-House Cases*. See Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 650 (2000) ("Under this compromise interpretation, the Clause serves as a vehicle for the protection, not of all personal rights, but of what I call 'uniquely federal' rights . . .").

32. See *Doe v. Bolton*, 410 U.S. 179, 201 (1973). The Court in *Bolton* held that it would violate the Privileges and Immunities Clause of Article IV for Georgia to limit the procurement of abortions to citizens of Georgia. *Id.* The Court wrote, "Just as the Privileges and Immunities Clause protects persons who enter other States to ply their trade, so it must protect persons who enter Georgia seeking the medical services that are available there." *Id.* at 200 (citations omitted); see also *Saenz*, 526 U.S. at 502 ("[The Privileges and Immunities Clause] provides important protections for nonresidents who enter a State . . . to procure medical services . . .").

The Court handed down its decision in *Bolton* on the same day that it handed down its decision in *Roe*. However, the Court's finding that the Privileges and Immunities Clause of Article IV prohibited Georgia from discriminating against nonresidents with respect to the procurement of medical services including abortions was not dependant on the Court establishing in *Roe* a federal right to abort. Even if there did not exist a federal right to abort, the Court recognized that states could grant to their citizens such a right as a matter of state law, which in fact several states have done. See *supra* note 14. As to those states that have done so, the Court in *Bolton* held that the Privileges and Immunities Clause of Article IV prohibits those states from discriminating against nonresidents as to such state-granted fundamental rights. *Bolton*, 410 U.S. at 200. More particularly, those states that have granted to their citizens the right to obtain medical services including abortions are obligated by the Privileges and Immunities Clause of Article IV to make those same services available to visiting citizens of other states on the same terms as the state of destination accords to its own citizens.

Concededly there are certain well-defined rights which states can restrict to their citizens without running afoul of the Privileges and Immunities Clause of Article IV. Examples of such rights include the right to vote in state and local elections and the right to receive certain state-conferred benefits such as public welfare and free public education. See, e.g., *Martinez v. Bynum*, 461 U.S. 321, 333 (1983) (upholding residency requirement for free public school

This in turn brings us full circle to what I called Professor Fallon's primary insight, which is that, after the reversal of *Roe v. Wade*, federal courts would again be forced to confront the profound question of the legal status of the fetus.³³ I disagree. Even if a state passed an anti-travel, anti-abortion law, I think the Court, in striking down the law under the Citizenship Clause or the Privileges or Immunities Clause of the Fourteenth Amendment, would *not* have to address the legal status of the fetus.³⁴ In fact, if the Court struck down the law under one of the doctrines mentioned by Professor Fallon in his lecture, that is, the Sixth Amendment, the Court would also not have to address the legal status of the fetus.³⁵

attendance). Similarly, the Court has held that states can restrict to their citizens without violating the Privileges and Immunities Clause of Article IV certain other non-fundamental privileges and benefits whose denial to nonresidents would not seem to threaten interstate comity or undermine what it means to be a citizen of the United States. *See, e.g., Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978) (finding that a statute that imposed higher elk hunting fees on nonresidents was not subject to heightened Privileges and Immunities Clause scrutiny).

Professor Tribe similarly argues that whether a nonresident can successfully invoke the anti-discrimination protection of the Privileges and Immunities Clause of Article IV will turn on the nature of the privilege or benefit to which the nonresident has been treated non-equally. *See* Tribe, *supra* note 20, at 142. He argues that the Court's Article IV decisions establish that states need not treat nonresidents and residents the same as to "those state resources, services, or benefits, access to which our system treats as the defining characteristics of state citizenship—things a state might deny to the citizens of sister states without threatening the cohesive structure of the Union" and "those state resources, services, or benefits that no hospitable community of American citizens would be expected to withhold from their fellow Americans just because their home state was elsewhere." *Id.*

33. *See* Fallon, *supra* note 1, at 622.

34. It would be unnecessary for the Court to assess the legitimacy and weight of whatever justification the home state would offer, even one the state deemed to be compelling, if the Court would construe the Privileges or Immunities Clause and/or the Citizenship Clause of the Fourteenth Amendment to find that U.S. citizens have a constitutional right to travel to any state in the Union for the purpose of availing themselves of those fundamental rights the state of destination grants to its own citizens. *See supra* note 32. In this way the two Privileges and Immunities Clauses of the U.S. Constitution can be seen as complementary. In furtherance of interstate mobility and nationhood, the Court has construed the Privileges and Immunities Clause of Article IV to prohibit the state of destination from denying to visiting residents of other states the right to exercise those fundamental rights that the state of destination grants to its own citizens. Likewise interstate mobility and nationhood will be fostered if the Court should construe the Privileges or Immunities Clause and/or the Citizenship Clause of the Fourteenth Amendment to prohibit a home state from criminally prosecuting its residents for exercising those same rights.

35. If the Court would construe the vicinage requirement of the Sixth Amendment to prohibit a state, under any circumstances, from prosecuting individuals for conduct that occurred outside of the state, there would be no need for the Court to assess the legitimacy and weight of the reasons why the state had sought to project its criminal laws into another state.

V.

Professor Fallon's primary insight, brilliant and provocative as it is, stands on water that may never freeze into the thin ice of what I suggest is a very unlikely combination of a doubtful Supreme Court reversal and an implausible state law. But, for the sake of discussion, assuming that *Roe v. Wade* is reversed and such a state law is adopted, I would have wanted Professor Fallon to analyze how the Supreme Court should decide a constitutional challenge to the law. While waiting for Professor Fallon to do so, I have pressed ahead. I predict that the Court would apply the newly reawakened Citizenship and Privileges or Immunities Clauses of the Fourteenth Amendment, and rule that a state law which forbids a citizen from traveling to another state to take advantage of the fundamental laws in that other state is unconstitutional.³⁶ Moreover, were the Court to apply these two Fourteenth Amendment doctrines, as I suggest, it would not necessarily have to confront the issue of the legal status of the fetus. In fact, this might be a very powerful reason why the Court would employ the doctrines I suggest instead of those suggested by Professor Fallon.

36. If the Court would so find, then the Court also would hold that Congress, under Section Five of the Fourteenth Amendment, could pass a law that prohibited a pro-life state from enacting a law that prohibited or otherwise burdened the ability of one of its residents from traveling to a pro-choice state to procure an abortion. The Court would view the congressional act as *enforcing* U.S. citizenship rights protected by the Citizenship Clause and/or the Privileges or Immunities Clause of the Fourteenth Amendment. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("Congress' power under § 5 . . . extends to enforc[ing] the provisions of the Fourteenth Amendment.") (quotations omitted). Thus, I find Professor Fallon's claim that Congress could not rely on Section Five as the textual basis for abortion regulation to be overstated. Fallon, *supra* note 1, at 622.