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WHY *ROE* WON'T GO

MICHAEL S. GREVE*

INTRODUCTION

I am quite fond of jurisdictional and choice-of-law issues, and I cannot think of a more judicious and sure-footed guide through this terrain than Richard Fallon. I shall not quarrel with Professor Fallon's legal analysis of his hypotheticals on the retroactive application of pre-*Roe*[1] abortion statutes or on the extraterritorial application of post-*Roe* state laws (the gravamen of Professor Fallon's article[2] and argument). The real difficulty with Professor Fallon's essay, it seems to me, lies elsewhere: ultimately, the argument lacks the moral seriousness that befits this sordid subject.

I. NO WAY

I begin with a confident prediction: *Roe* will not be overturned any time soon. That is not simply a matter of judicial "vote counting"; even an additional anti-*Roe* vote on the Supreme Court would not materially change my prediction. The reason is that Justices do what Richard Fallon asks us to do here: they try to envision the consequences of their decisions, especially on matters of such gravity. The most certain consequence of overruling *Roe* would be a massive political upheaval. On one side, the Republican Party would face terrible difficulties in maintaining its electoral coalition, at least through one or two election cycles. On the other side, overturning *Roe* might do what even *Bush v. Gore*[3] failed to do—sour the legal establishment on the Court.

The weight of these considerations in the judicial calculus is a matter of conjecture. Perhaps, the Justices do not care much about election outcomes (although by some accounts, past abortion decisions *have* been "timed" for

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1. Roe v. Wade, 410 U.S. 113 (1973).

2. 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).

3. 531 U.S. 98 (2000).

elections).[4] Perhaps, they ignore the clamor and chatter at the Harvard Law School and its *New York Times* satellite offices.[5] And perhaps, the legal establishment would digest the demise of *Roe v. Wade* at the same speed with which it seems to have digested *Bush v. Gore*—as a shocking betrayal that leaves a very bad aftertaste but ultimately, not a sufficiently compelling reason to revisit the institutional commitment to an imperial Court. Against these "perhapses," however, stands the fact that the Justices care very much about their own future places in history and, moreover, about the Court's institutional prestige and reputation. These in turn depend on a political base that will defend the Court *as an institution*.[6] Under current and reasonably foreseeable conditions, that base cannot be the Federalist Society, and it cannot be the law schools. Rather, the Court's political base is an eclectic, ideologically diverse mix of court-centered activists and interest groups—all of them dismayed (for widely varying reasons) with what the Court has done, but all of them hoping that the Court may yet come to see the light on "their" issues.

Having staked its institutional prestige on *Roe* and its progeny, the Court will be hard-pressed to find a face-saving exit. A dramatic, outright reversal of *Roe* might easily prompt a potent institutional attack from the losing side. If I am right about its likely electoral consequences, it might even cause very bad blood all around. It is, in all events, not calculated to help the Court institutionally.

I will briefly return to this point at the end of my remarks. My initial observation is this: for a Court that wants to get out of "the abortion-umpiring business,"[7] *or even for a Court that does not give a rip about abortion per se but simply looks to its own institutional interests*, the optimal strategy is to eviscerate *Roe* piecemeal, one restriction at a time. The conceptual framework of *Planned Parenthood of Southeastern Pennsylvania v. Casey*[8] leaves ample

4. David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 583 (2001).

5. However, Judge Larry Silberman some years ago famously attributed the Supreme Court's solicitude of elite opinion to a "Greenhouse Effect," as in Linda Greenhouse of *The New York Times*. Judge Laurence Silberman, Judicial Activism: The Press Pulls the Strings, Speech Before the Federalist Society in Washington, D.C. (June 13, 1992), *in* TEX. LAW., June 29, 1992, at 15. Greenhouse herself has been very candid about her views on intensely controversial constitutional issues, including abortion. Linda Greenhouse, A Bridge Over Troubled Water: 2006 Radcliff Institute Medal Acceptance Speech (June 10, 2006), *available at* http://www.radcliffe.edu/alumnae/ reunions/4and9/greenhouse.php.

6. The contention that the Supreme Court (like any other political institution) needs a base of support is a central point of ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (4th ed. 2005). *See also* Martin Shapiro, *The Supreme Court from Early Burger to Early Rehnquist*, *in* THE NEW AMERICAN POLITICAL SYSTEM 47 (Anthony King ed., 2d ed. 1990).

7. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

8. 505 U.S. 833.

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room for that strategy. Depending on the future appointments, Justice Kennedy's calculations about his legacy, and the sequencing of abortion cases, the Supreme Court may well use that maneuvering room. That way, if *Roe* were eventually repealed, it would no longer matter very much.

II. SUBSTANCE AND JURISDICTION

The considerations just sketched, I admit, are somewhat unfair to Richard Fallon. "Ain't gonna happen" is not a compelling response—it is no response at all—to the proposition that *Roe might* be overturned, which is the speculation Professor Fallon asks us to entertain.[9] Moreover, a gradual evisceration of *Roe* could pose many of the difficulties he discusses. If a wholesale abortion prohibition can be enforced extraterritorially, then so can a partial one. So what of it?

Professor Fallon's central thesis—that the Supreme Court could not get out of the "abortion-umpiring business"[10] even if it wanted to, at least not by means of overruling *Roe*[11]—depends in some sense on what exactly one means by "umpiring." What Justice Scalia meant by that phrase (contained in an impassioned opinion)[12] is that the Court should abandon the attempt to define the contours of an extra-textual constitutional right. He has consistently maintained that the Court is ill-equipped to serve as the nation's moral guardian—among other reasons, because the attempt to umpire a culture war eventually forces the Court to choose sides.[13] I do not believe, however, that Justice Scalia then wrote or now labors under the impression that a reversal of *Roe* would spell an automatic end to all cases *involving* abortion in some way or another. If the Supreme Court were to surrender its monopoly over the definition of abortion rights, those rights would be defined elsewhere, predominantly (though perhaps not exclusively) in the states. As Professor Fallon observes, the substitution of a uniform right with a federal, decentralized arrangement necessitates a determination of exactly which state gets to decide what and for whom.[14] State laws on abortion, as on all other matters, may pose difficult problems of jurisdiction, choice of law, and the

9. *See generally* Fallon, *supra* note 2.

10. *Casey*, 505 U.S. at 996 (Scalia, J., concurring in the judgment in part and dissenting in part).

11. Fallon, *supra* note 2, at 612–14.

12. *Casey*, 505 U.S. at 996 (Scalia, J., concurring in the judgment in part and dissenting in part).

13. Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn.").

14. Fallon, *supra* note 2, at 633–36.

like. Surely, Justice Scalia understands that point. (He used to teach Conflicts of Law.[15])

The question is whether there is a meaningful difference between the direct judicial determination of abortion rights and the adjudication of jurisdictional questions that arise over politically and statutorily determined abortion rights. On that score, it seems to me that there is all the difference in the world between an abortion case and an abortion-related case on, say, the choice of law; between the umpiring of abortion and a second-order determination of which state gets to decide what with respect to abortion. A few examples illustrate the difference.

Commerce Clause[16] decisions are jurisdictional decisions. The scope of the Commerce Clause determines which jurisdiction, state or federal, gets to decide what. Under the post-New Deal understanding, any economic transaction is *ipso facto* "interstate commerce," and so the modern Commerce Clause decisions have involved controversial social issues with a highly attenuated economic nexus: guns in schools, violence against women, illegal drugs. Yet few, I trust, would contend that the Supreme Court was "umpiring" those issues in *Lopez*,[17] *Morrison*,[18] or *Raich*.[19] *Raich* was no more pro-"War on Drugs" than *Lopez* was pro-guns in schools or than *Morrison* was pro-gang rape. The Justices can easily tell the difference between substance and jurisdiction, and so can the public.

Judicial decisions concerning gay rights and especially same-sex marriage illustrate the same point. State court decisions that directly umpire those matters—"homosexual marriage, yea or nay"—are invariably the stuff of national press coverage. Second-order jurisdictional controversies have largely failed to attract comparable coverage, though not for lack of occasion. Because gay marriage involves a complicated web of ongoing relations rather than a one-shot act, it poses far more, and far more difficult, jurisdictional and choice-of-law questions than would abortion. For example, the highest courts of Vermont and Virginia have become embroiled in a nasty dispute over custody rights arising from one of Vermont's "civil unions." (Is Virginia compelled to recognize Vermont law in that dispute? Is Vermont in turn compelled to respect Virginia's emphatic "no" to that question? Who gets to

15. *See* Justices of the Supreme Court, http://www.supremecourtus.gov/about/biographies current.pdf (last visited Mar. 28, 2007).

16. 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 . . . .").

17. United States v. Lopez, 514 U.S. 549 (1995) (addressing guns in schools).

18. United States v. Morrison, 529 U.S. 598 (2000) (addressing violence against women).

19. Gonzales v. Raich, 545 U.S. 1 (2005) (addressing medical marijuana).

keep the child?)[20] Vermont was the first civil union state;[21] Virginia sports the most draconian anti-gay marriage constitution in the country.[22] Evidently, the citizens of those states take marriage laws seriously. And yet, the vexing custody case, which puts the laws of both states to the test, has attracted no public notice, let alone commotion.

Jurisdictional cases may simply be too complicated for newspaper headlines and public consumption. But that only goes to show that at some level, the complications matter. They dampen feverish public agitation, and they independently affect the case outcomes. In jurisdictional or choice-of-law cases, one can actually imagine Justices and judges taking "positions" at variance with their underlying substantive preferences. As Justice Scalia might say, the presence of a jurisdictional issue forces the Court to act as an actual court of law, instead of simply "choosing sides" in a law-free environment.

Richard Fallon suggests that there is no getting away from the substance. For example, the adjudication of jurisdictional cases might still compel the Court to make a determination with respect to the strength of the state's interest in regulating abortion.[23] Perhaps so. I will even grant a concession that Professor Fallon does not invite: judicial preferences on abortion rights may be sufficiently intense to affect the determination of second-order questions. It is perfectly plausible to argue that the *Roe* Court hand-tailored doctrines of standing, ripeness, and mootness to fit the abortion context,[24] and that the post-*Roe* Court created a kind of second-class free speech status for abortion protesters.[25] If *Roe* were overturned, something of the sort might come to pass in abortion-related cases on jurisdiction and choice of law. But if abortion rights have a gravitational pull, then so does the rest of the legal universe. Rules of general applicability are not easily tailored to individual issues, and even the most results-oriented judge will have to consider how a rule that produces the "right" abortion result would play out in a different context, in the hands of different judges.

20. Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951 (Vt. 2006); Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330, 332 (Va. Ct. App. 2006); *see also* Alan J. Keays, *Civil-Union Custody Suit Back in Rutland Court*, RUTLAND HERALD, Nov. 16, 2006, at A1.

21. *See* Ellen Barry, *Eagerness and Some Resignation as Civil Union Law Takes Effect*, N.Y. TIMES, Feb. 20, 2007, at B1.

22. VA. CONST. art. I, § 15-A (effective Jan. 1, 2007).

23. *See* Fallon, *supra* note 2, at 634–36.

24. *See* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 623–24 (1992).

25. *See* Madsen v. Women's Health Ctr., 512 U.S. 753, 785, 791–92, 803–04, 814 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that the Court created a special First Amendment standard for abortion-related case).

III. LITIGATION DYNAMICS

Presumably, Richard Fallon intends his Article as more than a moot court exercise. If so, his examples should have some practical plausibility. In my judgment, they lack that plausibility. Instead, Professor Fallon's scenarios assume a cascade of increasingly unlikely events.[26]

First off, and most trivially, the Supreme Court does not *have* to hear any abortion-related case. It can simply deny certiorari. One would assume that a Court that has (by stipulation) taken abortion off its agenda would resist litigants' attempts to force that subject back on to the docket. Thus, something or somebody would practically have to force the Court's hand.

A series of circuit splits, accompanied by public clamor over the Court's failure to address the matter, might fit that bill. That scenario, however, supposes that Fallon-style cases arise with some regularity. And that, in turn, supposes that voters, their state representatives, and public prosecutors will, in a post-*Roe* era, do extreme things—*very* extreme things, with sufficient regularity to produce a steady stream of litigation. That seems exceedingly unlikely.

Imagine, if you will (and as Richard Fallon asks you to) a state that is completely dominated by the most extreme contingent of the anti-abortion movement.[27] No such state exists, but for the sake of Professor Fallon's argument, I shall follow him and call it Utah. Bear in mind that Professor Fallon's scenarios presuppose a large supply of abortion-related cases, from several Circuits—meaning that a single Utah will not do. Let us therefore envision a dozen Utahs, where rabid Right-to-Lifers get what they want: what will it be? Professor Fallon presents several dire possibilities. None of them are remotely plausible.

Professor Fallon envisions prohibitory abortion statutes that make no exception for the health or even the life of the mother. I doubt that any such statute would see the light of day. If it did, it would not survive the death of a single woman, let alone the inevitable onslaught by the plaintiffs' bar. Individual misfortunes with life-saving prescription drugs and vaccines routinely produce liability litigation and shrill denunciations of the producer's and the government's callousness. An abortion statute that compelled the medical profession to tolerate serious injury or even death for women would soon be repealed.

26. I cannot discuss all of Professor Fallon's hypotheticals. My discussion is limited to the scenarios that occupy a large amount of space in his analysis. I do not discuss Professor Fallon's potential First Amendment problems, see Fallon, *supra* note 2, at 640–46, which, in an Internet age, can arise and have arisen over any number of morally freighted practices that are legal in some states but illegal in others. The only question is whether we should have special rules for abortion-related speech, to which the answer is "no."

27. Fallon, *supra* note 2, at 628.

Professor Fallon also envisions the retroactive enforcement of anti-abortion statutes,[28] as well as the enactment of extraterritorial criminal statutes, *against women* who have procured abortions.[29] No serious right-to-life group, advocate, or institution proposes or even condones any such policy. (At least one pro-life institution vehemently opposes such a policy: the Catholic Church.)[30] Professor Fallon's scenarios, then, must apply to the much narrower class of abortion *providers*, rather than consumers. Even within this small class, however, the prospects of retroactive state enforcement and of extraterritorial legislation and enforcement seem very slim. The states that are most likely to enforce pre-*Roe* statutes will have little occasion to do so. Even now, the Utahs of this nation have only one or two abortion providers, and a few years hence the number may well be zero.[31]

The prospect of a Utah law banning abortions and the prosecution of a California doctor for performing an abortion on a Utah citizen in California[32] strikes me as even more far-fetched. Even supposing that such a law were enacted, who would enforce it and how? Public prosecutors have no ready way of knowing who has left the state and for what reasons. Perhaps, private informants—akin to whistleblowers or environmental citizen plaintiffs—could remedy that problem. We now have to presume, however, that Utah citizens will not only vote for the law but will then assist in enforcing it—for example, by reporting to the authorities their next-door teenager's suspicious weekend trip to an unknown destination, possibly California. The authorities would then have to investigate whether the trip was (a) to California and (b) to an abortion clinic rather than Disneyland. The authorities, moreover, would have to pay those exorbitant detection and enforcement costs with sufficient frequency to allow some organization to find a test case—nay, scores of test cases, including at least one in which the authorities do not simply drop the prosecution to defeat the legal challenge.

To say that the scenario calls for speculation is to put it mildly. It calls for absurdity.

28. *Id.* at 616–21.

29. *Id.* at 627–36.

30. Sister Paula Vandegaer, LCSW, *After the Abortion*, http://www.usccb.org/prolife/programs/rlp/99rlvand.shtml (last visited Mar. 28, 2007).

31. See Stanley K. Henshaw & Lawrence B. Finer, The Accessibility of Abortion Services in the United States, 2001, 35 PERSP. ON SEXUAL & REPROD. HEALTH 16 (2003) ("Measures of availability have generally declined since 1982: The number of abortion providers in the United States has fallen by 37%, and the proportion of women living in counties with no abortion provider has increased from 28% to 34%.").

32. *See* Fallon, *supra* note 2, at 634.

IV. ANALOGIES

I have tried to think of historical parallels to a *Roe* reversal, on the theory that analogies might shed light where speculation easily leads astray. The most obvious and current analogy is gay rights, specifically gay marriage. Certainly, the comparison is imperfect, as the Supreme Court has so far declined to establish a uniform rule (from which it might then have to retreat). However, the fear that the Supreme Court *might* take that step has prompted a great deal of political action in the states, with widely differing results. Many states have enshrined prohibitions against same-sex marriages in their constitutions, while others have proceeded to legitimize marriage-style arrangements for same-sex couples, typically with the helpful assistance of state courts. As noted earlier, state-to-state variation poses far more regular and vexing jurisdictional and choice-of-law problems in this context than are likely to arise in the abortion context. So far, however, the state-by-state sorting process appears to work tolerably well. Whatever costs and inconveniences may flow from decentralized decision-making in this context, they pale against the costs of a constitutional amendment for or against same-sex marriage, under Article V[33] or the Supreme Court's steam.[34]

A second analogy is the end of Prohibition. Here again, there are differences. Most obviously, Prohibition was both enshrined[35] and then repealed through an actual constitutional amendment,[36] rather than judicial edict. Still, the parallels between Richard Fallon's hypothetical *Roe* reversal and the repeal of the Twenty-First Amendment are striking. Here as there, the issue is the repeal of an earlier constitutional amendment. Here as there, the repeal would allow the states to go their separate ways. Here as there, the decision would involve a central issue of social conflict or, if you will, of the culture war. In both cases, the central question is whether the underlying product is sinful or ordinary. "Demon rum" or just another consumer good? The destruction of innocent life, or just another medical procedure?

The end of Prohibition posed all of the problems Professor Fallon envisions, except more so. It meant that alcohol would be sold, shipped, and advertised as a consumer product, and thousands of legal cases arose over the implications. Questions of retroactive enforcement took on particular urgency, as thousands of prosecutions over past violations were still pending at the

33. U.S. CONST. art. V.

34. *See* Michael S. Greve, *Same Sex Marriage: Commit It to the States*, FEDERALIST OUTLOOK (Am. Enter. Inst. for Pub. Pol'y Res., Washington, D.C.), Mar. 2004, *available at* http://www.aei.org/docLib/20040310_No.20_16486graphics.pdf.

35. U.S. CONST. amend. XVIII.

36. U.S. CONST. amend. XXI, § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed.").

time.[37] The cases hit the courts at a time when the Supreme Court exercised much less discretion than it does now over its docket. Questions arose over the scope of both federal and state authority, and they arose at a time when the Supreme Court's Commerce Clause jurisprudence was undergoing a dramatic change for reasons unrelated to alcohol regulation.

Despite all of this, the questions proved easily manageable. The Supreme Court did entertain a number of relevant cases in the 1930s, many of them over the question of whether the Twenty-First Amendment and the Webb-Kenyon Act immunized state statutes that would otherwise violate the Dormant Commerce Clause.[38] The Court's answer was to let the states have their way. And with respect to violations of Prohibition-era federal statutes, the Court declared that the Twenty-First Amendment rendered the National Prohibition Act inoperative, cutting off all pending prosecutions under it.[39] As near as one can tell, no serious political constituency mistook the Court's jurisdictional determinations for verdicts on prohibition per se. The constitutional rule having been repealed, the Court got out of the alcohol "umpiring" business, and by the 1940s, cases related to alcohol regulation practically disappeared from the Court's docket. It was another six decades before the Court seriously re-examined the question—when it was safe to do so, and under very different economic, technological, and social conditions.[40]

V. THE ECOLOGY OF ABORTION

I fear that neither of my sanguine analogies will persuade Richard Fallon. Abortion, he might say (and did say, in the course of this colloquium) is more akin to slavery than to Prohibition or gay marriage. It is a dispute as to who counts as a person, and in that contest, no quarter may be given. If abortion is like slavery (or worse), how can one trust in jurisdictional sorting? Why would people who believe that abortion is murder stop at state borders? The opponents of *Dred Scott* did not stop at the borders; why should the opponents of *Roe*?

At the bottom of Richard Fallon's worry lies a deep distrust of anti-abortion constituencies (or at least, the organized constituencies). Let the Supreme Court repeal *Roe*, Professor Fallon imagines, and those constituencies

37. Don H. McLucas, Note, *Some Legal Aspects of the Repeal of the Eighteenth Amendment*, 28 U. ILL. L. REV. 950, 956 n.34 (1934).

38. Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Indianapolis Brewing Co. v. Liquor Control Comm'n of Mich., 305 U.S. 391 (1939); Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938); State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59 (1936); McCormick & Co. v. Brown, 286 U.S. 131 (1932).

39. United States v. Chambers, 291 U.S. 217, 222–23 (1934).

40. Granholm v. Heald, 544 U.S. 460 (2005) (finding that the Twenty-First Amendment and the Webb-Kenyon Act did not immunize discriminatory state alcohol regulation against Dormant Commerce Clause challenge).

will push to enact their extremist, punitive, vengeful agenda. And in many states, they will succeed. Remove that factual premise, and none of Professor Fallon's scenarios makes sense.

There are in fact people who believe, and institutions that teach, that abortion is the killing of innocent human life. Contrary to Professor Fallon's supposition, however, very few of those people and institutions believe that abortion is principally a law enforcement issue—a social problem that could be addressed by jailing tens of thousands of aborting women or by having public prosecutors troll after out-of-state abortion providers. The vast majority of right-to-life advocates have a rather more nuanced view of the matter. For example, they are inclined to think of women who have made that tragic choice as victims rather than perps. The Catholic Church, by all accounts an organizational mainstay of the right-to-life movement, runs clinics and crisis centers for expectant mothers—and for women who have had abortions.[41] Perhaps, this is a clever public relations ploy and a concession to the spirit of the times. But perhaps, the Church thinks that it is in the business of redeeming lives, as opposed to destroying them. And perhaps, that quaint belief would survive a repeal of *Roe*.

Richard Fallon's inordinate fear of committing abortion to democratic politics is anything but idiosyncratic. Precisely the same fear drives the modern Supreme Court: remove the judiciary's careful superintendence of the nation's moral and social life, the Justices apprehend, and Hark! What mayhem follows.[42] *Roe* and its progeny are the most pristine exemplar. In 1973, when it effectively legislated a model abortion statute for all fifty states, the Supreme Court sought to envision—and hasten—a progressive future, just as it had done so nobly and successfully in *Brown v. Board of Education*.[43] Surely, the country would come to see the Court's wisdom. Surely, *Roe* would do to right-to-life constituencies what *Brown* and its progeny had done to racists—decimate their ranks, and de-legitimize them as a force in American politics. When that did not come to pass, members of the Court sternly warned dissident citizens that they would be "tested by following."[44] That exhortation seems to have gone unheeded. The ornery American people, including especially its right-to-life constituencies, insist on making their own moral judgments. Those groups understand perfectly well that abortion leaves most of their fellow citizens deeply conflicted and ambivalent. They likewise understand that abortion is not (to repeat) foremost a law enforcement issue but

41. *See* Alpha Health Services, Alpha Center: Services, http://www.alphacenter.org/services/abortionrecovery.php (last visited Mar. 28, 2007); Hope After Abortion, http://www.hopeafterabortion.com (last visited Mar. 28, 2007); Project Rachel Outreach, http://www.usccb.org/prolife/issues/postabortion/index.shtml (last visited Mar. 28, 2007).

42. ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM 3–9 (2001).

43. *See* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 27–29 (1975).

44. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 868 (1992).

a fight for the hearts and minds of the American people. Citizens who oppose abortion are perfectly prepared to wage that fight through persuasion, patiently and peacefully. They do ask, however, that they be permitted to do so without being told by the United States Supreme Court that their position is illegitimate and beyond the bounds of democratic debate.[45]

A repeal of *Roe*, Richard Fallon writes in what almost looks like a coda to his long and in many ways instructive discussion of post-*Roe* problems, could not be easily cabined. It would likely have a large "butterfly effect."[46] The observation is correct, but the animal metaphor is off. *Roe* is not a butterfly but a turtle—the turtle on which the Supreme Court's universe has come to rest. In some sense, it is true after all that the Supreme Court cannot easily leave the abortion-umpiring business. The reason, however, is not that the abortion problem would promptly return in a jurisdictional garb. The reason is that the umpiring of the nation's mores has come to be the Court's principal business. It has come to define the Court's institutional role and, more fatefully, public and political perceptions of that role. A repeal of *Roe* would amount to an admission that the modern Court's project has been profoundly ill-advised from the start. That, to my mind, is the correct view. But it is not an insight that will come easily to the Court.

45. *See* Stenberg v. Carhart, 530 U.S. 914, 957 (2000) (Kennedy, J., dissenting) (arguing that the majority's reading of *Casey* implies that citizens may not express their sentiments on abortion through state legislation).

46. *See* Fallon, *supra* note 2, at 652.

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