THE HUMAN LIFE REVIEW

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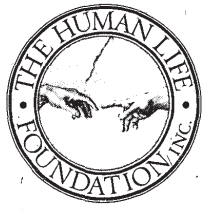

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the HUMAN LIFE REVIEW

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ROE OVERTURNED:

A 6-3 Ruling Ends 50 Years of Federal Abortion Rights

—New York Times *headline, June 25, 2022*

When *Roe* v. *Wade* was issued on January 22, 1973, it surprised just about everyone, including our founder J.P. McFadden. He read the text of the sweeping opinion the next day in the *New York Times*—back then "the paper of record" still was a *paper of record*—and, as he later recalled, his life changed: "It was a day-long road to Damascus for me. I hadn't realized these kinds of things were going on. I hadn't realized that anyone was making these arguments, that the Supreme Court of the United States could put the moral suasion and moral power of this country behind killing babies."

From that day on, McFadden (then assistant publisher at *National Review*) made mounting a campaign against abortion his priority. He set up a lobbying office in Washington DC, and, convinced that every movement needed an intellectual arm, established the Human Life Foundation, which, since 1975, has published the *Human Life Review.* In his introduction to the first issue, McFadden wrote that "Those of us who care about the value of life—about abortion, euthanasia, and other present-day challenges to the sanctity of life—need such a publication, and need it badly, as a vehicle for the widespread public dissemination of intelligent (even scholarly) and informed viewpoints on these vital matters."

Disseminating intelligent, scholarly, and informed viewpoints on vital matters of life and death is precisely what this unique journal has done for going on half a century. Platforms for arguments against abortion, euthanasia, and other assaults on human dignity have proliferated in recent decades, yet none has amassed the *Review*'s unparalleled archive—a richly detailed record of the human life debate as it has unfolded in political, legal, philosophical, theological, and medical discourse since a rogue Supreme Court, running roughshod over the Constitution, pronounced mothers had a right to kill their unborn children.

Helen Alvaré, professor of law at Antonin Scalia Law School at George Mason University (and the Human Life Foundation's 2019 Great Defender of Life), has called the *Human Life Review* "the place where the movement for life goes to do its thinking." In a recent column, Alvaré wrote that the July 24 *Dobbs* decision overruling *Roe* "is a win for the unrelenting efforts of pro-life scholars . . . This body of scholarship never simply stamped its feet and demanded that everyone adopt a moral respect for unborn life. It

argued the biological case for their humanity and their right not to be killed. It argued about the history and meaning of the 14th Amendment's 'liberty' clause. It made the case that traditional judicial respect for past precedents—stare decisis—could not apply to past decisions that are egregiously wrong, legally unworkable and totally devoid of respect for the text of the Constitution, for history and for precedent. Today, the majority's opinion in *Dobbs*, which relies upon this impressive trove of scholarship, vindicates these 49 years of effort." (The *Human Life Review*'s archive is a repository of much of that scholarship.)

Since May, when a draft of the *Dobbs* opinion first leaked, pro-abortion zealots have stamped their feet in public squares and media venues, demanding that everyone adopt moral respect for the unrestrained abortion license sanctioned by *Roe*. Enraged protesters threaten Supreme Court justices, camping outside their homes while the Department of Justice refuses to end these unlawful acts. Churches and crisis pregnancy centers are desecrated and vandalized. And, in corporate America and academe, efforts to expel those holding pro-life views from public—and professional—life are coalescing into a nationwide crusade.

"With the Supreme Court's overturn of *Roe* v. *Wade*, it is no longer enough to be pro-choice," opined the highly regarded law professor and pundit Jonathan Turley after scores of medical students and their families staged a walkout at the University of Michigan's July White Coat Ceremony, snubbing a speaker who had previously espoused pro-life views though her speech had nothing to do with abortion. "Today," he went on, "it seems you must be anti-pro-life to be truly pro-choice—and, across the country, pro-life viewpoints are being declared virtual hate speech." Today, millions and millions of citizens, heretofore mostly unburdened by abortion concerns in the voting booth, are compelled to figure out, perhaps for the first time, exactly what their position on baby-killing is, and how (if at all) it will affect their vote. Norma McCorvey's "great mushy middle" is the prize "anti-pro-life" crusaders have in their sights.

Law is a great teacher, and for almost 50 years *Roe* v. *Wade* has "taught" Americans that legal abortion is a matter of women's liberation—that "control over reproduction" is needed to assure their equality and success. Generations have been propagandized with this message. And the damage is incalculable. Starting with over 63 *million* unborn children who are dead—sons, daughters, grandchildren, siblings, aunts, uncles, cousins, as well as potential friends, spouses, parents, innovators, heroes, peacemakers . . . a constellation of individual human beings casually consigned to a black hole of human depravity.

During these dark decades, we have also seen the passive and active killing of disabled infants . . . and adults. In an article in the Summer 1975 issue of the *Review,* Malcolm Muggeridge observed that "The logical sequel to the destruction of what are called 'unwanted children' will be the elimination of what will be called 'unwanted lives'—a legislative measure which so far in all human history only the Nazi Government has ventured to enact." One could argue that such a legislative measure was enacted by a Florida court in 2005 when it ordered what Paul McHugh (in an essay reprinted in the *Review* thirty years after Muggeridge's), called the "annihilation" of Terri Schiavo, a disabled and unwanted wife whose husband, rejecting her family's offer to take over her care, insisted instead on her death. And got it.

On May 31, 1973, four months after the Supreme Court gave baby-killing its blessing, James Buckley introduced a Human Life Amendment in the Senate, warning that "Such a situation cannot continue indefinitely without doing irreparable damage to the most cherished principles of humanity and to the moral sensibilities of our people. The issue at stake is not only what we do to unborn children, but what we do to ourselves by permitting them to be killed."

Now that the Court has returned the "authority to regulate abortion . . . to the people and their elected representatives" we will see if the damage is reparable. We know we are in for another long hard fight. One that many of us who lived to see *Roe* overturned won't be around to finish. But we are here for its beginning. Many states have so-called trigger laws in place, some (like New York) granting unlimited abortion access, others (like Texas) severely restricting it. Already courts have put restrictive laws on hold while abortion providers attempt to resurrect *Roe* in the "penumbras" of state constitutions. Democrats have made "the right to choose" their rallying call and will pound the mushy middle with deceptive advertising as elections approach. Blue-state governors are already promising to underwrite abortion tourism. Self-identified pro-life politicians at all levels of government, not rhetorically taxed until now, will either make a winning case for life or lose elections.

And the *Human Life Review* will continue to be the place where the movement for life does its thinking, providing readers with thoughtful analysis and informed opinion as the campaign to move Americans away from careless abortion acceptance moves to state legislatures and closer to home. And we will continue to do what we've done since J.P. McFadden launched this much needed journal in 1975: keep the record. Because as he said then, "No one should be able to say, whatever happens, that they didn't know what's actually going on here."

The Editors

Dobbs and Constitutional Limits on Abortion

Gerard V. Bradley

In *Dobbs* v. *Jackson Women's Health Organization,* the Supreme Court reversed *Roe* v. *Wade* and declared that it was returning abortion regulation to the "people and their elected representatives." The collective freedom of political choice that *Dobbs* affirmed sounded plenary. The Court said that "the Constitution unequivocally leaves [abortion] for the people." *Dobbs* asserted no constitutional right to life for the unborn. The justices did recognize what they called a "legitimate state interest" in "respect for and preservation of prenatal life at all stages of development." But a state (such as California) could ignore that "interest" and legislate abortion-on-demand. The federal government seems free to "codify" *Roe.*

A closer look at the *Dobbs* opinion, however, reveals a different and much more promising story. The Court's reasoning in support of its reversal of *Roe* holds together only on grounds that entail substantial constitutional protection for the unborn. In fact, *Dobbs* puts in place all the building blocks needed in future litigation to deliver to unborn human beings all of the protection that they deserve as "persons" under the Equal Protection Clause.

Dobbs' overruling of *Roe* is the end of the beginning of the pro-life struggle in America. It also inaugurates the climactic drive to finally make every child, born and unborn, welcome in life and protected by law.

I

Dobbs held that "the Constitution does not confer a right to abortion. *Roe* and *Casey* are overruled." Almost fifty years after handing down *Roe* v. *Wade,* the Supreme Court finally corrected the biggest mistake it ever made. That is not only my judgment. It is also the confession of the justices, all but expressly. The Court infrequently overrules itself on constitutional issues; a "partial list" in *Dobbs* included only twenty-six instances since 1938. Rarely in these overruling cases has the Court fessed up as it did in *Dobbs,* where it said that *Roe*'s "constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional

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provisions to which it vaguely pointed." *Roe* "was more than just wrong. It stood on exceptionally weak ground." (*Dobbs* cited approvingly one early critic who asserted that *Roe* was "not constitutional law and g[ave] almost no sense of an obligation to try to be.") Almost never does the Court admit that a decision was wrong from the get-go. It did in *Dobbs*: *Roe* was "on a collision course with the Constitution from the day it was decided." It was "egregiously wrong from the start."

The *Dobbs* Court cited three constitutional cases that also overruled "important" precedents. None of the three treated the targets of its fire as harshly as *Dobbs* treated *Roe.* One involved Jehovah's Witnesses schoolchildren who refused to salute the American flag. *Dobbs* noted that the overruling case (*West Virginia* v. *Barnette* in 1943) came just three years after the case it reversed (*Minersville School Dist.* v. *Gobitis*). *Dobbs* maintained that "*Barnette* stands out because nothing had changed during the intervening period other than the Court's belated recognition that its earlier decision had been seriously wrong." Not so: *Barnette* considered the same basic facts as those presented in *Gobitis.* But it did so, the *Barnette* Court said, in light of different constitutional provisions. More importantly, the Court in the interim had revolutionized its civil liberties jurisprudence.

Dobbs also cited *West Coast Hotel* v. *Parrish,* decided in 1937. According to *Dobbs,* it "signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation." It did indeed. The combined effect of that case and some others was to clear constitutional obstacles blocking important New Deal programs. The practical political effect was seismic. The overruling cases were many. They were much more forgiving of earlier, errant decisions than is *Dobbs* of *Roe.* Although I could not swear to it from present memory, none of the overruling cases said that the early twentieth century classically liberal (we would say libertarian) holdings exemplified by *Lochner* v. *New York* were wrong the day they were decided.

That leaves one more parallel case cited by Justice Alito: "[t]he infamous decision in *Plessy* v. *Ferguson,*" the 1896 case that ratified racial segregation. According to the *Dobbs* Court, *Plessy* was (like *Roe*) "'egregiously wrong' on the day it was decided," and "should have been overruled at the earliest opportunity." When the Court finally abandoned *Plessy* nearly six decades later in *Brown* v. *Board of Education,* though, the justices spoke of it quite differently than they did of *Roe* in *Dobbs. Brown* never said that *Plessy* was wrong on the day it was decided. It said that the historical evidence about the import of the Fourteenth Amendment for segregated schools was "inconclusive." *Dobbs* could hardly have been more certain that the historical

case against abortion rights was airtight. *Brown*'s stated rationale for reversing *Plessy,* moreover, turned upon the gradual evolution of public education into a uniquely valuable opportunity, as well as upon mid-twentieth-century social scientific evidence of the psychological effects of segregated schools upon black kids' educational achievement. *Dobbs* denied that any changes like those underlay its willingness to reverse *Roe.*

Dobbs establishes that *Roe* was a singular constitutional catastrophe, an unparalleled disaster of judicial reasoning, the most unalloyed "exercise of raw judicial power"—Byron White's explosive charge in his *Roe* dissent and the *leitmotif* of *Dobbs*—in the Court's history.

II

Dobbs said that, like *Plessy*, *Roe* was not only wrong but also "deeply damaging." The "damage[e]" done by *Plessy* is obvious: State-mandated segregation victimized black children throughout public schools across America, handicapping them for the rest of their lives. When the *Dobbs* Court totaled up the butcher's bill for *Roe*, however, the stated principal victims were not the sixty million babies aborted since 1973. The "victims" were the constitutional order, our democracy, American politics. The justices said that the *Roe* Court "usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people . . . . The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe.*" "*Roe* fanned into life an issue that has inflamed our national politics," and "has obscured with its smoke the selection of Justices to this Court in particular, ever since." *Dobbs* stated that the "permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting," quoting Justice Scalia's opinion in *Casey*. "That is what the Constitution and the rule of law demand."

In other words: *Roe* was bad constitutional law. But it was not necessarily bad policy.

Throughout *Dobbs* the justices strain to strike the pose of morally neutral umpires on abortion. For example: "Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." "The contending sides also make conflicting arguments about the status of the fetus. This Court has neither the authority nor the expertise to adjudicate those disputes." Emphasizing his moral "neutrality" is clearly the whole point of Justice Kavanaugh's concurring opinion.

This "neutrality" includes a notable silence about the central constitutional

question posed by abortion: Are the unborn "persons" who enjoy a right to life under the Equal Protection Clause? The relentlessly critical *Dobbs* opinion uttered not a word of reproach for how Harry Blackmun handled this paramount issue in *Roe*, a question that Blackmun rightly said was dispositive. Texas's lawyer in *Roe* argued that "upon conception, we have a human being, a person within the concept of the Constitution." Blackmun took the referent to be the Due Process Clause, rather than the Equal Protection Clause. The latter is the correct provision, for it imposes upon the state an obligation to protect everyone from private violence, the situation presented by permissive abortion laws. Due Process pertains instead to state acts of violence. Blackmun nonetheless gauged the stakes correctly: "If this suggestion of personhood is established, the appellant's case . . . collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant [that is, 'Jane Roe'] conceded as much on reargument."

To resolve Texas's challenge, Blackmun turned the Court's gaze not outward toward the reality of persons but inward to narrower legal reasoning. He decided to treat the question not as one about who really is a person, but rather as about a technical term of art. The effect was to obscure the living human individual in utero in lawyers' pettifoggery. Blackmun catalogued in *Roe* the 22 or so usages of the word "person" in the entire Constitution. These included, for example, stipulations about the minimum age for various political offices and about runaway convicts and fugitive slaves. Blackmun then wrote for the Court that, "in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application."

Those many usages indeed have no such "applications." No set of "applications," however, amounts to a definition of "person." It amounts instead to a list of things which various subsets of persons can do or can have done to them. Fetuses do not, for example, run for president, and the Constitution implicitly disqualifies them from doing so. But that exclusion does not render them non-persons, any more than it renders anyone who is foreign-born, or who is not yet 35 years old, or who has not lived in America for 14 years, a non-person. For the Constitution stipulates that "[n]o Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States."

Nor does the fact that fetuses cannot be extradited suggest that they are not "persons" at all. The Constitution's extradition clause says that a "person charged in any State with Treason, Felony, or other Crime, who shall

flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." It does not "apply" to an eight-year-old child any more—or less—than it does to a fetus, because neither kids nor fetuses can be convicted of crimes. Blackmun's other "applications" similarly have no tendency to define "person" or to establish when any "person" begins. They pertain to prohibitions and permissions for some "persons" but not for others. No one thinks that these others—the foreign-born or children—are not "constitutional persons."

Even in the awful *Dred Scott* decision, which touched off the Civil War, the Supreme Court recognized that slaves were "persons," albeit not "citizens," who possessed in any event few rights that citizens and other persons were bound to respect. The Court there said that the "only two clauses in the Constitution that point to this race, treat them as persons whom it was morally lawful to deal in as articles of property and to hold as slaves." *Roe* nowhere mentioned the Court's conclusion five years earlier in *Levy* v. *Louisiana* that "illegitimate children are not 'nonpersons'" because "[t]hey are humans, live, and have their being," and so "are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." According to these criteria, the unborn are surely "constitutional persons."

The makers of the Fourteenth Amendment made clear who counted as a "person": everybody; every member of the human species; every being that (who) is in fact a person—without exception. The meaning of the term "person" in the Fourteenth Amendment is, in other words, transparent for the truth of the matter. The truth is that a person begins at conception. Because every one of us is an embodied rational being, a unity of mind, spirit, and body, it follows that when our bodies began at conception, we—the living bodily beings that you and I are—did. Sometimes apologists for abortion appeal to untutored intuition to refute this truth, asking: "Do you really think that the embryo which is no larger than a period on this page is like us?" The answer is: "Yes, of course, for that is the way we all looked when we were that young." Even Harry Blackmun started life as a one-cell human embryo.

III

Does *Dobbs*' silence mean that the Court implicitly *affirmed* Blackmun's conclusion that the unborn do not count as "constitutional persons"? That is a plausible reading of the opinion and, evidently, how the Court wants it to be read. But the only coherent reading of *Dobbs* belies this interpretation.

"Personhood" was not put in issue by any party in *Dobbs.* The Court seems to have thought that it could resolve that case without implicating the matter.

Doing so appealed to the majority justices partly because it was suited to the moral neutrality they strove to maintain. One source of this desired "neutrality" appeal is the majority justices' preferred way of interpreting the Constitution—"originalism"—and its stated commitment to abstain from basing decisions on "value judgments." And, as Antonin Scalia famously put it in his *Casey* opinion, when persons begin cannot be determined as a "legal" matter, because it was a "value judgment."

Whatever could be said in favor of this value-aversion when it comes to other questions in other cases, it is an unwarranted hesitation in *Dobbs.* Judging whether procuring an abortion is morally right or wrong involves value judgments. Describing an abortion as any act which intentionally or unjustifiably causes the death of an unborn human individual does not.

For one thing, ascertaining when new members of the human species begin is not a value judgment. Lawmakers in most states and in Congress made precisely these sorts of judgments when they enacted the many feticide laws now in force. The federal Unborn Victims of Violence Act, signed into law by President Bush in 2004, is typical of them. (Full disclosure: I testified in Congress in favor of the Act.) It stipulates that anyone who engages in certain prohibited conduct "and thereby causes the death of . . . a child, who is in utero at the time the conduct takes place, is guilty of a separate offense" punishable just as if the victim were not in the womb but walking around like the child's mother, or father, or aunt or uncle or neighbor. Who is this equal (so to speak) victim? "[I]n this section" of the UVVA, "the term 'unborn child' means a child in utero, and the term 'child in utero' or 'child, who is in utero' means a member of the species homo sapiens, at any stage of development, who is carried in the womb."

Lower courts have not hesitated to affirm the many convictions obtained under this and cognate state laws. Nor should they hesitate. The question about when people begin is no more mysterious or complex or "unjudicial" than everyday questions that courts routinely answer, questions (and answers) that similarly require judges to master a certain body of scientific information as a predicate for making moral-metaphysical judgments of great consequence. Among these important everyday matters are insanity, mental incompetence, voluntariness, intention, whether persons have free choice sufficient to hold them criminally responsible, and the question of when someone dies. Courts are presently faced with an important question about mind-spirit-body unity in the many contexts where "transgenderism" is at issue. The common question in those cases is whether my male body (for example) is constitutive of who I (the person, Gerry Bradley) really am. Or am I really a mental-emotional-psychological reality, a free-floating spirit that

happens to be housed in this body, a body that may or may not correspond biologically to who I really am?

The standing conservative reticence about "value judgments" cannot in any event fully explain *Dobbs*' silence about constitutional "personhood" due to invaluable new "originalist" research presented to the Court by scholarly *amici.* A masterful brief by Robert George and John Finnis supposed that (in Finnis' description of it) the "truth that human beings are persons is *not* of primary concern to the Supreme Court." These scholars compiled exhaustive historical evidence that "proves prohibitions of elective abortions constitutionally obligatory because unborn children are persons within the original public meaning of the Fourteenth Amendment's Due Process and Equal Protection Clauses." For "among the legally informed public of the time, the meaning of 'any person'—in a provision constitutionalizing the equal basic rights of persons—plainly encompassed unborn human beings." The *Dobbs* majority could have—and, in my judgment, should have—counted the unborn as constitutional "persons" on these originalist grounds. But neither the majority opinion nor the two concurrences mentioned this historical argument.

IV

Any explanation for the Court's silence about "personhood" must also include a place for felt political necessity, namely, the justices' belief that it would shock our polity to go from *Roe*'s radical permissiveness to equal protection of unborn persons. In footnote 7 of his dissent, Justice Breyer observed that the "majority takes pride in not expressing a view 'about the status of the fetus.'" Then he wrote:

> The majority had a choice of two different ways to overrule *Roe* and *Casey.* It could claim that those cases underrated the State's interest in fetal life. Or it could claim that they overrated a woman's constitutional liberty interest in choosing an abortion. (Or both.) The majority here rejects the first path, and we can see why. Taking that route would have prevented the majority from claiming that it means only to leave this issue to the democratic process—that it does not have a dog in the fight. [citation omitted] And indeed, doing so might have suggested a revolutionary proposition: that the fetus is itself a constitutionally protected "person," such that an abortion ban is constitutionally mandated. The majority therefore chooses the second path, arguing that the Fourteenth Amendment does not conceive of the abortion decision as implicating liberty, because the law in the 19th century gave that choice no protection.

Breyer—joined by Justices Kagan and Sotomayor—accurately describes the basic structure of the majority opinion. Let's say that the majority had to make (following Breyer's lead) a key "strategic choice": inflate the fetus or deflate the right to abortion. The problem is that the choice is unavailable:

The second "path" is not an alternative to the first. Successfully traversing the second instead depends upon traveling the first. One cannot downgrade the asserted abortion right *without* upgrading the status of the fetus. In fact, the *Dobbs* opinion collapses unless the Court picks a "dog in the fight," even at the risk of "suggest[ing]" that the "fetus is itself a constitutionally protected 'person.'"

Let me explain.

The *Dobbs* majority faced two bumps on Breyer's "second path." One required the Court to cogently distinguish the putative "right to abortion" from the "privacy" precedents to which *Roe* fastened it and in which the *Dobbs* dissenters would find it. Chief among these were *Griswold* and *Eisenstadt,* the contraceptives cases. The other bump, requiring the *Dobbs* Court to determine if a right not mentioned in the Constitution deserves protection as if it is in fact mentioned, confronted the *Dobbs* Court with the question about how to identify such "unenumerated" rights. Here *Dobbs* followed the analytical framework the Court established in the 1997 assisted suicide case *Washington* v. *Glucksberg.* The Court needed to show that no right to abortion could be found in our history and traditions, especially around the time that the Fourteenth Amendment was ratified. Leaving the "state's interest in fetal life" where it found it won't provide the needed lift. Getting over these two obstacles requires—in Breyer's phrasing of it—valuing the "state's interest in fetal life" higher than the *Dobbs* Court was willing to explicitly "rate" it.

First, the privacy precedents. *Dobbs* said that "*Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage." But, according to *Dobbs,* "[w]hat sharply distinguishes the abortion right" from these other cases is that abortion "destroys what those decisions call 'potential life.'" Again: "what is distinctive about abortion [is] its effect on what *Roe* termed 'potential life.'"

"Potential[ity of] life" is a touchstone of the *Dobbs* opinion. Its prominence reflects the Court's studied effort to avoid committing itself not only to a moral evaluation of abortion, but also to a description of what makes this "profound moral question" profound. The *Dobbs* Court often observed that Americans past and present held and hold that abortion kills an unborn human being. *Dobbs'* opening paragraph is illustrative: "Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life." But reporting what some people believe is to state a fact about them. It establishes nothing about either what

abortion really does or even what the justices in *Dobbs* think it does. The Court occasionally makes one of these reports its own. But it does so only where the report describes abortion as homicidal in the alternative. For example: Abortion is "fundamentally different," according to *Dobbs,* because "as both *Roe* and *Casey* acknowledged, . . . it destroys what those decisions called 'fetal life' and what the law now before us describes as an 'unborn human being.'"

The *Dobbs* Court explicitly asserts in its own voice no more than *Roe* did: Abortions destroy "prenatal" or "fetal" life. Given the context, one could confidently insert the missing word "human"; thus, "prenatal human life." But even this is not yet the truth that a distinct, whole, living, individual human being is present "prenatally." "Fetus" and "prenatal life" are distinguished from the rest of us adjectivally, as biological matter akin perhaps to that of which you and I are composed but still not anything like the mind-spirit-body unity that a human person with rights is.

There is surely no such thing as "potential life," at least for anyone who does not subscribe to Aristotle's view, adopted by Aquinas, that animation with a rational soul occurs six weeks after conception, so that before that point there is a living organism that is only potentially a human being. This speculation has been utterly disproved by modern science. Nor was there any such thing as "potential life" in the law of abortion at around the time the Fourteenth Amendment was adopted up to 1973. As a matter of fact, Harry Blackmun invented "potential life" to avoid facing the hard questions presented by his plan to legalize abortion. Texas argued in *Roe* that, apart from the Fourteenth Amendment, it had a compelling interest in saving the lives of unborn human beings from abortion. Blackmun replied that "a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone." Texas never used the term "potential life."

It is therefore most unfortunate that *Dobbs* doubled down on this bogus concept when pressed by the dissenters' insistence that *Roe* cannot be distinguished from "*Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell.*" Justice Breyer concluded footnote 7 by emphasizing his contraception-based criticism. "The trouble is that the chosen path—which is, again, the solitary rationale for the Court's decision—provides no way to distinguish between the right to choose an abortion and a range of other rights, including contraception." The Court replied that "we have stated unequivocally that '[n]othing

in this opinion should be understood to cast doubt on precedents that do not concern abortion.'" Why not? "[C]ontraception and same-sex relationships are inherently different" because abortion "uniquely involves what *Roe* and *Casey* termed 'potential life.'" This reply is not only ineffective. It is unintelligible. What could it possibly mean to say that abortion involves, in a singular way ("uniquely"), the imaginary construct of somebody else?

"Potential life" does not correspond to anything in the real world. To the extent that the concept can be brought into contact with the argument in *Dobbs,* it favors the dissenters. "Potential life" does not describe the embryo or the fetus and so has nothing to do with abortion. It is, however, an apt term integral to a sound understanding of contraception and the morality of it. Contraception does not "destroy" anybody already in existence, as does abortion. But it does involve envisioning a "potential" child—one who might come to be as a result of the sexual intercourse one has chosen—and then acting so as to make that "potential" human individual not come to be. It is, perhaps, a notional "destruction" of what could usefully be termed a "potential [human] life." Contraception involves the intention that someone who could later exist, not.

The majority justices' wariness about choosing a "dog in the fight" trips them on the other bump along Breyer's path. The affirmation that abortion kills an unborn human child is necessary to the Court's proof that abortion is *not* an unenumerated constitutional right. The Court denies that "a right to abortion" is (here following *Glucksberg***)** "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." Why not? It will not do to say, as a superficial reading of Alito's opinion might suggest the Court is saying, that the issue can be resolved by playing a word-match game: *Roe* was about a "right to abortion" and there were many laws long ago that banned "abortion." The *Glucksberg* analysis is not about semantics or nomenclature. It is rather about the historical treatment of some specific human act. The question is whether a right to do some particular act is, or is not, "deeply rooted in this Nation's history and tradition."

The specific human act at issue in *Dobbs* has to be the deliberate killing of an unborn human being. Neither "potential life" nor an indeterminate term such as "prenatal life" will do. That is because the historical evidence which the Court musters to refute the putative "right to abortion" is *about* a more inflated (if you will) definition of abortion. This evidence and not the Court's own lexicon supplies the meaning of that "abortion" which is the subject of the Court's "critical question whether the Constitution, properly understood, confers a right to abortion."

The core of the Court's case for a negative answer to the "critical ques-

tion" is this: "[b]y the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow." The Court repeats in almost these exact words this conclusion a half-dozen times in *Dobbs.* It is indispensable to the Court's answer to the *Glucksberg* question. The voluminous *Dobbs* Appendix catalogs that decisive body of statutory laws. Only a handful of those fifty-one laws actually uses the word "abortion." Most of that handful pair the term "abortion" in the disjunctive with "miscarriage": Thus, it is unlawful to "procure a miscarriage or abortion." Even the statutes that use the term "abortion" do not take its meaning for granted. They do not presuppose some ambient canonical definition. The statutes do not leave the identity or status of abortion's victims in haze. The specifics across this entire body of laws are remarkably consistent, not least because many jurisdictions copied the earlier anti-abortion laws of others. These laws do not outlaw "abortion," save for the very specific human act which some of them name "abortion." It is the substance and not the name that matters.

That "abortion" which is contended for in *Dobbs* is negated by laws, the composite common core of which makes it a crime to "administer" to "any pregnant woman" ("with child") anything whatsoever with the "intent to procure the miscarriage of any such woman" (or to "destroy such child"), unless it is done to save the life of the woman. *This* is what no one has a constitutional right to do. *This* is what it means to conclude, as the *Dobbs* Court does, that "there is no constitutional right to obtain an abortion." *This* is the pertinent meaning of "abortion" in *Dobbs.*

Insofar as one imagines that "abortion" extinguishes something called "potential life," nothing in *Dobbs* tends to show that there is no constitutional right to obtain one. Unless *Dobbs* affirms that in an abortion a living human individual is deliberately killed, the whole opinion fails to launch.

V

Dobbs promises to sustain against constitutional objection almost every restriction on abortion up to and including near total prohibitions. (It is almost certain that a life-of-the-mother exception is constitutionally required.) For this great end the pro-life movement has worked for nearly five decades. Several passages in *Dobbs* hold out a corresponding symmetrical permission, up to and including abortion-on-demand, as if California, for example, is just as free to permit abortion as Mississippi, for example, is to restrict it. Consider this passage: "Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the

States. They have failed to make that showing, and we thus return the power to weigh those arguments to the people and their elected representatives."

Is this apparent symmetry supported by a coherent reading of the whole opinion?

The key doctrinal holding of *Dobbs* (with internal citations omitted) is this:

> A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development, the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

Nothing in *Dobbs* suggests that by "maternal health and safety" the majority means anything like a requirement to permit abortions thought to serve "health" in the unbounded sense used in *Doe* v. *Bolton,* which encompassed all aspects of a woman's well-being as she understands it. Thus, these are all bases for *restricting* abortion access or for prohibiting it entirely. The Court articulates its holding in terms of state authority to "regulat[e] or prohibit[] abortion," not expressly in terms of permission. To the obvious objection that permitting is simply the other side of the coin of restricting, the answer is: yes, in a way. But that does not mean that a challenge to an abortion restriction by, say, an abortion clinic should be subject to the same level of judicial scrutiny as a challenge to a permissive abortion law by, say, the husband/father of a child whose wife/mother seeks an abortion.

In any event: Would a permissive abortion law like, say, the *Roe/Casey* regime uprooted by *Dobbs*, or California's existing radically permissive regulations, or the Biden Administration's promised "codification" of *Roe,* pass constitutional muster under the "rational basis" test? This is in critical part to ask: Is it "rational" to judge that there is a substantial change in the moral status and worth of the unborn child, somewhere between the formation of what biology indisputably establishes is a unique human individual at the moment of fertilization and the birth of that individual months later?

It is an organizing moral norm in our legal system that any human being who has been born is thereby counted among the class of "persons" who are, by belonging to that class, equally protected by the laws against homicide. Intentionally killing a one-day-old baby is murder just like killing an athlete in his or her prime is murder, and both are murders just like killing an addled pensioner. Again: What is the "rational basis" for concluding that an unborn human being simply does not count under a state's homicide laws, when that same human

being would be fully protected by them once emerged from the womb?

Is it rational to so judge, especially when the truth about when persons begin has become more evident and therefore less reasonably deniable since 1973? Prenatal research, sonograms, and DNA evidence of how the embryo carries within it all the information needed to direct the tiny person's growth throughout life show conclusively the existential continuity of everyone from fertilization to death. These biological and other scientific facts suggest strongly that for each one of us, one began as a person in a moral sense when one's bodily life as a distinct organism began.

The *Dobbs* Court sets out the main points of the argument for holding that California (for example) has no such rational basis. To be sure, the Court here is not working itself up to *asserting* (much less *holding*) that the unborn count as constitutional "persons." Its purpose is to refute pro-choice arguments that there are reasonable distinctions to be made during the course of pregnancy in assaying the state's interests in protecting (what is too often called) "potential life." Even so: *Dobbs*' rhetorical questions could be easily turned around into assertions. Then they would form the premises of a compelling argument that the unborn are, from the moment of conception, persons for the same reasons and due to the same characteristics that make you and me persons, too.

First, *Dobbs* recognized that whatever it is that gives *anyone* a right-to-life, it must be something about that individual and not about some external circumstance like "viability." According to *Dobbs*, "[t]he most obvious problem with any [contrary] argument is that viability is heavily dependent on factors that have nothing to do with the characteristics of a fetus. . . . One is the state of neonatal care at a particular point in time. . . . And if viability is meant to mark a line having universal moral significance, can it be that a fetus that is viable in a big city in the United States has a privileged moral status not enjoyed by an identical fetus in a remote area of a poor country?"

The Supreme Court deployed in *Dobbs* what amounts to a no-substantial-change-from-the-moment-of-fertilization line of argument against making *any* prenatal distinction among unborn children. "The definition of a 'viable' fetus is one that is capable of surviving outside the womb, but why is this the point at which the State's interest becomes compelling? If, as Roe held, a State's interest in protecting prenatal life is compelling 'after viability,' why isn't that interest 'equally compelling before viability'?" To this cogent question, the *Dobbs* Court replied: "*Roe* did not say, and no explanation is apparent." "Viability" is, the Court concluded, an "arbitrary line."

The Court pivoted on this argument when it turned to the rationality of distinctions between pre- and post-natal human beings. This "arbitrary line," the

Court wrote, "has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. Some have argued that a fetus should not be entitled to legal protection until it acquires the characteristics that they regard as defining what it means to be a 'person.' Among the characteristics that have been offered as essential attributes of 'personhood' are sentience, self-awareness, the ability to reason, or some combination thereof." But "[b]y this logic," Justice Alito wrote for the majority, "it would be an open question whether even born individuals, including young children or those afflicted with certain developmental or medical conditions, merit protection as 'persons.'"

Here the majority justices walk wittingly right up to Breyer's stated "risk" of "suggest[ing the] revolutionary proposition," that "the fetus is itself a constitutionally protected 'person,' such that an abortion ban is constitutionally mandated." If abortion kills an unborn human individual who cannot be rationally distinguished as a homicide victim from the victim of infanticide (for example), then the Constitution requires that the child in utero be protected by law just as is the infant.

Conclusion

It might be technically accurate to state (as does Justice Alito) that the *Dobbs* opinion "is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth." The Court's opinion, however, *entails* the "view" that the unborn count *as if* they are constitutional persons, at least where the protection of laws against being killed are at issue. This is not to say that the majority justices presently intend to strike down permissive abortion laws as irrational, although one or more might. It is that the law they have made in *Dobbs,* and the essential reasons for that holding, put them on a path which leads to the practical equivalent of constitutional personhood for the unborn. Even if these justices built better than they knew, they built it just the same.

The Legal Consequences of *Dobbs*

Edward Mechmann

The goal the pro-life movement has worked and prayed for over the last half-century has finally been accomplished. The Supreme Court has finally overturned *Roe* v. *Wade*[1] and *Planned Parenthood* v. *Casey*.[2]

Here is the money quote from the majority opinion in *Dobbs* v. *Jackson Women's Health Organization*, authored by Justice Samuel Alito: "We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision."[3]

We can now take a preliminary look at the new world of abortion law under *Dobbs*, to get a sense of where we are and where we're going.

The Law before Dobbs

Let's do a quick recap on the situation that existed pre-*Roe*. Before that decision, it was understood that states had extremely broad discretion to protect unborn children.

Protections for unborn children, and thus the illegality of abortion, were recognized in English common law as far back as the thirteenth century. American common and statutory law followed suit and consistently criminalized abortion. At the time *Roe* was decided, almost all states had laws that protected unborn children subject to a few narrow exceptions (to save the life or health of the mother, fetal disability, or rape and incest). Only four states permitted abortion virtually on demand, at least up until 24 weeks. No court had ever held that abortion was a right under the U.S. Constitution.[4]

Roe turned that world upside down. It invalidated every single one of those laws. It held that an unborn child is not a "person," and thus was not entitled to any protection under the Constitution. Instead, it held that the right to kill an unborn child was actually a constitutional right. Never mind that the people who drafted and ratified the Constitution and its amendments would have considered that idea completely absurd.

Roe established an arbitrary framework for regulating abortion based on trimesters. Those rules were later modified by the Supreme Court in *Casey*. The Court held that viability was the key moment for regulating abortion.

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Prior to viability, abortion could not be prohibited, and no regulation could survive if it imposed an "undue burden" or a "substantial obstacle" on a woman seeking an abortion. After viability, abortion could be regulated but there had to be an exception for the "health exception."

But according to the Court, that "health exception" had to be so broad as to permit abortion for any reason. In *Roe*'s companion case, *Doe* v. *Bolton*,[5] the word "health" was defined to mean "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."

Few abortion laws survived review under the *Roe*/*Casey* rules, which have been acidly called an "ad hoc nullification machine."[6] In practice, abortion on demand was constitutionally protected through all nine months of pregnancy, with few exceptions.[7] And that meant that no matter how many different laws pro-life legislatures managed to pass since 1973, courts consistently struck down most of them.

What Does *Dobbs* Do?

The most important thing that the Supreme Court did in *Dobbs* was to recognize that "*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences."[8]

Thus *Dobbs* reversed one of *Roe*'s fundamental mistakes. Abortion is no longer given any special protection under the U.S. Constitution. Laws will no longer be held to the arbitrary and incoherent "undue burden" rule of *Casey*. States are now given much more leeway to protect unborn children at any stage of pregnancy.

Thanks to *Dobbs*, courts will evaluate whether laws protecting unborn children have any rational relationship to a legitimate government interest.[9] They will enjoy a "strong presumption of validity."[10] And those "legitimate interests include respect for and preservation of prenatal life at all stages of development."[11]

This "rational basis" test is the most deferential test for constitutionality. It is used routinely in cases involving rights that are not considered "fundamental" but are instead just "liberty interests." That is now the category into which abortion falls, thanks to *Dobbs*. And the crucial point is that most laws survive constitutional review under the "rational basis" test.

Many states have recently passed laws that give broad protection to unborn babies, and others will undoubtedly follow. Some states still have pre-*Roe* laws on the books that may spring back into life. We can expect that most of these laws will now be upheld. But this is a very complicated situation that requires state-by-state analysis of statutes, constitutions, and judicial decisions.[12] It is also a moving target, as both pro-life and pro-abortion legislatures are rapidly at work.

There are already major differences between states. For example, in New York, the right to an abortion is virtually unlimited. The New York Court of Appeals has upheld "the fundamental right of reproductive choice."[13] In 2019, the "Reproductive Health Act" was enacted, reaffirming that abortion is a "fundamental right," removing any criminal penalties for anyone who performs an abortion, authorizing non-physicians to perform abortions, and guaranteeing the right to abortion on demand throughout pregnancy. The Act even repealed a law that required a second physician to be present at a late-term abortion, to provide care for the child.[14] Unfortunately, *Dobbs* will have no effect on these awful laws, and abortion will continue its brutal harvest in New York.

In contrast, prior to *Dobbs*, Mississippi had numerous laws that would provide extensive protection for unborn children and restrict abortion. The law upheld by *Dobbs* bans abortions after 15 weeks with an exception for "medical emergencies," which are defined in a way that is limited to the mother's health. Some of their other laws ensured medical care for children born during an abortion, required extensive informed consent, mandated parental involvement for minors seeking abortions, banned partial birth and dismemberment abortions, and banned telemedicine abortions. But Mississippi also has a six-week ban and a "trigger law" that would ban all abortions with limited exceptions.[15] The legality of the regulations was previously in dispute, but they would certainly be upheld after *Dobbs*. The six-week law and the trigger law may also be upheld. Mississippi will continue to be a leader among pro-life states.

We can also see the likely result of *Dobbs* by looking at two recent Supreme Court cases that struck down health and safety regulations for abortion clinics.[16] Both laws were struck down under the "undue burden" standard, in decisions where the Court basically second-guessed every aspect of the legislation's purpose and effect. In a post-*Dobbs* environment, those laws would be easily upheld under a "rational basis" test that defers to a state's interest and method in regulating medical practice.

The *Dobbs* holding makes two very important points that may seem like "inside baseball" for lawyers, but which have enormous significance for future cases. First, the Court said that "no such right is implicitly protected by any constitutional provision."[17] The Court went on to explicitly rule out an argument that has often been advanced by abortion advocates (including the late Justice Ruth Ginsburg) that abortion should be protected by the Equal Protection Clause.[18] Their theory is that because abortion uniquely affects women, any law that restricts it prevents women from full participation in society. The Court has now closed the door to that dangerous argument.[19]

The second point is that the Court clearly defined the test for identifying a right that is not specifically enumerated in the Constitution. This is a very contentious issue in constitutional law, because it will determine how creative courts can be in inventing new rights. Here, though, the Court reaffirmed the narrow rule, established in its decision denying a right to assisted suicide.[20] As a result, an "unenumerated right" must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[21] This will be very important in holding off any attempt to resurrect assisted suicide or euthanasia, or any innovations from gender ideology.

It's very fortunate that there was a majority of the Court that agreed on the holding to overrule *Roe* and *Casey*. When the Court can't produce a majority opinion, that can cause all kinds of confusion as to exactly what is the controlling holding, and thus how to apply the case in the future. The rule is that if there's no single opinion that has a majority, the opinion with the narrowest ground becomes the precedent that has to be followed.[22]

For example, *Casey* was essentially a 5 to 4 decision, but the justices in the majority couldn't agree on the rationale, so the plurality opinion joined only by three justices became the rule. That's how we got *Casey*'s viability line and its "undue burden" standard, even though a majority of the Court didn't agree to it.

Having a clear majority opinion in *Dobbs* is a strong statement about what the law is and how future courts should proceed.

What Dobbs Didn't Do

Dobbs changed the rules only for the federal Constitution, which means that state constitutions will now be a major field for litigation. Abortion advocates are showing an increasing interest in trying to convince state courts to interpret their state constitutions to guarantee the right to abortion.[23] Some state courts have done so already, but in most states it wasn't litigated to *Dobbs*. The problem here is that we would have to rely on state attorneys general to defend their laws against constitutional challenges. As we've already seen in Michigan, we cannot always rely on that.[24]

A significant danger is if state courts decide that abortion is a "fundamental right" under their state constitutions. Under the "tiers of scrutiny" approach discussed above, this means that courts will subject any law affecting abortion to the highest level of review, called "strict scrutiny." Under that standard, the government has the burden of showing that the law is narrowly tailored to achieve a compelling state interest.

Most laws that receive strict scrutiny are found to be unconstitutional. As Justice David Souter once said, "Strict scrutiny leaves few survivors."[25] In

practical terms, this means that in those states where abortion is considered a "fundamental right," it will be as if *Dobbs* never happened. Abortion will continue to have special protection under the law, if state judges are so inclined to treat it so.

Dobbs also did not specifically address the continued validity of *Roe*'s gaping "health exception." The Mississippi law under consideration had a very narrow "medical emergency" exception for abortions after 15 weeks of pregnancy. It only covered serious threats to the mother's physical health, with no room for expansion to "all factors . . . relevant to [her] well-being." But we still have to watch out for future courts trying to resurrect the broad *Roe* health exception, for example in assessing late-term abortion bans under the "rational basis" standard.[26] As anyone who follows Second Amendment jurisprudence could tell you, lower courts are very creative in finding loopholes in Supreme Court rules. We don't want an apparent victory in *Dobbs* to turn out to be illusory.

Some Myths about *Dobbs*

In anticipation of *Dobbs*, pro-abortion rhetoric and political scare tactics began to spin some myths about what the decision would do. This is ironic in a way, because there were many, many myths about *Roe* and *Casey* that concealed how radical those decisions were.

Dobbs does not mean that women will face criminal prosecution for abortions or miscarriages. The uniform practice before *Roe* was to prosecute the abortionist and not the mother, who was seen as a second victim. For at least a century before *Roe*, no woman was prosecuted for an abortion. Most state laws explicitly immunize the mother from prosecution, and there is no indication that any law enforcement agency has an interest in prosecutions.[27] And there is no question that pro-life advocates would support laws to protect mothers from any criminal liability.

Dobbs also did not make abortion illegal in most of the country. Unfortunately, a significant majority of the population will still be living in states that recognize broad rights to abortion under either statute or their state constitutions. A very large percentage of abortions currently already take place in those states, and none of them have residency requirements.[28] Some of those states have declared themselves to be "abortion sanctuaries" and have enacted laws that would facilitate travel to obtain abortions.[29]

As a result, it is far from clear how much *Dobbs* will impact the number of abortions, at least in the short term. A recent Guttmacher Institute study shows that the majority of abortions (54 percent) are done with drugs—so-called "medical abortions."[30] Thanks to greater flexibility in federal and state

laws for "telemedicine," even women who live in highly protective states will still be able to obtain abortions over the internet. Many states have already tried to restrict or regulate the use of these drugs, and this will continue to be a major area of litigation after *Dobbs*.

Dobbs also doesn't overrule the sexual revolution. The Court explicitly disavowed any impact on other decisions recognizing "privacy," "liberty," and "personal autonomy" rights: "our conclusion that the Constitution does not confer [a right to abortion] does not undermine them in any way."[31]

This is an important point. Advocates have been weaving horror stories to scare the politicians by claiming that *Dobbs* will lead to laws against contraceptives. This scare tactic is unfounded. Much has happened since the 1960s, when the Supreme Court held that the constitutional "right to privacy" included access to contraceptives for married couples.[32]

There is no possibility that any state legislature will pass a general ban on contraceptives, and without a law to challenge, there can't be a court ruling. In any event, such a ban would certainly fail even the deferential "rational basis" test in today's legal climate.

Nor does *Dobbs* endanger the right to same-sex "marriage." When the Court invented that right it did not cite *Roe* or *Casey*, nor were its decisions based on the general "right to privacy."[33] Since then, there has been no effort to reverse those decisions. In fact, many states took legislative action to "legalize" same-sex "marriages," even though that was not necessary. As of this date, 37 states recognize same-sex "marriages" by statute.[34] *Dobbs* does nothing to alter or threaten this legal status quo.

However, these scare stories should still teach prolifers to avoid any extremism of our own. The overturning of *Roe* does not mean that full protection of the unborn is politically feasible at this time. Public opinion is still confused and divided over the morality and legality of abortion. Large majorities support legalized abortion in many cases and particularly in the earlier stages of pregnancy, and our position of abolition remains very much a minority one.[35] Legislative and legal initiatives should thus continue to proceed incrementally, to build public support for further and more extensive reforms. This will not satisfy many people in the pro-life movement, who are impatient with incrementalism and eager for a final resolution of abortion. But there is truth in the adage that politics is the art of the possible.

Unfinished Business

The really bad news is that *Dobbs* didn't correct *Roe*'s most tragic error. When the *Roe* Court held that an unborn child was not a "person,"[36] it made the same mistake as in the infamous *Dred Scott* decision[37]—writing an entire

class of humans out of the Constitution. It made that mistake because it adopted a warped view of legal history that was proposed by abortion advocates. Yet, as was made clear by the incisive amicus briefs filed by Joseph Dellapena[38] and by Robert George and John Finnis[39] in *Dobbs*, that view of history was completely wrong, and the legal personhood of an unborn child was firmly established in the history of American and English common and statutory law.

The *Roe* Court got this part of the history egregiously wrong and this has still not been corrected.

Convincing the Court to correct its mistake has always been one of the ultimate goals of the legal wing of the pro-life movement. With *Roe* finally out of the way, scholars and advocates can now devote more attention and effort in that direction. The predominance of originalism in current conservative jurisprudence, which looks to the original public meaning of the Constitution, provides a rich environment for this key concept to grow and bear fruit.

Indeed, Finnis and George's brief persuasively argues that the legal personhood of the unborn was clearly understood at the time of the ratification of the Fourteenth Amendment. As a result, they maintain that the original public meaning of that amendment requires that unborn children be entitled to the rights of due process and equal protection of the laws.

This would turn *Roe* on its head, by recognizing the inalienable human and constitutional rights of unborn children. That would permit pro-life advocates to directly challenge the constitutionality of liberal abortion laws. The argument would be that they are denying unborn children their rights to the equal protection and due process of law. Perhaps they could even convince courts to apply the "strict scrutiny" standard to pro-abortion laws, which would create a strong presumption in favor of legal protection for the unborn.

The Court did inch a little bit down the path of recognizing the human rights of unborn children. The majority rebuked the dissent for its single-minded focus only on the interests of the woman seeking an abortion.

They said: "The dissent has much to say about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women. These are important concerns. However, the dissent evinces no similar regard for a State's interest in protecting prenatal life."[40]

And the Court went even further, saying, "According to the dissent, the Constitution requires the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed."[41]

The Court also broached the question of "personhood."[42] It was a very brief and inconclusive discussion. But the Court expressed its doubt that any

arbitrary line like viability made sense in determining when someone has legal personhood. That may represent an opening to an argument that birth is likewise an arbitrary line, and that human and legal rights therefore extend back into the womb.

It is truly remarkable and encouraging to see fetal personhood discussed, and the right to life before birth explicitly recognized, in a majority opinion of the Supreme Court. It's a start.

The Beginning and the End

In the midst of all this technical legal discussion, we must always bear in mind the ugly reality of abortion. Every day, thousands of innocent unborn children are killed by drugs that poison them or doctors who dismember and mutilate them. Their mothers also suffer the trauma of an abortion. The doctors and others involved in an abortion are damaged too, even if their hardened hearts don't recognize it.

A sane and moral society would recoil in horror at this monstrous injustice. *Dobbs* has done our society a favor by taking the abortion debate out of the courts and back into the public square. It is now up to us to make abortion's awful reality manifest and change the hearts and minds of our brethren.

As we go forward, it may be worth recalling the famous remark by Winston Churchill during the Second World War: "Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning."

NOTES

1. 410 U.S. 113 (1973).
2. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992).
3. *Dobbs* v. J*ackson Women's Health Organization*, No. 19-1392, slip op. at 5. The majority opinion was supported by five Justices. Chief Justice Roberts concurred in the judgment upholding the Mississippi statute, but did not concur in overruling *Roe* and *Casey*.
4. For a comprehensive review of the history of abortion law, see Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* (2006), which was cited repeatedly in the *Dobbs* opinion, and Prof. Dellapenna's amicus curiae brief in *Dobbs*, https://www.supremecourt.gov/DocketPDF/19/19-1392/185316/20210806173754092_19-1392%20Amicus%20Br%20Joseph%20Dellapenna.pdf.
5. 410 U.S. 179, 192 (1973).
6. The pithy phrase is usually attributed to Justice Antonin Scalia, but it originated with Justice Sandra Day O'Connor in *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, dissenting).
7. E.g., *Carhart* v. *Gonzalez*, 550 U.S. 124 (2007) (upholding the federal ban on partial-birth abortions).
8. *Dobbs*, supra at 6.
9. *Dobbs*, slip op. at 77.
10. Id.
11. Id. Other factors include "the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability."

12. See, e.g., Guttmacher Institute, "Abortion Policy in the Absence of *Roe*" (June 1, 2022), https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-Roe
13. *Hope* v. *Perales*, 83 N.Y.2d 563 (1994). See below for the legal significance of this.
14. 2019 N.Y. Laws Ch. 1; for a detailed critique of its provisions, see New York State Catholic Conference, "New York's Late-Term Abortion Expansion: The 'Reproductive Health Act' Fact Sheet," https://www.nyscatholic.org/wp-content/uploads/2019/03/rha-fact-sheet.pdf.
15. Americans United for Life, "Mississippi's Abortion Laws," https://aul.org/spotlight/mississippi/ (updated as of June 16, 2022). The "trigger law" (Miss. Code Ann §41-41-45 (2007)) took effect when the state attorney general certified that it is reasonably probable that the law would be upheld now that *Roe* had been overturned.
16. *Whole Woman's Health* v. *Hellerstedt*, 579 U.S. 582 (2016).
17. *Dobbs*, slip op. at 5.
18. Id., at 10-11.
19. There remains a threat that this argument could be made based on a state Equal Rights Amendment or Equal Protection Clause. Edward Mechmann, "The Dangerous Good Intentions of the Equal Rights Amendment" (February 12, 2020), https://edwardmechmann.wordpress.com/2020/02/12/the-dangerous-good-intentions-of-the-equal-rights-amendment/. .
20. *Washington* v. *Glucksburg*, 521 U. S. 702 (1997).
21. Dobbs, slip op. at 12-15.
22. This rule was established in *Marks* v. *United States*, 430 U.S. 188 (1977).
23. See, e.g., Center for Reproductive Rights, State Constitutions and Abortion Rights (2022), https://reproductiverights.org/wp-content/uploads/2022/05/State-Constitutions-Report-5.12.22.pdf.
24. The Attorney General of Michigan has announced that she will not defend a lawsuit challenging that state's pre-*Roe* statute. https://www.michigan.gov/ag/News/press-releases/2022/04/07/AG-Nessels-Statement-on-Efforts-to-Preserve-Abortion-Rights-in-Michigan. But a recent Supreme Court ruling may give legislators the ability to defend laws if the attorney general refuses. *Berger* v. *North Carolina State Conference of the NAACP*, No. 21-248 (decided June 23, 2022).
25. *City of Los Angeles* v. *Alameda Books*, 535 U.S. 425, 455 (2002) (Souter, dissenting).
26. Theresa Stanton Colette, "Perspectives on the Impending Fate of *Roe*," *Human Life Review* (Summer 2021), p. 38.
27. Linton, Paul Benjamin, "Overruling *Roe* v. *Wade*: The Implications for Women and the Law" (2017), https://ssrn.com/abstract=3200207, and Clarke Forsythe, "Punishing Women for Abortion–Trump Contradicts Centuries of Legal Experience," National Review Online (April 1, 2016), https://www.nationalreview.com/2016/04/donald-trump-abortion-wrong-punishing-women/.
28. Guttmacher Institute, "Long-Term Decline in US Abortions Reverses, Showing Rising Need for Abortion as Supreme Court Is Poised to Overturn *Roe* v. *Wade*" (June 15, 2022), https://www.guttmacher.org/print/article/2022/06/long-term-decline-us-abortions-reverses-showing-rising-need-abortion-supreme-court.
29. E.g., New York (https://www.governor.ny.gov/news/governor-hochul-signs-nation-leading-legislative-package-protect-abortion-and-reproductive), New Jersey (https://nj.gov/governor/news/news/562022/approved/20220511a.shtml) and California (https://apnews.com/article/abortion-california-sanctuary-625a118108bcda253196697c83548d5b).
30. Guttmacher Institute, supra at note 28.
31. *Dobbs*, slip op. at 31-32; see also at 66 and 71-72.
32. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The right was later expanded to include non-married couples, *Eisenstadt* v. Baird, 405 U.S. 438 (1972), and minors *Carey* v. *Population Services International*, 431 U.S. 678 (1977). Those decisions have been much criticized, and *Roe* was specifically based on *Griswold*'s "right to privacy." But no Justice has ever suggested that overruling *Roe* undermines the "right to privacy" as it relates to sexual conduct.
33. See *Obergefell* v. *Hodges*, 576 U.S. 644 (2015) (the majority cited the "right to privacy" cases as merely "instructive") and *Windsor* v. *United States*, 570 U.S. 744 (2013) (the word "privacy" is never mentioned in the majority or dissenting opinions).
34. *World Population Review*, "Gay Marriage by State 2022," https://worldpopulationreview.com/state-rankings/gay-marriage-by-state.
35. See, e.g., Pew Research Center, "America's Abortion Quandary" (May 6, 2022), https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/.
36. *Roe*, 410 U.S. at 158.
37. *Dred Scott* v. *Sandford*, 60 U.S. 393 (1857).

38. Supra, at note 4.
39. Brief of Scholars of Jurisprudence John M. Finnis and Robert P. George as Amicus Curiae Supporting Petitioners, *Dobbs*, supra, https://www.supremecourt.gov/DocketPDF/19/19-1392/185196/20210729093557582_210169a%20Amicus%20Brief%20for%20efiling%207%2029%2021.pdf.
40. *Dobbs*, slip op. at 38.
41. Id.
42. Id. at 51.

"Hate-watching anything in particular?"

Dismantling the United States of America

Lyle R. Strathman

America . . . we have a problem!

It seems the United States of America is undermining the United States of America.

The smoldering social ruckus—the internal strife and intrigue—that is occurring in the United States today should not be, but it is, and it didn't just happen—it was caused, caused by generations of bigotry and injustice, nurtured by prejudice and intellectual poverty. To some it may seem a trivial consequence—a disruptive interlude that interferes with their everyday pursuit of physical pleasures and comforts. But for those thoughtfully affected by the turmoil, it is a leap into a social abyss from which there seems to be no escape. How did this happen?

Part I: The Beginning

The preamble to the Declaration of Independence—*The Unanimous Declaration of the thirteen United States of America* (1776)—explicitly states: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[1] This statement underscores all of mankind's reliance on their Creator and therefore must be considered a universal maxim applicable to all Americans regardless of any racial, ethnic, or cultural characteristic, and to all branches of all governments within the bounds of the United States. This single statement is the most significant and most far reaching of any of mankind's humanly contrived notions that have ever been expressed. Additionally, the substance of this preamble is repeated in the Fifth and Fourteenth Amendments to the Constitution of the United States (1789).

In 1787, delegates from the thirteen United States of America met in Philadelphia to address the need for a more substantial national government than that afforded them by the Articles of Confederation and Perpetual Union (1781). Overall, the more populated states wanted legislative representation based on a state's population, while the less populated states wanted equal legislative representation for each state. Additionally, the delegates realized

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that some semblance of state sovereignty must remain—a federal republic—as there were too many nuances between the individual states for an all-encompassing, centralized governing body to address all of the sectional parochialisms of the individual states—one size does not fit all.

The *Records of the Federal Convention of 1787* vol. 12a, 22b & 32c comprise the collection of extant notes from the daily proceedings of that convention from which the Constitution of the United States was crafted. As noted in the records, the so-called Great Compromise of 1787 was offered by Connecticut delegates Roger Sherman and Oliver Ellsworth to resolve the dispute between the less populated states and the more populated states over representation in the new national government. Two other notions seemed to be prevalent throughout the convention as well: There was adamant opposition to an all-encompassing centralized, national government—which was deemed authoritarian and oppressive—and opposition to open-ended, majority-rule democracies—which were regarded as self-indulgent and neglectful of lesser populated social segments. In addition, some of the delegates held the opinion that the majority of any population—the people-at-large—was vulnerable to deceptive tactics that might be perpetrated by unscrupulous, self-serving politicians.

During the course of the convention, then:

> "Mr. Roger Sherman opposed the election (of the legislative body) by the people, insisting that it ought to be by the 〈State〉 Legislatures. The people he said, immediately〉 should have as little to do as may be about the Government. They want information and are constantly liable to be misled."[2a] (Madison, Thursday May 31, 1787)

> "The objects of the Union, he (Roger Sherman) thought were few. 1. Defense against foreign danger.[2] (Defense) against internal disputes & a resort to force.[3] Treaties with foreign nations.[4] Regulating foreign commerce, & drawing revenue from it. These & perhaps a few lesser objects alone rendered a Confederation of the States necessary. All other matters civil & criminal would be much better in the hands of the States. The people are more happy in small than large States."[2a] (Madison, Wednesday June 6, 1787)

> (Alexander Hamilton) "Society naturally divides itself into two political divisions—the *few* and the *many,* who have distinct interests. If government in the hands of the *few,* they will tyrannize over the many. If [in] the hands of the many, they will tyrannize over the few. It ought to be in the hands of both; and they should be separated."[2a] (Hamilton, Monday June 18, 1787)
> "I (Judge Oliver Ellsworth) think the second branch of the general legislature (the Senate) ought to be elected agreeable to the report . . . The state legislatures are more competent to make a judicious choice, than the people at large."[2a] (Yates, Monday June 25, 1787)

> "I (Judge Oliver Ellsworth) now move the following amendment to the resolve—*that in the second branch* (the Senate) *each state have an equal vote.* I confess that the effect of this motion is, to make the general government *partly federal and partly national.* This will secure tranquility, and still make it efficient; and it will meet the

> objections of the larger states. In taxes they will have a proportional weight in the first branch (the House of Representatives) of the general legislature."[2a] (Yates, Friday, June 29th, 1787)

Further, in regards to the election of United States Senators:

> "I (Judge Oliver Ellsworth) have the greatest respect for the gentleman who spoke last. I respect his abilities, although I differ from him on many points—He asserts that the general government must depend on the equal suffrage of the people. But will not this put it in the power of few states to control the rest? It is a novel thing in politics that the few control the many. In the British government, the few, as a guard, have an equal share in the government. The House of Lords, although few in number, and sitting in their own right, have an equal share in their legislature. They cannot give away the property of the community, but they can prevent the commons from being too lavish in their gifts."[2a] (Yates, Saturday, June 30th, 1787)

The commons to which Judge Ellsworth referred is the House of Commons in England's Parliament—equivalent to the House of Representatives in the Congress of the United States —the representative of the people-at-large.

To ensure the goals of the delegates, the compromise provided for a bicameral federal legislature comprising two operationally and physically separated chambers: The Senate would have equal representation from each state (chosen by each state's legislature to retain state sovereignty and to guard against an open-ended, majority rule democracy), while the House of Representatives would have proportional representation based on each state's population (chosen by each state's people-at-large). And so, the delegates from each of the states to the convention achieved their objectives by crafting a *constitutional* federal republic in sharp contrast to the centralized, national governments of their European ancestors.

Although perhaps not specifically stated or intended by the delegates, the Great Compromise of 1787 virtually advanced the notion that representation of minorities in government was a necessary requisite for any successful federal republic; minorities—whether states, districts, or social segments—must be represented in the daily affairs of government to be other than helpless onlookers who might thereby become dissident citizens.

Part II: The Problem

The Indian Removal Act (1830)[3]

On May 28, 1830, the national government of the United States began the relocation of Native Americans to "west of the river Mississippi."[3] This act—the Indian Removal Act of 1830—essentially ignored a basic, unalienable principle of the founding fathers, to wit: "no person . . . shall

be deprived of life, liberty, or property, without due process of law."[4] The removal act expelled Native Americans from their homelands and virtually declared Native Americans to be "non-persons" in the eyes of the majority of the then federal government, and thus began the long Trail of Tears episode. The removal scheme continued into the late 1800s, concluding with the Wounded Knee Massacre (1890) in South Dakota.

The Indian Removal Act emboldened the already established caste system—which began with legalized slavery—not in law but in fact. The caste system essentially declared Native Americans and African Americans to be unqualified recipients of the benefits of the United States of America; it seems Native Americans and African Americans were considered little more than social refuse, even *beasts of burden*—property—in the case of African Americans. This injustice continues to this day, with more than one-million Native Americans[5] still living—willingly and unwillingly—on over three hundred reservations[6] in North America, mostly "west of the river Mississippi," under subjugation of the national government of the United States, to wit: Unalienable human rights and superficial human rights are mutually incompatible.

The Catholic Petition for Common School Funds (1840)[7]

During the early 1800s, New York City began the distribution of tax revenues to common schools—specifically to secular schools or those affiliated with Protestant Christianity. Catholic Christians, as might be expected, sensed the inequity of their being singled out as unqualified to receive government financial assistance for education and accordingly submitted a petition to their city government for such financial assistance; given that all the people of New York City pay taxes equally, it seemed all the people of New York City should benefit from those taxes equally.

> In 1824 the Board of Aldermen of the City of New York were empowered by the state legislature to select those schools qualified to receive state funds. . . the (Public School) Society distributed almost all of the funds to Protestant schools. The Catholic Petition for Common School Funds was written on September 21, 1840, and was also endorsed by some of New York City's Jews . . . the petition was denied.[8]

Even though Congress could make no law "respecting an establishment of religion," the Constitution did not prohibit either the Supreme Court of the United States or a sovereign state such as New York—or the City of New York—from exercising religious bigotry, to wit:

> Congress shall make no law respecting [or disrespecting?] an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[9]

This act by the New York City aldermen further emboldened the caste system by incorporating Catholic Christians as unqualified recipients of the benefits of the United States of America. The lower caste now included Native Americans, African Americans, and Catholic Christians, while the upper caste—the democratic majority—was the ruling class. In the course of time, this common school fund injustice was replicated throughout the United States and continues to this day, to wit: Religious freedom and religious exclusions are mutually incompatible.

***Dred Scott* v. *Sandford* (1857)[10]**

Slavery was a major issue of the 1787 Federal Convention,[2b] as the delegates knew full well there was no compromise between free and slave. Not only were the delegates struggling to determine whether the representation of each state should be relative to their populations, but the delegates were also plagued with the notion of legalized slavery: Five states from the South were adamantly pro-slavery, while eight states from the North were opposed to slavery. As it turned out, the slavery issue was deemed of lesser importance to the delegates than the formation of an effective national government, so it was sluffed off as a state sovereignty issue. During the course of the convention, then, the delegates simply concerned themselves with how slaves would be evaluated for tax purposes—because slaves were considered property—and with how they would be calculated toward each state's population in determining their legislative representation, avoiding the fact that slaves were persons. This particular scenario during the convention can only be regarded as cold-hearted and sociologically ugly. If the crafting of the bicameral federal legislature by the delegates to the convention was the Great Compromise of 1787, the legitimization of slavery via state sovereignty was the Great Blunder of 1787.

Essentially, *Dred Scott* v. *Sandford* declared that African Americans were not and could never be citizens of the United States of America. This is the first time the Supreme Court explicitly declared African Americans to be unqualified for participation in the society of the United States of America. The author (Chief Justice Roger Taney) had the courage to acknowledge that Dred Scott was a person according to the Declaration of Independence. That is, he was a human person created by God and enjoyed the rights of life, liberty, and happiness according to his Creator but, because Dred Scott was a slave—property under the constitutional provision of state sovereignty—the author lacked the courage to acknowledge him to be a person according to the contemporary interpretation of the Constitution. African Americans were persons according to their Creator, but not according to the Constitution.

What? To most people of any faith, Man's Law (or its interpretation) may not usurp Nature's Law or God's Law (or their interpretations).

Dred Scott v. *Sandford* is very wordy, but essentially the author declared African Americans cannot be persons because they are slaves, i.e., property; it seems the author could just as well have declared African Americans cannot be slaves, i.e., property, because they are persons, but lacked the courage to do so. Disastrously, the legalized racial injustice effectuated by *Dred Scott* v. *Sandford* was a catalyst to the American Civil War (1861-1865) and its aftermath—a social disorder that perpetuates racial prejudice and injustice throughout the United States yet today, to wit: Freedom and slavery are mutually incompatible.

Seventeenth Amendment (1913)[11]

The Seventeenth Amendment—the selection of United States senators by the majority vote of each state's people-at-large rather than by a state's legislature—ended the liaison between state legislatures and the national legislature—the Congress—in direct opposition to the foresight of the founding fathers. Whereas the United States Senate previously acted as a check against "lavish gifts" that might be bestowed on the people-at-large by the House of Representatives, it now became arm-in-arm with the want of the masses. In addition, state sovereignty—which was a major declaration of the convention—was weakened, as was the federation of states. It is puzzling that the legislators of the individual and sovereign states voted for this amendment, which vacated their authority to select their own state's senatorial representative to the Congress of the United States. Thus began the transformation of the United States from a federal republic into a democratic republic—a majority-rule democracy—notwithstanding the wisdom of the delegates to the Federal Convention:

> **"**I (William Pierce) was myself of opinion that it would be right first to know how the Senate should be appointed, because it would determine many Gentlemen how to vote for the choice of Members for the first branch,—it appeared clear to me that unless we established a Government that should carry at least some of its principles into the mass of the people, we might as well depend upon the present confederation. If the influence of the states is not lost in some part of the new Government we never shall have anything like a national institution. But in my opinion it will be right to shew the sovereignty of the state in one branch of the Legislature, and that should be in the Senate."[2a] (Pierce, Wednesday, May 31, 1787)

> (Mr. Patterson) "We are met here as the deputies of 13 independent, sovereign states, for federal purposes. Can we consolidate their sovereignty and form one nation, and annihilate the sovereignties of our states who have sent us here for other purposes?"[2a] (Yates, Saturday, June 9, 1787)

> "He (Mr. Sherman) observed that as the people ought to have the election of one of the branches of the legislature (House of Representatives), the legislature of each state ought to have the election of the second branch (Senate), in order to preserve the state sovereignty."[2a] (Yates, Monday, June 11, 1787)

The Seventeenth Amendment exasperated members of the former Confederate States of America (1861-65)—the South—that alleged the amendment to be nothing more than an act of Civil War revenge and a constitutional scheme to diminish state sovereignty; Southerners defended sovereignty as a state's rights issue, whereas Northerners alleged state sovereignty to be nothing more than a Southern ruse to ensure a shadow of legalized slavery. Whatever, this amendment widened and deepened the social rift between those supportive of state sovereignty and those supportive of a centralized, national government.

The Seventeenth Amendment did not fix the problems mentioned in the plea for the amendment, but simply transferred them to the masses. In so doing, this amendment became a classic example of "throwing the baby out with the bath water." Though seemingly well intentioned, it lessened both the federation of states and the sovereignty of states and set into motion a migration from a federal republic toward a centralized, open-ended, majority rule democracy—a democratic republic—which the founding fathers had shunned, to wit: Sovereign-state federal governments and majority-rule centralized governments are mutually incompatible.

***Engel* v. *Vitale* (1962)[12]**

Engel v. *Vitale* ended the practice of prayer in public schools—taxpayer-funded schools—as envisioned by the 1824 Board of Aldermen of the City of New York. It effectively ended Protestant Christianity's cultivation of morals and ethics in public schools, and opened Pandora's Box to popularly contrived, manipulated, and determined morals and ethics, which coincides with one of Karl Marx principles: "There are, besides, eternal truths, such as Freedom, Justice, etc., that are common to all states of society. But Communism abolishes eternal truths, it abolishes all religion and all morality, instead of constituting them on a new basis; it therefore acts in contradiction to all past historical experience."[13]

During this same era and accompanying this court's decision were the deterioration and ultimate disregard of the Motion Picture (and TV) Production Code; the propagation of the slogan "If it feels good, it must be good" and its corollary: "If it feels good, do it"; Woodstock (1969) and its aftermath—sexual anarchy and hallucinogen usage; and, in more recent years, greater boldness in the nation's anarchic social climate, such as bullying, shoplifting,

vandalism, scamming, casual sex, and porch piracy.

This Supreme Court ruling seems to have disregarded the First Amendment and placed Protestant education in the same class as Catholic education—or any other religious-based education—and opened the way for secular religion and its counterpart, social anarchy. It greatly expanded the financial injustice initiated by the New York City aldermen, which was originally perpetrated only against students affiliated with Catholic education. This court's decision instituted secular religion as the basis of government-funded education, which seemingly contradicts the First Amendment. Incidentally, this court could just as well have interpreted the First Amendment to declare taxpayer funds must be allocated to every student's tuition regardless of whether the school attended was religious or secular in nature, but, again, the court lacked the courage. On the other hand, remember that the Supreme Court need not abide by the First Amendment—only the Congress.

Had the 1824 New York City aldermen practiced religious tolerance and equality in the first place, how different education—and maybe our nation's social fellowship—might be today; in addition, had the 1962 Supreme Court exercised the courage to empower the First Amendment instead of gutting it, how different the United States social climate might be today, to wit: Social order and social anarchy are mutually incompatible.

Reynolds v. *Sims* (1964)[14]

Reynolds v. *Sims* furthered the influence of the Seventeenth Amendment by mandating that all legislators in state governments be elected from districts of approximately equal populations, according to the court's interpretation of the so-called "equal protection clause" of the Fourteenth Amendment. Consequently, the participation of minority-populated districts in state legislatures was terminated—an unambiguous contradiction to the wisdom of the Founding Fathers. Many if not most state constitutions were at the time patterned after the original federal Constitution, so that minority-populated districts might have some representation in their legislatures—a Senate and a House of Representatives—where State senators were elected from county or parish geographic districts and State representatives were elected from nearly equally populated districts: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."[15]

That this Supreme Court did not complete the transformation of the national government from a federal republic into a majority-rule democratic republic by mandating United States senators to be elected from equally populated districts

is a conundrum. Be that as it may, *Reynolds* v. *Sims* furthered the transformation of the United States into a majority rule democratic republic, and furthered the adulteration of state sovereignty by its infringement of the constitutions of the various states—constitutions that were previously accepted as in conformance to the Constitution of the United States. It is uncanny and mind-boggling that—after an elapsed period of nearly two hundred years—the Supreme Court should suddenly declare it unconstitutional for state constitutions to be patterned after the Constitution of their own parent nation, that is, the United States of America. This court's opinion, by the way, is like declaring it unnatural for children to be of the same species as their parents.

After World War II and the memories of atrocities committed by centralized, autocratic governments during that war, majority-rule democratic action flourished with reckless abandon in the United States, whence *Reynolds* v. *Sims*, together with other initiatives—the Seventeenth Amendment, Americans for Democratic Action (ADA), American Civil Liberties Union (ACLU), Gallup Polls (statistical analysis of popular opinions), etc.—magnified the antagonism between state sovereignty advocates and centralized, majority rule government advocates, to wit: Minority-inclusion representation and majority-exclusive representation are mutually incompatible.

***Roe* v. *Wade* (1973)[16]**

Without a single phrase cited from the Declaration of Independence or the Constitution of the United States to support the "right to abortion," *Roe* v. *Wade* became the deathblow for civil harmony in the United States. *Roe* v. *Wade* simply declared pre-born human persons to be "non-persons" because they were not explicitly itemized as "persons" in the Constitution—weird, neither were Native Americans, African Americans, Asian Americans, Latino Americans, nor European Americans. Yet, this court singled out pre-born persons—alone—as being "non-persons" over all other persons, not unlike the way the *Dred Scott* v. *Sandford* court virtually pronounced African Americans to be "non-persons." However, unlike *Dred Scott* v. *Sandford*—whose author acknowledged African Americans to be persons according to their Creator—the author of *Roe* v. *Wade*, Justice Harry Blackmun, had not even the courage to acknowledge all human persons to be "persons" with rights according to their Creator: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."1

When the preamble states that "all men are created equal," it must mean at the moment of a person's conception, because that is when—and only when—a *particular* person is created; even Chief Justice Roger Taney intimated that

in *Dred Scott* v. *Sandford*. How different our society would be today had the 1973 court truly and courageously stated that the Constitution simply does not grant a "right to abortion."

An outgrowth of *Roe* v. *Wade* was a statement by then Rep. Geraldine Ferraro that "she personally opposes abortion but supports a woman's right to choose for herself on the subject."[17] Ferraro's dichotomous notion has become highly regarded by pro-abortion advocates, pro-choice advocates, and other waywards as a way to hide their cultural malignancy: They don't care. Be that as it may, we—the people-at-large—seem not to care either; we care mostly about what affects us immediately and personally, to wit: Pro-life and pro-abortion are mutually incompatible.

***Obergefell* v. *Hodges* (2015)[18]**

Obergefell v. *Hodges* seems to be a copy-cat of the same moral rationale that Geraldine Ferraro's statement concocted regarding *Roe* v. *Wade*. Her dichotomous statement suggests "truth be damned, do whatever you want," which, by the way, seems to be in agreement with the moral and ethical deficiencies that emerged during the era of the *Engel* v. *Vitale* decision. This rationale seems likewise to be the basis of *liberty* as interpreted by Justice Anthony McLeod Kennedy in the *Obergefell* v. *Hodges* decision: "The right to marry is a fundamental right inherent in the liberty of the person, and, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same sex may not be deprived of that right and that liberty."[18] Combining the implied judicial thoughts discerned from *Engel* v. *Vitale, Roe* v. *Wade*, and *Obergefell* v. *Hodges* breeds a jumbled standard of morals and ethics—if any at all—in accordance with Geraldine Ferraro's dichotomous statement. Accordingly, it seems *liberty* in conjunction with the Supreme Court's interpretation of the Due Process and Equal Protection Clause of the Fourteenth Amendment allows whatever. Future extrapolations from these decisions, then, might easily be exploited by the Supreme Court to legitimatize hallucinogens, prostitution, euthanasia, termination of defective persons, national government mandating states' affairs, public opinion quashing unalienable rights, etc., and thereby perpetuate and intensify the already divisive social ruckus—the internal strife and intrigue—that is undermining the United States today.

Marriage has historically been a natural contract—written or unwritten—between one man and one woman, at least since the time of the writing of Genesis. Marriage is a *natural right* not a *state right,* and the state has nothing to do with it other than respect it and accept it. Further, as was previously stated, Man's Law may not usurp Nature's Law or God's Law.

Obergefell v. *Hodges*' legalization of same-sex marriage obliterated the foundation of civilized human society, i.e., the nuclear family. Heretofore, marriage was considered—and in some cases legally defined—as a contractual union between one man and one woman. In fact, sex has as its natural purpose the procreation of the species—whether human persons or some other species—and the family has as its primary purpose the protection of that relationship and its offspring; not so homosexual relationships. It seems the Supreme Court would have better served itself and the Constitution by declaring that it had no jurisdiction in the matter. None of this, however, censures homosexuality or casual sex or whatever; only that marriage per se is a contractual union between a man and a woman, not between anybody and anybody for any reason.

Civilized human society has thrived on the foundation of the nuclear family—the relationship between one man and one woman, and their children—but some contemporary social engineers want to include everyone in what they refer to as "the family." To some, "the family" is a mass of individuals whose relationships resemble those associated with a tribe; thus, a regression toward the tribal family. Note that the "Abolition [Aufhebung] of the (nuclear) family"[13] was one of the key *historical* aspects of Karl Marx and Frederick Engels' social enlightenment: the *Manifesto of the Communist Party*. Throughout the *Manifesto*, the tribal family as such is vigorously predicted and promoted: "The bourgeois (nuclear) family will vanish as a matter of course when its complement vanishes, and both will vanish with the vanishing of capital,"[13] to wit: Nuclear families and tribal families are mutually incompatible.

***Dobbs* v. *Jackson Women's Health Organization* (2022)**

It seems our nation too often has been challenged with social issues inundated by the forces of popular opinion on the one hand and constitutional truth on the other, and that government delegates too often seem attracted to those decisions that favor popular opinion—but then, as they say, we are a democracy. It further seems that righteous government social acts flow along with little or no notice by the people-at-large, whereas errant acts or decisions by government delegates engender everlasting turmoil and even conflict. And, notwithstanding previously and seemingly errant government decisions chronicled in this essay, every future litigation before the court must be regarded as an opportunity to set the course aright.

On June 24, 2022, Associate Justice Samuel Anthony Alito Jr. delivered the majority opinion in *Dobbs* v. *Jackson Women's Health Organization*, a case challenging the constitutionality of a Mississippi law prohibiting most

abortions after fifteen weeks of gestation. In the opening paragraph he remarks:

> Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views . . . views about the particular restrictions that should be imposed.[19]

This overview of the abortion issue underscores the infinite disparity that exists between the different social stances of the people-at-large in the United States. Unfortunately, *Dobbs* failed to resolve the fundamental issue that pre-born human beings are persons and, therefore, have a right to life under the Fifth and Fourteenth Amendments to the Constitution. If this seems reminiscent of and a rehash of the slavery and sovereign state issue of 1787 through 1863, so be it.

With respect to the forthcoming argument in this section, the reader is reminded of two indisputable scientific notions. First: Something cannot be born from nothing. Creatures lacking a specific nature and substance cannot—by their own doing—beget or transform their selves into creatures that embody that specific nature and substance. That is, inorganic substance cannot beget or transform its self into vegetable substance, nor can vegetable substance beget or transform its self into animal substance, nor can animal substance beget or transform its self into rational substance, i.e., a human person. Second: Because something is neither added to nor subtracted from the formulation of the conceived substance of a human being after conception, and because the conceived substance grows its self into the living person that it is, personhood must be intrinsic to the conceptual substance of every human being.

From the *Records of the Federal Convention of 1787*, then, it seems the Founding Fathers demonstrated a great deal of knowledge and courage in their creation of our federal republic. And, with such records in hand, it seems a sovereign state—such as the State of Mississippi or any other sovereign state—has not only the right but the obligation in accordance with the Fifth and Fourteenth Amendments to the Constitution of the United States of America (cited in numerous cases tried before the Supreme Court) to legislatively ensure that "NO PERSON . . . shall be deprived of life, liberty, or property, without due process of law"[4] and, thereby, empower legal protection for the life of every person—including pre-born persons. Similarly, it seems a sovereign state—such as the State of Mississippi or any other sov-

ereign state—has not only the right but the obligation in accordance with the preamble to the Declaration of Independence (previously cited in numerous cases tried before the Supreme Court) to legislatively "hold these truths to be self-evident, that ALL MEN are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness"[1] and thereby empower legal protection for the life of every person—including pre-born persons. In these regards, the obligation to legislatively protect the life of pre-born persons, as in *Dobbs* v. *Jackson Women's Health Organization,* reinforces the intent of the Constitution, whereas the right to terminate the life of pre-born persons, as in *Roe* v. *Wade,* subverts the intent of the Constitution.

Part III: Understanding the Ruckus

America . . . what can be done?

Insights into the problems presented above reveal that we are not lacking in the knowledge of truth, but the decisions rendered in them indicate that truth and courage are suffering defeat at the hands of seemingly twisted legalism, social bias, and popular opinion. The Founding Fathers are dead and so too, it seems, is courage: The Supreme Court lacks courage; the major political parties lack courage; we, the people-at-large, lack courage.

It would be easy to simply suggest the foregoing problems be resolved through revocation or repeal, but that is not going to happen. Human history has shown that society does not self-correct or reverse direction of its own accord: Self-righteous judges are reluctant to reverse errant court decisions; self-serving politicians are only concerned with voter applause; self-centered people-at-large are made submissive through "lavish gifts" of welfare and entitlements (the counterpart of the "bread and circuses" of ancient Rome). Perhaps it would help if we could only see each individual person as our Creator does, but then, of course, we would have to recognize God, and that would violate social secularism.

Perhaps the reader can better understand today's social ruckus by reflecting on present-day art forms; after all, "Art is a reflection of society."[20] Much of contemporary art seems to be incoherent and characteristically obscure—a lot of the visual arts appear as mindless arrays of psychedelic colored splotches intermingled with meandering streaks of conflicting hues and shadows; a lot of the aural arts sound like endless contrivances of ear-piercing, high-pitched shrieks of incoherent vocalized syllables accompanied by repetitive, body-throbbing BOOM-BOOMS. Or, maybe, our social ruckus might be likened to the visible *snow* seen in early-era television broadcasts, or the audible *static* heard on early-era radio broadcasts: *noise* . . . noise that

drowns out the reality of sight and sound, the reality of what we need to see and hear to survive.

A cursory examination of presidential election after-effects in the United States since *Roe* v. *Wade* seems to exhibit the following divisiveness in our social environment:

- The northeastern geographic region of the United States—from Baltimore, MD, to Minneapolis, MN—seems to exhibit a social aura supportive of majority-rule socialism coupled with an advocacy for legalized abortion.
- The southeastern geographic region of the United States—from Raleigh, NC, to Tulsa, OK—seems to exhibit a social aura supportive of social conservatism coupled with an opposition to legalized abortion.
- The Pacific Coast geographic region of the United States—from Seattle, WA, to San Diego, CA—seems to exhibit a social aura supportive of social liberalism coupled with an advocacy for legalized abortion.
- The central geographic region of the United States—from the Appalachians to the Rockies—seems to exhibit a social aura supportive of free enterprise individualism coupled with an opposition to legalized abortion.

These observations are not hard and fast, but they should be indicative of the extensive civil division that percolates throughout every aspect of social life in the United States.

In the world of physical science, Sir Isaac Newton's first law of motion states: "An object continues its present state of motion or rest unless changed by an external force." Applying an analogy of this law to the social world suggests that the United States will continue its present migration away from its founding constitutional federal republic and its maxim "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness"; and will gravitate toward some kind of centralized, open-ended, majority-rule democracy—wherein the individual states become little more than subjugated districts within that government, and the lesser populated social segments become "helpless onlookers"—and, bolstered by self-confirming Gallup Poll opinions, will gravitate toward popularly derived morals and ethics, because a constitutional federal republic and an open-ended democratic republic are mutually incompatible.

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The Pro-life Movement's Place in History

David Marcus

There are only a handful of political/social/cultural movements in American history that labored for 50 years or more to arrive at success. The first was abolition, which procured freedom for slaves but only after a bloody civil war. Next the suffragette movement opened the voting booth to women—half the nation's population. The 20th-century civil rights movement chipped away the last legal barriers to equality under the law. Today, the pro-life movement, having fought since 1973 to overturn *Roe* v. *Wade*, takes its place among these historical triumphs.

Historical perspective is not a big part of modern daily life. The bomb-cyclone news cycles and incessant social media posts often make *last week* seem like a long time ago, let alone the '70s. Still, as we celebrate the *Dobbs* victory at the Supreme Court, it is worthwhile to ponder how such an unlikely and scattered movement achieved its foremost goal when just a scant few years ago it seemed impossible.

The victors in this fight, so many of whom didn't live to see *Roe* overturned, were a motley crew, a band of lawyers, doctors, politicians, religious, intellectuals, activists, and laymen and laywomen of all stripes who stayed true to a single North Star conviction: that every human being, including those not yet born, had dignity and must be protected. On this there would be no compromise, which, in modern-day America, where accommodation is a virtue, was an aberration.

For much of the 50-year fight, those who opposed abortion could have chosen a third way, an off-ramp from the uphill fight against *Roe*. Until about a decade ago, most on the other side of this fight took a grave and conciliatory attitude: "Safe, legal, and rare" was their mantra. Some on the pro-life side were tempted to take the target off of *Roe*, to abandon the political and legal battle and work to make "rare" even more rare. But most held the line on protecting every human life—thank goodness they did so.

Even if we accept that the "safe, legal, rare" argument was made in good faith, we should have known, and many did, that the end result of capitulating to that modest proposal would be a country with no limitations on abortion.

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The temptation to give in was strong, perhaps even reasonable, given the slings and arrows, the name-calling and castigation, prolifers endured. How much easier it would have been to say, "While I personally oppose abortion, I won't tell others what to do."

But let us not forget that the abolition movement could have compromised on better treatment of slaves without ending the institution, women could have been brought into the political process without being granted the right to vote, and the civil rights movement could have sought accommodation, rather than equality. What kind of country would we live in today had those movements succumbed to the corrupting ease of compromise?

Now, with the Court's *Dobbs* decision having erased the morally challenged and wholly invented constitutional right to abortion, the fight to protect the life of the child in the womb continues, state by state, and, more importantly, pregnancy by pregnancy.

The 50-year fight to end *Roe* holds lessons for us going forward, none more important than the need to maintain single-mindedness. The achievement of every prolifer—famous or unknown, visible or behind-the-scenes—in ending *Roe* is profound. But there is more to be done, and to learn how to succeed in the future, we need only look to the past. And remember that we do this because every single human life has been blessed with dignity by God.

Tearing Us Apart:
A Resource for Reshaping the Abortion Landscape

William Murchison

NATION FACES CHANGED ABORTION LANDSCAPE

—Headline, the New York Times*, June 26, 2022*

Sure enough? The *Times*, the *Times*!—America's narrow-eyed bearer of meat-slab tidings and truths wouldn't tickle us under the chin with a feather, would it, hoping to provoke a giggle? What's this that the revered *Times* appears to have in mind—a new landscape in which to contemplate the meaning of life awaiting its share of sunlight? Just when we thought legal guarantees of such an opportunity were off the table forever?

We are in a sense back where we were on January 21, 1973, before the United States Supreme Court, on a vote of seven against two, kicked the table over, declaring abortion a constitutional right, on grounds having less to do with the moral authority of the seven than with the deference their power commanded.

The new state of things, judicially speaking, is a good thing. We are about to have the national conversation, so to speak, that we never had in the beginning, before our highest court imposed on us a belief-regime for which we were unready: morally, religiously, culturally, politically. Maybe politically most of all, as matters worked out.

We don't know what's ahead, today's Supreme Court having put in our possession that new landscape to which the *Times* alludes: a replacement, its features still undetermined, for the shrubbery and overgrowth which the old court countenanced in *Roe* v. *Wade*. We will talk and talk and talk, and plan and plan and plan, concerning the ways our civilization—if we may still call it that—apprehends and teaches about obligations to unborn human life. Or the lack of obligations. That would be another approach to the discussion.

What a perfect time for the appearance of Ryan T. Anderson's and Alexandra DeSanctis's *Tearing Us Apart: How Abortion Harms Everything and Solves Nothing* (Regnery Publishing, $29.99, 296 pp). It is one richly researched, easy-to-read conversation-starter, that's for sure. Just as intended,

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I can only assume.

Somebody, whether publishers or authors or all at the same time, divined what was coming—namely, the overthrow of the ever-more untenable *Roe* v. *Wade* regime. But there was more to the project than that. And I don't mean the salivating prospect of filthy lucre tumbling into parched pockets. Financial profit is what flows from rightly judging, then satisfying, a public need. Few public needs seem to me so obvious as the clearing away of growth and moral tangles from the abortion landscape willed us by the 1973 court.

We know the new landscape will teem with activity. Our formerly pro-life-friendly (by his own account) president declares that "This decision must not be the final word. My administration will use all of its appropriate lawful powers. Congress must act. And your vote? You have the final word. This is not over."

Vice President Harris seconded the motion: "You [the voters] have the power to elect leaders who will defend and protect your rights." Then there's Sen. Elizabeth Warren, writing with a collaborator in the *Times*: "We must restore our democracy so that a radical minority can no longer drown out the will of the people."

What does all this portend? Something that has never happened—but should, for all kinds of reasons, not least the vindication of democratic processes shut down, tied up, garroted during all the bleak years since January 22, 1973. It is fun to pick up from Sen. Warren the idea of restoring "our democracy"—which is to say, the notion that here, in one form or another, the people rule. Democracy, we are going to re-learn during the debate ahead of us, is a governmental species rather different from krytocracy—the Greek for government by judges.

Perhaps you have noticed we never debated, once *Roe* v. *Wade* came down from on high, the claimed merits of weaving into the Constitution a right that entailed the extinction of unborn human life. We took the Supreme Court's word that 1) abortion is, at worst, a thing morally indifferent and not worth much conversation and 2) the Court enjoyed the princely right to say so without contravention. This was not exactly how previous generations had thought and acted. In 1861, the princely approach was tried. It failed, to say the least.

It has done rather poorly since then. What was the idea in 1973—that unborn children enjoyed no rights important enough to offset the claims of mothers and self-ordained apostles of women's demands for equality and politicians with an interest in placating both aforesaid categories? That would about sum it up, I think. Protests against the Supreme Court's exercise of "raw judicial power," as one dissenter in *Roe* called it, came too late. The

thing was done. Contravening arguments were too late: That portion of the community fixated on the fruitfulness of allowing unborn babies to be wiped off the map had won—juridically speaking.

Let's get back to the book I am reviewing. I have spent time talking about democracy and the need for respectfully debating large questions because I see the value of *Tearing Us Apart* as consisting in its potential as a resource for the task of reshaping the abortion landscape. It needs to be, in the words of the Book of Common Prayer, read, marked, learned, and inwardly digested. It is an evidence-based, *a posteriori* assault on what the Supreme Court wrought in *Roe*. You can undertake such a project, if you like, in an angry, vengeful spirit; but Anderson, who is president of the Ethics and Public Policy Center in Washington, D.C., and DeSanctis, a well-known conservative commentator, are not playing that game. They want to argue, not rant and rave and name-call in the manner of polemicists on each side of the question. They bring to the conversation, if I am not overusing that hopeful word, a spirit of forcible restraint.

Their idea is that the abortion regime of the past five decades has messed us up in seven distinct and highly dangerous ways. To wit: It "harms the unborn child"; "it harms women and the family"; it "harms equality and choice"; it "harms medicine"; it "harms the rule of law"; it "harms politics and the democratic process"; and, with all that, it "harms media and popular culture."

How do you like all that, as sweeping indictments go? I would say Anderson and DeSanctis have pretty much cleared the field of defensible locations for pro-choice sentiments: which is of course a different thing from clearing the field of defenders. Any number of Bad Ideas always survive attempts to uproot them. See: "Russia, 1989-2022." Have not pro-choice elements for half a century chafed at the survival of, as they see it, antiquated notions of disdain for a woman's sovereignty over her body? There seems, merely on the evidence of what the Elizabeth Warrens are presently saying, no chance whatever of a sword handover by Planned Parenthood at Appomattox Courthouse.

I do not see *Tearing Us Apart* as a proclamation of cultural/moral triumph after a long dark night. I see it as a summons to understand what the *Roe* regime has meant in American life, and on that basis to work with all diligence for its replacement, to whatever extent proves possible.

The summons is manifestly compelling. The reader needn't run all seven declarations up the flagpole and salute gaily. Two or three will do: say, the one on all the harm the *Roe* regime has wreaked on women. *Women!* Wasn't this thing supposed to be about doing good things for the put-down half of American society that couldn't control—legally control, I mean—their own

wombs, their own proclivities for sex, and for just plain privacy? "I should be the one to decide if my body creates a life," according to Amelia Bonow, the founder of the action group Shout Your Abortion, in a video meant for young girls.

Well, as Anderson and DeSanctis would have it, relying on medical evidence and, inter alia, the testimonies of women: "Abortion pits women against their children, telling pregnant mothers that violence against their unborn child might be necessary for them to flourish," furthermore "enabling [them] to behave like irresponsible men who walk away from their unborn child." And it plays into the "eugenic" notion that we improve the human race by ridding it of the mentally challenged and the otherwise unfit. "Unfit" by whose standards? By the standards of the purifiers, pouring poison into lives meant originally for love.

The purifiers include the media and the entertainment industry, who, we are coming to understand, align themselves with the top money-earners and private jet-buyers who see abortion as a social good. "The less riff-raff we have to put up with, the better for us all," could be their slogan. Because it sure turns out that blacks are heavier users of the abortion option than are whites. I have long wondered why that indisputable point seems not to resonate with progressives opposed to blacks being killed by cops but not by abortionists. It must be a factor of age.

You will readily understand that *Tearing Us Apart* is anything but a lab-coat, wire-rimmed-spectacles production, meant for small-volume publication in the Journal of This-and-That. The authors have points they would wish to make. They make them well and concisely—overwhelming us in a sense by the sheer compilation of the damage wreaked upon society—wreaked upon humanity—by the political-governmental enforcement of a policy not so much as discussed before its sudden imposition.

The service this book provides the community is thus considerable. It lays before said community the essential points for the sharp narrowing, if not, ideally, the extinction, of abortion. Used rightly for the public purpose I see as intended, it invites response: Yes, all right, you say this; but look at it this way.

That would be, it seems to me, the essence of the task in front of us after the High Court decision of June 2022 and its landscape-clearing effects. Something old is gone. Good riddance, many of us would say, but that isn't the present point. The present point, in a democratic society more than nominally devoted to the governance of the people, is to find what the people actually want, and to give effect to that policy.

We converse all the time these days about "conversation" and the need for more of it in difficult situations. The need for it, where sincerely asserted,

makes good sense. Its techniques are, well, democratic: a position stated, a countering argument offered, a solution, or half-solution, or quarter-solution arrived at. Or maybe the whole thing deferred a bit, until tempers have cooled and circumstances of one sort or another have had their way.

The idea in democratic debate is *Show! Persuade!* Talk others into a belief or course of action. Democratic measures—the division of powers, say, among branches of government at both state and federal levels—brake the zeal of the off-with-their-heads coterie, those devoted, as the *Wall Street Journal*'s indispensable Dan Henninger recently put it, to "this now-constant style of bullhorn politics—with its shaken fists and denunciations of normal deliberation and process."

What we clearly need is a bullhorn moratorium. We need debate. Which is where Anderson and DeSanctis come in. They have ideas. Ideas different from, say, those of Elizabeth Warren. Nonetheless, ideas thought through, researched, and presented in reasonable terms. (For present purposes I draw no metaphysical contrasts between the Anderson-DeSanctis portfolio and ideas that stand in stark contrast.)

Free speech—the right to propose and oppose—is supposedly an essential element of the American accommodation to the reality of life away from, say, Mount Sinai and its smoking tablets. We have less and less free speech in our time: those with the bullhorns having sketched out for us their rectitude and brains, and everybody else's corresponding need to sit up and listen.

My life in the journalism profession has instructed me in the wisdom of the Founders, who wove free speech into our constitutional fabric. I can say with all honesty I have not the slightest problem with listening to countervailing ideas on any subject, from a West Texas hailstorm to a campaign in support of my professional eradication. I might learn something. I might see something a different way. Might the same be said of some (not all, we are learning) who are dismayed by the Supreme Court's new abortion jurisprudence, yet fear to ram their views down others' throats?

Better for democracy and civic peace that both, or all, sides in important controversies receive a respectful hearing. As didn't happen with abortion, a top-down knock-'em-out job if ever there was one. A rape of sorts. For which reason, as Justice Antonin Scalia observed, *Roe* "destroyed the compromises of the past, rendered compromise impossible for the future," and left the whole question to national, as opposed to local, determination, rendering compromise all the harder.

Anderson and DeSanctis have a nice chapter pertaining to the damage inflicted by abortion upon politics and the democratic process. Large numbers of Americans, after *Roe*, continued to oppose the decision and its instrumental

work. Tough! The court was in charge, see, pal? As in an Edward G. Robinson flick, the judges packed gats—of the judicial sort. Wasn't nobody telling dem guys in the black robes they was wrong. Small wonder, as the authors note, the Court's longtime intractability on the issue of its authority "undermined the Court's own credibility, turning judicial confirmation hearings into circuses." What an interesting notion, would you not say so, Mr. Justice Kavanaugh?

Ryan Anderson and Alexandra DeSanctis are deeply—and intelligently—committed to their analyses and positions. That is the secondary point here. The primary point here is that they have wrestled together most of the salient points requiring debate as to the justice of a judicially enforced abortion policy. There are other things that might be said, but these suffice.

If we are going to talk about such a policy, and we have to, here is the place to start. What has the pro-choice side to say about what the pro-life side says here? Some of us would truly love to know. No swear words, please, on either side. Just, well, First Amendment conversation.

"What about you, Judson—have you signed the warden's birthday card?"

Abortion, Simone Biles, and the Autonomous Self

Thomas H. Hubert

After the close of the 2020-21 Olympics, the gymnast Simone Biles, who identifies as Catholic, took to her Instagram account to declare herself "pro-choice" regarding the issue of abortion. The news, as they say, went around the world—instantly. In that announcement Miss Biles also alluded to her negative experience as a foster child, one that apparently shaped her views on the life issues generally. But her main point, relative to abortion, was personal autonomy: "Your body. Your choice."[1]

In his rosary meditation on the Visitation, Bishop Robert Barron discusses Mary's key role in what the theologian Hans Urs von Balthasar called the "theo-drama," God's plan for salvation as revealed in Scripture (Luke 1:39-56). Pregnant with Jesus, she hastens to visit her cousin Elizabeth, whom she has learned is also pregnant. Mary, says Bishop Barron, acts as she does because she is following God's "direction." But in today's secular culture, we are bedeviled by the "ego-drama," the story "I'm writing, I'm producing, I'm directing, and I'm starring in."[2]

Miss Biles is an actor in an ego-drama. When, as a Catholic, she adapts the mantra of the secular culture and proclaims herself "pro-choice," she is following not God's direction but her own. As are presidents and other high-ranking politicians when they too reject—as Catholics—the Church's teaching on abortion.

In January 1988, 15 years after *Roe* v. *Wade*, Walker Percy—doctor, novelist, philosopher, and father—sent a letter to the *New York Times* in which he observed that the abortion issue "seems presently frozen between the 'religious' and the 'secular' positions, with the latter apparently prevailing in the opinion polls and the media." The *Times* and other "honorable institutions," he wrote, while defending human rights in general, "may not accept the premise of the sacred provenance of human life,"[3] a position that had implications beyond abortion.

This, I suspect, is where Percy, one of America's best-known writers at the time, discredited himself with the editorial staff. For here he recalled various leaders of the pre-Nazi Weimar Republic: "physicians, social scientists,

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jurists, and the like" who, with "the best secular intentions" for improving German society, advocated "getting rid of the unfit and the unwanted." Percy's point was that "once the line is crossed," and the principle that "innocent life can be destroyed for whatever reason" is accepted, there is no clear marker for when to stop the killing:

> Depending on the disposition of the majority and the opinion polls—now in favor of allowing women to get rid of unborn and unwanted babies—it is not difficult to imagine an electorate or a court ten years, fifty years from now, who would favor getting rid of useless old people, retarded children, anti-social blacks, illegal Hispanics, gypsies, Jews . . .
>
> Why not?—if that is what is wanted by the majority, the polled opinion, the polity of the time.

The *Times* didn't publish the letter.[4] But seven years earlier, the paper had run an op-ed of Percy's titled "A View of Abortion, with Something to Offend Everybody." In it he called out some of his "allies" for giving him "as big a pain as [his] opponents." Many "so-called pro-lifers," he complained, "seem pro-life only on this one perfervid and politicized issue." But there was, he went on, "nothing new" about that. The reason for his op-ed, Percy said, was to "call attention" to a "con job" that pro-choicers "have hit on in the current rhetorical war":

> The current con perpetrated by some jurists, some editorial writers, and some doctors, is that since there is no agreement about the beginning of human life, it is therefore a private religious or philosophical decision and therefore the state and the courts can do nothing about it. This is a con . . . religion, philosophy, and private opinion have nothing to do with this issue.
>
> Such vexed subjects as the soul, God, and the nature of man are not at issue. What we are talking about and what nobody I know would deny is the clear continuum that exists in the life of every individual from the moment of fertilization of a single cell.
>
> There is wonderful irony here. It is this: the onset of individual life is not a dogma of the Church but a fact of science. How much more convenient if we lived in the thirteenth century, when no one knew anything about microbiology and arguments about the onset of life were legitimate.[5]

Abortion advocates have perpetrated this con job, which had its roots in Harry Blackmun's *Roe* v. *Wade* opinion, for going on fifty years, ignoring science and promoting slogans like "Your body. Your choice," which are easily apprehended and repeated by young people (like Miss Biles) who may as well be living in the 13th century as far as their familiarity with microbiology goes.

But even those who would acknowledge the argument from science don't necessarily accept it as a reason to prohibit abortion. Because in the age of

the ego-drama, only *I* can decide what's best for *me*. Unbridled autonomy is a sacred operating principle of contemporary secular culture, one that affects us all, whether we acknowledge it or not. It is a clear threat not only to unborn life but to the fundamental sense of community that also protects other vulnerable lives from being deemed "unworthy of life."

Between his 1981 op-ed and 1988 letter, Percy published perhaps the most unorthodox work of his career, *Lost in the Cosmos: The Last Self Help Book* (1983),[6] a witty yet serious spoof of the self-help genre that invites the reader to think hard about the nature of . . . the self. While I can't begin to do the book justice, for my purposes here I would like simply to single out Percy's description of the "autonomous self," one of a multiplicity of selves he examines.

> *The autonomous self* . . . sees itself as a sovereign and individual consciousness, liberated by education from the traditional bonds of religion, by democracy from the strictures of class, by technology from the drudgery of poverty, and by self-knowledge from the tyranny of the unconscious—and therefore free to pursue its own destiny without God (*Lost*, 13).

Percy describes the autonomous self as being "savvy to all the techniques of society," and

> appropriates them according to his or her discriminating tastes, whether it be learning "parenting skills," consciousness-raising, consumer advocacy, political activism liberal or conservative, saving whales, TM, TA, ACLU, New Right, square-dancing, creative cooking, moving out to country, moving back to central city, etc.

Some might find this an admirable vision. But cannot such freedom also be problematic? Is there a point when the autonomous self runs out of internal resources necessary for conducting a decent life? For being a good person?

In a discussion of the autonomous self and religion (*Lost*, 157), Percy observes that "the God-party, at least those who say 'Lord, Lord' most often, are so ignorant and obnoxious that most educated people want no part of them." Yet, he goes on,

> as obnoxious as are [Protestants, Catholics, and Jews] none is as murderous as the autonomous self who, believing in nothing, can fall prey to ideology and kill millions of people—unwanted people, old people, sick people, useless people, unborn people, enemies of the state—and to do so reasonably, without passion, even decently, certainly without the least obnoxiousness.
>
> And it can do so with a clean conscience since such killing is done for the Greater Good.

As for Percy's Protestants, Catholics, and Jews, it is not at all difficult to imagine any one of them "identifying" as a member of their faith group and yet, *as an autonomous self*, paying little or no attention to its precepts and doctrines. The autonomous self is often practically formed before he or

she receives formal religious instruction. It "follows its own counsel," as the Psalmist avers (81:12), a solitary confabulation with little wisdom exchanged. It thus may not regard the theology, disciplines, rituals, and sacraments of a church as sources of formation and guidance.

It is not a case of hypocrisy. That concept is irrelevant here. The autonomous self may simply decline on the front end and all along to see that abortion, for instance, is the killing of a human being. (It is in fact likely not seen.) And if one does not so see it, the thing does not exist. In a passage in Percy's *Love in the Ruins*, his protagonist Dr. More muses at one point about his colleagues: "There still persists in the medical profession the quaint superstition that only that which is visible is real."[7] That profession is not alone in holding this view.[8]

The autonomous self, Percy would argue, is the result, in part, of the now centuries-old Cartesian split in which that self, imagining that it validates its own existence by cogitation, is left wandering, lost in the cosmos, not knowing whether he or she is a "heart fastened to a dying animal" (Yeats) or an "intellectual soul" (Aquinas) incarnate. It is the condition that Percy addresses again and again: in *Love in the Ruins* and its sequel *The Thanatos Syndrome*, in essays both early and late, and quite explicitly in *Lost in the Cosmos*. The autonomous soul may think he or she "don't need no hep," like Flannery O'Connor's potential prophet in "A Good Man is Hard to Find."[9] But it is a delusion born of the very predicament in which he finds himself trapped.

The Tom More of *Thanatos* for his part discerns finally that the autonomous—and secretive—scientific scheme of his fellow physicians, aimed at "social betterment," is in fact destructive of the human project in general and of the individual human person in particular. One cannot simply drug people, collectively or individually, into better behavior without undermining their very nature. Better living through chemistry has its limits.

Back to Miss Biles: She is hardly to blame for her espousal of the doctrine of the autonomous self. It is one of the reigning doctrines of the secular age in which we live, the ancient view of Adam and Eve revived for the twenty-first century. It is like the air we breathe and as readily available. One has to be radically, heroically counter-cultural not to take it in and be corrupted by it. To fall prey to it is not only a harmful self-delusion, but may also lead one to presume power over another's being to which one has no right.

Like some other laypeople, well known and unknown, Percy himself does not speak for the Magisterium of the Catholic Church. That said, he did take great pains to discern and understand Catholic teaching and made a considerable effort to live according to its lights. I contend that one cannot discern much of anything simply by echoing the easy, far-left platitudes of the day. A

serious, fundamental re-seeing and re-thinking is in order. Properly to form one's vision and conscience, a person—of whatever faith—has first to listen to what his or her church teaches and then make an effort to understand why it does so. Do its authorized spokespersons and lay faithful make a cogent case for the communion's core beliefs, especially as these impinge upon the life issues? If so, then unmitigated individual autonomy may begin to fade.

As Percy notes in the final section on the autonomous self in *Lost in the Cosmos*, one can with great difficulty reenter—from the abstracted state of autonomy—an ordinary, concrete life "under the direct sponsorship of God." It is not what many would see as a spectacularly exciting life, but it can be rewarding beyond the dreams of avarice. It is "the life which is life indeed" of which St. Paul speaks (1 Tim. 6:19, RSV).

In a late essay, "The Holiness of the Ordinary," Percy pays homage, as a Catholic writer, to just such a life. It is, in brief, the sacramental life, one in which "the sacraments, especially the Eucharist . . . confer the highest significance upon the ordinary things of this world" (*Signposts*, 369). One can find great joy in such a life—as a writer, a gymnast, a mother or father, and not least as a member of that body in which the individual person, young or old and with no special skill, is honored and held sacred without the troubling and fallacious assertion of autonomy.

NOTES

1. https://www.ncregister.com/cna/catholic-gymnast-simone-biles-says-she-is-pro-choice-in-social-media-post.
2. The Rosary (Joyful Mysteries) with Bishop Robert Barron - Bing video
3. Walker Percy, "An Unpublished Letter to the *Times*," *Signposts in a Strange Land* (New York: Farrar, Straus and Giroux, 1991), 349-351.
4. The letter was subsequently published in the Spring 1988 issue of the *Human Life Review.*
5. *Signposts*, 340-342.
6. Walker Percy, *Lost in the Cosmos: The Last Self-Help Book* (New York: Farrar, Straus and Giroux, 1983). Cited hereafter parenthetically in the text.
7. Walker Percy, *Love in the Ruins: The Confessions of a Bad Catholic at a Time Near the End of the World* (New York: Farrar, Straus and Giroux, 1971), 29.
8. Seeing with the eyes is not the only way, of course, to know. The unborn child one may bear in one's own body may be unseen except through technological imaging, but if "seen" truly with the eye of the heart is a gift beyond casual calculation. Such seeing will always be a challenge to the autonomous self, for it calls upon one to refocus vision toward another.
9. Flannery O'Connor, "A Good Man is Hard to Find," *Collected Works* (New York: Literary Classics of the United States), 150. The Cartesian split arguably affects mostly those who elect to be affected. St. Augustine in *The City of God*, trans. Marcus Dods (New York: Modern Library, 1993) answers the Cartesians of his day on their own terms. I quote briefly: "For we both are, and know that we are, and delight in our being, and our knowledge of it. . . In respect of these truths, I am not at all afraid of the arguments of the Academicians, who say, What if you are deceived? For if I am deceived, I am. For he who is not, cannot be deceived; and if I am deceived, by this same token I am" (370).

Assisted Suicide Implicated in Suicide Crisis

Wesley J. Smith

Suicides are now at crisis levels. The number of people who kill themselves in the United States has risen 30 percent since 2000. Indeed, so great is the number that, according to the Center for Disease Control and Prevention (CDC), suicide has become one of the country's leading causes of death, with 45,979 self-killings in 2020.[1] (In comparison, in the same year, 38,824 people were killed in U.S. auto accidents.[2]) And that shocking number doesn't take into account those who seriously consider suicide—12.2 million American adults—or the 1.2 million who attempt it and live. Something has clearly gone very wrong with our culture.

The causes of the suicide crisis are many and complex and beyond fully exploring here. But one aspect of the question of causation that seems highly relevant barely receives the attention it deserves among suicide experts. That is: What role does advocacy for—and legalization of—assisted suicide/euthanasia have, if any, in increasing the number of suicides?

As a matter of logic and intuition, assisted suicide advocacy would seem to have an upward impact on our suicide rates. Legalizing assisted suicide sends the nihilistic societal message that public policy does not unequivocally oppose all suicides; in addition, once a state gives its imprimatur to self-killing as a means of alleviating suffering, the "pro-*some* suicides" message of the assisted suicide law is likely to be interpreted more liberally by suicidal people whose reasons for wanting to kill themselves lie beyond those legally allowed.

Medical Aid in Dying *Is* Suicide

Before we discuss the few studies conducted on this question, let's set the full table. Assisted suicide advocacy, by definition, promotes suicide. In those jurisdictions of the United States that permit it, assisted suicide covers only the terminally ill who want to die, but in countries like the Netherlands, Canada, Belgium, and others, assisted suicide is also available to suicidal people with chronic diseases, disabilities, age-related morbidities, and

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mental illnesses. That presents a political problem for activists. They know that suicide per se is not popular. So they deploy word engineering tactics by rebranding assisted "suicide" as something less directly off-putting.

The particular terms employed have shifted over time. Formerly, euthanasia advocates favored "death with dignity." These days, the euphemism of choice is the focus group-tested "medical aid in dying"[3]—which usually goes by the acronym MAID to further obscure the lethality of what is being described.

Here is the scam. Because (in the U.S.) laws that legalize assisted suicide restrict doctor-prescribed death (for now) to the terminally ill, and because, but for being diagnosed as dying, these patients would otherwise want to live, when they take a lethal overdose of barbiturates, they are not really committing suicide. Rather, they are merely receiving a medical treatment known as MAID. Thus, according to the reckoning of euthanasia activists, if the distraught owner of, say, a failed business intentionally takes an overdose of prescribed sleeping pills, it's suicide. But if the same man takes the pills because he has cancer, and the doctor prescribed the pills for that purpose, it is not suicide.

This is specious nonsense. Suicide describes *what* is done, not why. Suicide is defined as "the act or an instance of taking one's own life voluntarily and intentionally."[4] Assist means "to give support or aid."[5] When a suicidal person is prescribed an overdose by a doctor, that person is being aided in the suicide; hence, "assisted suicide" is both accurate and descriptive of the subject being discussed.

Adding to the confusion, laws that legalize assisted suicide specifically redefine the act so that it does not qualify as suicide. For example, Oregon's "Death with Dignity Act" states: "Actions taken in accordance with [the statute] shall not, for any purpose, constitute suicide, assisted suicide, mercy killing or homicide, under the law."[6] Some states even require prescribing doctors to lie on death certificates of their patients whose suicides they assisted by attributing the cause of death to the underlying disease.[7] Such sophistry may be politically expedient, but it does not change the nature of the act.

Suicide Prevention Organizations Ignore Assisted Suicide Advocacy

The legal definitions in statutes are not the only means by which assisted suicide is removed from relevancy to the suicide crisis. Suicide prevention campaigns validate the false distinction between suicide and assisted suicide by failing to address the issue in their campaigns and on their websites. Indeed, if one looks closely at most contemporary suicide prevention advocacy, it is as if assisted suicide advocacy doesn't exist.

Perhaps these organizations worry that their fund-raising would be impeded

by taking on such a divisive issue. This is certainly understandable, but it is not excusable. In this context, *silence equals consent*, perhaps even approval. But pretending that assisted suicide advocacy isn't relevant to suicide prevention abandons some of the very despairing people these organizations and their prevention campaigns are supposed to protect.

Space permits only a partial list of these abdicating groups and institutions. Let's start with the federal government. The CDC recently published a "strategic plan" to prevent suicide. And yet, despite the thousands of assisted suicides that have taken place in this country[8]—which, as stated above, *are suicides*—the plan makes no mention of "assisted suicide," "euthanasia," "MAID," or "aid in dying" or any reference to the impact of doctor-prescribed death on suicide statistics.[9] This despite the "Vision" enunciated in the CDC's strategic plan: "No lives lost to suicide."[10]

Other suicide prevention organizations are similarly AWOL. The American Foundation for Suicide Prevention does not grapple with the issue of assisted suicide in promoting its laudable goal of saving the lives of suicidal people. Indeed, the organization's website even discusses the role of doctors in this quest—without mentioning assisted suicide at all:

> Health professionals regularly encounter individuals who are at risk for suicide. Despite the comorbidity or co-occurrence of mental health conditions and suicide, the vast majority of mental health professionals—a group that includes psychiatrists, psychologists, social workers, licensed counselors, and psychiatric nurses—do not typically receive routine training in suicide assessment, treatment, or risk management. Primary care providers are also in a unique position to identify patients at risk of suicide and enact appropriate intervention methods. Of people who die by suicide, almost half had contact with their primary care provider in the month before death, and three out of every four had contact with their primary care provider in the year before death.[11]

The website doesn't even urge doctors who may be asked to write lethal prescriptions to refuse and instead engage prevention services for their at-risk patients. Worse, its white paper on training doctors to prevent suicide makes no mention of the issue.[12] Indeed, using the search function on the website turned up no mention whatsoever of "assisted suicide," "euthanasia," "aid in dying," or the like.

One organization—the American Association of Suicidology (AAS)—doesn't ignore the issue but actively *advocates for denying suicide prevention to terminally ill patients* who want assisted suicide unless they are found to have impaired judgmental capacities:

> While many forms of end-of-life care may be helpful, including palliative and hospice care, a patient's choice of PAD [physician assisted death] that satisfies legal criteria is not an appropriate target for "suicide" prevention.[13]

In other words, the AAS does not believe assisted suicide of the terminally ill should be prevented—despite its unequivocal mission statement, which reads: "To promote the understanding and prevention of suicide and support those who have been affected by it."[14]

Making matters even more alarming, the statement foresees a time when assisted suicide is expanded beyond the terminally ill (my emphasis):

> Nor does the fact that suicide and PAD are not the same indicate that some cases identified as suicides may not be deaths that have a great deal in common with PAD, *especially those in which poor health is a precipitating factor*. Although such cases are typically labeled "suicide" *if the person initiated the causal process leading to death, medical conditions associated with suicide risk in potentially terminal illness*—including (among the best studied) cancer, cardiovascular disease, COPD, Huntington's, HIV/AIDS, multiple sclerosis, ALS, Parkinson's, renal disease, and Alzheimer's—*may arise from the motivation to avoid a protracted, debilitating, and potentially painful bad death*.[15]

Did you get that? The AAS statement is *softening the ground for expanding supposedly not suicide "aid in dying" laws* to include situations that "have a great deal in common with PAD," e.g., *people with disabilities, chronic illnesses, and progressive conditions.* This is a betrayal of the very people suicide preventers are supposed to help.

Legalizing Assisted Suicide Increases Suicide[16]

Now let's explore whether the above has impacted overall suicide rates. Frustratingly, even though the nation's first assisted suicide law was passed in Oregon 30 years ago, few studies have been conducted to determine whether legalization has had any effect on the increasing rates of suicide. But that is slowly beginning to change. In 2015, a study published in the *Southern Medical Law Journal* applied CDC suicide data from states where assisted suicide was legal (at the time, Oregon, Washington, Vermont, and Montana). The authors reported that "PAS [physician-assisted suicide] is associated with an 8.9% increase in total suicide rates" (including assisted suicides), and when "state-specific time trends" are included, "the estimated increase is 6.3%."

As is usual in professional discourse, this study was praised and criticized in a 2017 responsive paper published in the *Journal of Ethics in Mental Health* (JEMH). While the critics recognized some strengths in the earlier study, they noted that suicide rates in Washington and Montana had been increasing before legalization, that the work exhibited "methodological weaknesses" (such as not taking trends in nations such as the Netherlands and Belgium into account), and that "association does not prove

causation." Still, even these critics did not contend that legalizing assisted suicide had no effect on overall suicide rates. Rather, they argued that much more research needed to be conducted "before definitive claims about the effects of legalization of medical assistance in dying on non-assisted suicide can be made."[17]

In 2022, one of the authors of the original paper responded to this criticism in the JEMH. This time, he compared suicide rates in European countries that had legalized euthanasia with demographically similar countries that had not, and reported a "concerning pattern" where EAS (euthanasia/assisted suicide) is legal. The study found (in line with my expectations) that in the four jurisdictions studied in which euthanasia and assisted suicide (EAS) are legal, "there have been very steep rises in suicide." Moreover, "In none of the four jurisdictions did non-assisted suicide rates decrease after introduction of EAS." In the Netherlands—which has recorded the highest number of deaths by EAS—"the rates of non-assisted suicide" increased following legalization. Even in Belgium, where "non-assisted suicide decreased in absolute terms, they increased relative to its most similar non-EAS neighbor: France."[18]

In 2022, a third study was published that also showed an increase in suicide rates associated with assisted suicide legalization, with a particularly adverse effect on women. Two professors writing for the *Centre for Economics Policy Research* (CEPR) tested their hypothesis that legalizing assisted suicide would "not only reduce practical barriers to committing suicide but may also lower societal taboos against suicide," leading to "an increase of suicide rates overall."

And indeed, after reviewing data taken from U.S. states that legalized assisted suicide as of 2019, and referencing the studies described above, the authors concluded:

> There is very strong evidence that the legalisation of assisted suicide is associated with a significant increase in total suicides. Further, the increase is observed most strongly for the over-64s and for women. To give an idea of the size of the effect, the event study estimates suggest assisted suicide laws increase total suicide rates by about 18% overall. For women, the estimated increase is 40%.

Did the increase in suicides include unassisted suicides? Yes.

> There is weaker evidence that assisted suicide is also associated with an increase in unassisted suicides. The effect is smaller (about a 6% increase overall, 13% increase for women). It is still statistically significant in the main estimates but not in all of the robustness checks, meaning we have less confidence in that result. However, we find no evidence that assisted suicide laws are associated with a reduction in either total or unassisted suicide rates.[19]

What are we to make of all of this? There is evidence that suggests suicide begets suicide, and that legal assisted suicide increases suicide rates overall. Obviously, more empirical studies and pointed analyses need to be undertaken, but if we care as a society about preventing suicides generally—regardless of our beliefs about assisted suicide for the seriously ill—surely the question of assisted suicide contagion should become a pressing concern in fashioning public policy.

Turning Suicide into a Human Right

There may not be much time. Assisted suicide advocacy is pushing Western society toward transforming suicide from a tragedy into a liberty interest. Lest the reader think I am alarmist, in Germany suicide and assisted suicide have already been transformed from actions that can be prevented legally into a fundamental human right.

A recent ruling from Germany's highest court cast right-to-die incrementalism aside and conjured a fundamental right both to commit suicide and to receive assistance in doing it. Moreover, the decision *explicitly rejected limiting the right to people diagnosed with illnesses or disabilities*. As a matter of protecting "the right of personality," the court decreed that "self-determined death" is a virtually unlimited fundamental liberty that the government must guarantee to protect "autonomy." In other words, the *German people now have the right to kill themselves at any time and for any reason—and receive help from anyone in doing it*. From the decision (published English version, my emphasis):

> The right to a *self-determined death is not limited to situations defined by external causes* like serious or incurable illnesses, nor does it only apply in certain stages of life or illness. Rather, this right is guaranteed *in all stages of a person's existence*. . . . The individual's decision to end their own life, *based on how they personally define quality of life and a meaningful existence, eludes any evaluation on the basis of general values, religious dogmas, societal norms for dealing with life and death, or consideration of objective rationality*. It is thus not incumbent upon the individual to further explain or justify their decision; *rather their decision must, in principle, be respected by state and society as an act of self-determination.*

The court wasn't done. The right to suicide also includes a right to *assist suicide*:

> *The right to take one's own life also encompasses the freedom to seek and, if offered, utilize assistance provided by third parties for this purpose*. . . . Therefore, *the constitutional guarantee of the right to suicide corresponds to equally far-reaching constitutional protection extended to the acts carried out by persons rendering suicide assistance*.

The court also opined that Germany's drug laws might have to be changed to facilitate the absolute right to die that "the state must guarantee":

> *Sufficient space must remain in practice for the individual to exercise the right to depart this life* and, based on their free will and with the support of third parties, to *carry out this decision on their own terms*. This not only requires legislative coherence in the design of the legal framework applicable to the medical profession and pharmacists *but potentially also requires adjustments of the law on controlled substances.*[20]

This is stunning and appalling: The court's ruling is so encompassing that it seems to apply even to children capable of making autonomous decisions, since being underage is a "stage of existence."

Conclusion

Western society is no longer anti-suicide, but anti-some-suicides. It still energetically seeks to prevent youth and veteran suicides, and the media assists in that effort. But at the same time, the media, popular culture, and the law promote assisted suicide as a means of "dying on one's own terms." For example, CNN named Brittany Maynard, who moved to Oregon from California to commit assisted suicide after being diagnosed with terminal brain cancer, one of its "11 Extraordinary People of 2014."[21]

Assisted suicide advocacy is certainly not the only factor in our worsening suicide crisis. It may not even be one of the most impactful causes, which include among others the increasing nihilism of society, the opioid catastrophe, family breakdown, the isolation caused by COVID policies, and the loss of community. But I do think the entire assisted suicide phenomenon plays a prominent role, still insufficiently appreciated or understood. Indeed, if there is a "right to die," how can it be limited to restricting categories? As the old saying goes, in for a penny—in for a pound.

In all of this, I am reminded of the prophetic lament by Canadian journalist Andrew Coyne written more than twenty years ago. Reacting to his country's strong public support for a father who murdered his disabled daughter as a supposed act of compassion, Coyne wrote: "A society that believes in nothing can offer no argument even against death. A culture that has lost its faith in life cannot comprehend why it should be endured."[22]

True. If we don't change our current cultural trajectory, we will not only become pro-some suicides but pro-suicide-for-all.

NOTES

1. Center for Disease Control and Prevention, "Facts About Suicide," Facts About Suicide (cdc.gov)
2. U.S. Department of Transportation's National Highway Traffic Safety Administration, March 2, 2022. NHTSA Releases 2020 Traffic Crash Fatality Data | FARS | NHTSA
3. See for example, Compassion and Choices, Medical Aid In Dying Is Not Assisted Suicide, Suicide or Euthanasia (compassionandchoices.org).
4. Merriam-Webster Dictionary, "Suicide," Suicide Definition & Meaning - Merriam-Webster.
5. Merriam-Webster, supra, "Assist," Assisted Definition & Meaning - Merriam-Webster.
6. Oregon Death with Dignity Act, "127.880 s.3.14. Construction of Act." Oregon Health Authority: Oregon Revised Statute: Oregon's Death with Dignity Act: Death with Dignity Act: State of Oregon.
7. For example, see Colorado End of Life Options Act, section "25-48-109 Death Certificate." 145Final.pdf (state.co.us).
8. According to Encyclopedia Britannica, "State by State Physician-Assisted Suicide Statistics," January 28, 2019, between 1998 and 2019, 2,814 people died from taking lethal prescriptions, with more than 4000 such prescriptions written. State-by-State Physician-Assisted Suicide Statistics - Euthanasia - ProCon.org
9. Center for Disease Control and Prevention, "Suicide Prevention Strategic Plan 2020-2022," Prevention Strategic Plan (cdc.gov).
10. Ibid.
11. American Foundation for Suicide Prevention, "Training health professionals in suicide assessment, treatment & management" (State priority) (afsp.org).
12. American Foundation for Suicide Prevention, "Policy Priority: Training for Health Professionals in Suicide Assessment, Treatment, and Management," February 18, 2022.
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14. American Association of Suicidology, Mission Statement. About AAS – American Association of Suicidology.
15. AAS, "Suicide Is Not the Same," Supra.
16. Some of the material in this section was taken from Wesley J. Smith, "Suicide Contagion," *First Things*, May 19, 2022. Suicide Contagion | Wesley J. Smith | First Things
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How Planned Parenthood Lets Women Down

Margaret Brady

Dr. Leana Wen had just lost her baby.

It was a hard blow during a difficult season of her life. As then-president of Planned Parenthood Federation of America, Dr. Wen was struggling with bureaucrats who didn't share her vision for the organization. They'd criticized her, undermined her, and finally given her an ultimatum: Change her approach to leading PPFA, or lose her job. In the midst of the turmoil, the conception of her second child was a momentary bright spot. It didn't last.

"My pregnancy loss was devastating in a way that I couldn't have anticipated," Dr. Wen says in her new memoir, *Lifelines: A Doctor's Journey in the Fight for Public Health*. "I cried for many hours and could not be consoled." Although she'd cared for many women with the same sad diagnosis, her medical training didn't prepare her for the feelings of anxiety and grief that accompany such an experience. Seeking a breather to recover, she took a vacation with her family over the Independence Day holiday.

"Then a bombshell went off," she writes. "I'd confided in someone at Planned Parenthood about my miscarriage, who told others without my consent. People began suggesting that I should use it as a reason to explain my departure. This was offensive and hurtful on so many levels that I began writing an op-ed about my miscarriage so as not to have this deeply personal experience stolen from me."

The editorial appeared on July 6, 2019, in the *Washington Post*, earning a tsunami of accolades. But the response to the piece from Wen's pro-choice allies was brutally mixed. "I could tune out the anti-choice extremists who said that I deserved what happened to me," she says of the reviews. "It was harder to ignore the criticism from people who accused me of stigmatizing abortion by talking about miscarriage." Days later, PPFA unceremoniously fired her. She'd been on the job for eight months.

Dr. Wen's experience as a woman working at the very heart of Planned Parenthood is just one prominent example of how the non-profit has squandered opportunities to serve the patients who are meant to be at the heart of its mission. About a million women suffer pregnancy loss every year, yet PPFA's approach to Wen matched that of the most regressive, patriarchal

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corporation imaginable. Instead of seeing her openness about her loss as a chance to speak into the lives of women, Planned Parenthood dumped her.

Indeed, the organization's leaders have opted for a narrow, inflexible focus on abortion, a procedure that most women will never seek out. Meanwhile, patients and their families continue to drown in a pool of unmet needs, even as the self-described "leading provider and advocate of high-quality, affordable healthcare for women, men, and children" looks away.

Planned What?

The first place to find this disconnect is in Planned Parenthood's name. Despite the attention paid to the childfree movement, and the supposed environmental and mental health benefits of not reproducing, most Americans still want to be parents. Pew Research Center recently found that even among the minority of young people who don't see kids in their future, more than one in three say it's because of (potentially treatable) medical problems or the lack of a (potentially en route) partner.

In particular, motherhood is having a bit of a surge recently. In 2018, about 86 percent of U.S. women age 40 to 44 had given birth at some point in their lives. That's boosted from 80 percent a decade earlier. For comparison, in the 1970s, the share of women who'd had a baby by 44 was 90 percent, which, if trends continue, isn't far off. Although the United States and other Western countries continue to struggle with low overall birth rates, most individual women do eventually get around to having kids—they're just waiting longer to do it. It's hard to overstate the implications childbearing has for a woman's social, physical, and mental well-being. So, you'd expect the self-proclaimed "leader in the fight for reproductive health" to provide significant support to those who are reproducing.

Unfortunately, it's just not so.

Consider infertility, for example. It's one of the world's most common health problems, affecting 10 to 15 percent of couples. Millions of American women are dealing with this medical challenge, which research shows is about as emotionally distressing as a cancer diagnosis. It's a condition that health insurance companies notoriously don't cover: Only 19 states have laws requiring that simple procedures (like unclogging a woman's Fallopian tubes) be paid for. Women of color are at higher risk of suffering from infertility, even after taking into account variables like education, economic status, smoking, obesity, and age.

But PPFA's outreach to these patients is virtually nonexistent. Its website briefly describes high-risk in vitro fertilization, cheerfully adding that it "tends to be pretty expensive"—and that it's not provided by Planned Parenthood.

One of the few affiliates to attempt to treat infertility, Planned Parenthood South Texas, focuses its efforts on intrauterine insemination, also known as IUI. Sometimes crudely called the "turkey baster method," it has abysmal success rates, with around 85 percent of patients left childless.

What about women who are already pregnant? A quiet crisis is unfolding for them, and their babies. Maternal mortality in the United States has been steadily creeping upward since the turn of the millennium, taking the lives of 861 women in 2020. This disturbing trend has no equivalent elsewhere in the developed world. And in this case, too, black women are at highest risk, with a death rate three times worse than for white women. Traditionally positive factors like education actually amplify the inequality: A college-degreed black mother is more likely to die than a white mother who didn't finish high school.

How does Planned Parenthood address this women's health crisis? Feebly. Despite a network of more than 600 clinics positioned to interface with needy communities, PPFA has no national program aimed at saving mothers' lives. That's despite the fact that simple interventions can make a big difference. Doulas, for example, have been shown to be effective advocates for pregnant women, overriding the built-in biases of healthcare institutions that are not set up to listen to patients—especially female patients of color. Bizarrely, Planned Parenthood affiliates responded to the concept by appropriating it and starting "Abortion Doula" programs. But these "doulas" aren't centered on helping women question and push back on their abortion provider; instead, their work involves comforting clients who are frightened and distressed.

Even when local PPFA affiliates attempt to engage with the crisis, the bottom line remains abortion. In Northeast Ohio, Planned Parenthood's "Healthy Moms, Healthy Babies" initiative sought to save moms' and babies' lives by encouraging prenatal care, working with high-risk women in their own neighborhoods. The program was shuttered at the beginning of the coronavirus pandemic, even as the state's PPFA affiliates fought to keep using scarce Personal Protective Equipment for abortions. It has not reopened. Some services, it would seem, are more "essential" than others.

PPFA's abandonment of mothers' health is capped by its complete absence of support for perinatal mental wellness. About 15 to 20 percent of women develop postpartum mood disorders and anxiety, illnesses that can have a cascading effect on their physical health, their relationships, and their careers. Despite the stigma that continues to surround PMAD (Perinatal Mood and Anxiety Disorders), it's one of the most common reproductive-associated health conditions women (and their partners) can encounter. And, once again, women of color are at higher risk and have less chance of accessing

care. "Planned Parenthood health centers don't provide treatment for postpartum depression," PPFA's website explains, offering no excuse.

Bad Medicine

PPFA's advocates would likely object that the organization does work to reduce maternal mortality—by prescribing massive amounts of female contraceptives. After all, one of the risk factors for maternal death is pregnancies that follow one after the other, with little gap left for the mother's body to rest and recover.

But Planned Parenthood's most commonly offered methods of family planning come with a host of harms for women. The birth control pill's status as a carcinogen has been re-confirmed by a Danish study on nearly 2 million women that found it caused a 20 percent increased risk of breast cancer. The non-hormonal IUD, Paragard, has been linked to bleeding, copper toxicity, and infection. And in 2015, Planned Parenthood lined up at an FDA hearing with Bayer Pharmaceuticals and much of the U.S. medical establishment against a tidal wave of women complaining about Essure, a sterilization device that repeatedly perforated patients' uteruses and left them in crippling pain (Bayer eventually removed the product from the market, and in 2020, settled with patients for $1.6 billion).

Women's desire for effective family planning that doesn't cause depression, stroke, cancer, weight gain, blood loss, and general misery, has led to an explosion of interest in Fertility Awareness Based Methods, or FABMs. Planned Parenthood acknowledges the existence of FABMs on its website. But its explanation mixes in misleading statements, such as that the methods can't be used if a woman has an irregular cycle (they can, and they can be used to help make her cycles healthier). That suggests clinic staff aren't prepared at all to guide women in how FABMs work.

It Didn't Have To Be This Way

Planned Parenthood's erstwhile president, Dr. Leana Wen, took over in 2018. She was only the second doctor to ever run PPFA, and the first in about 50 years, which is as good a sign as any that medicine has been subordinate to abortion advocacy. Wen arrived with experience in public health as the Baltimore City health commissioner, where she tackled issues as diverse as the opioid crisis and helping the pharmaceutical supply chain recover from the community's 2015 race-related riots.

As befitted her role as a doctor, Wen knew that women are whole people with far greater challenges than just undesired pregnancy. She envisioned a Planned Parenthood that responded to more of their needs. In a *New York*

Times editorial, she explained she wanted PPFA to "increase care for women before, during, and after pregnancies," and described visiting one such affiliate where newborns could receive vaccinations under the same roof where their mothers could get treatment for postpartum depression, addiction, and other disorders. Wen wanted Planned Parenthood's reality to match its marketing as a healthcare dynamo.

She even harbored hopes of working with groups that didn't have gung-ho pro-choice views. By growing connections with people who didn't like abortion, but who did appreciate PPFA's work on other aspects of healthcare, she aspired to move the organization into the mainstream. A broader coalition of supporters, she reasoned, would also provide protective cover for abortion services.

Planned Parenthood's headquarters staff wouldn't go for it. In her memoir, Wen describes every woman's nightmare, overhearing a derogatory conversation while in the ladies' room at work. "I thought we'd get a rock star rabble-rouser, a congresswoman or a senator. Instead, we got a doctor," she heard one colleague snipe. Another critic at the bathroom counter chimed in to complain that Dr. Wen was still seeing patients, when she could be spending that time banging the drum at donor events. For these detractors, healthcare was quite literally a distraction from the political work they thought was most important.

Wen also recalls an extremist culture where colleagues celebrated the label "pro-abortion" and considered it a positive moral good. As a physician, she'd encountered many women who experienced their abortions as painful and heart-wrenching, and she continued to hear such stories every day in her new role. But PPFA's stakeholders resisted being honest about patients' real lives. "Not all women who go through abortions think the decision was difficult . . . You can't make it sound so dramatic," Wen quotes them as telling her. It's no surprise that some members of the same empathy-challenged group reacted heartlessly to Wen's miscarriage.

It turns out that Dr. Wen wasn't the first woman to try to make Planned Parenthood live up to its promise, and its hype. Pam Maraldo, an advanced practice nurse, served as president of PPFA for two short years, starting in 1993. She, too, had begun her brief tenure wanting to remake the organization into a full-service women's healthcare provider, with media headlines at the time trumpeting the need to move "Beyond Abortion." And, she, too, had been quickly drummed out of her position by abortion enthusiasts. "Pam drove to Baltimore to see me," Wen writes. "Over lengthy conversations, I came to see that our experiences, separated by more than two decades, had much in common."

Meanwhile, Wen's replacement at PPFA, Alexis McGill Johnson, couldn't

be more devoted to abortion as the organization's reason for being. In an interview with the *Washington Post*, she dropped one of Planned Parenthood's recent popular talking points—that abortion is only 3 percent of its activities—like a hot potato. "I think when we say, 'It's a small part of what we do,' what we're doing is actually stigmatizing it," she said. "We are a proud abortion provider . . . So I don't like to marginalize it in that way." PPFA has sprinted so quickly away from Wen's centrist message around public health that its new leader has been forced to denigrate and discard its own marketing.

That no doubt pleases the national-level Planned Parenthood activists who have made abortion activism the center of their own identities. But it doesn't help affiliate staff in clinics across the country, who are tasked with convincing their communities that their work is pro-woman, not pro-abortion. And it does nothing to help women with a host of unmet needs, most of which have nothing to do with ending a pregnancy.

It begs the question: Were women ever the mission of Planned Parenthood? If they ever were, the organization has long since abandoned them. Abortion is PPFA's true passion now.

"Why do you always take the fish's side?"

What We Owe the Dead

Robert Seelig

One of my life's defining moments occurred before I could read the back of a cereal box. I was four years old, too young to tie my own shoes, when I stood on tiptoes and looked into my father's casket. He was just thirty-seven. His bipolar disorder had overcome his brilliant mind, and he died a victim of suicide. I wept and wept while my dad's body was moved to the crematorium. At the time, his remains could not be interred at our local Catholic cemetery, a crushing blow for those who understood better than I did. The distance from our family's faith when we most needed closeness would leave a lifelong impression.

Burial and respect for the dead are core differentiators between humans and beasts. We have evidence[1] that even the earliest humans buried their dead. We know that ritual and symbolism have always been an essential part of the human experience. Ancient epics like the *Iliad* remind us of the social role funeral ritual and communal grieving played thousands of years ago, as Achilles rallied his comrades to mourn Patroclus:

> ". . . Draw near to the body and mourn Patroclus, in due honor to the dead. When we have had full comfort of lamentation we will unyoke our horses and take supper all of us here." On this they all joined in a cry of wailing and Achilles led them in their lament. Thrice did they drive their chariots all sorrowing round the body, and Thetis stirred within them a still deeper yearning. The sands of the seashore and the men's armor were wet with their weeping, so great a minister of fear was he whom they had lost.

Throughout human history, burying the dead has been a mystical experience that transcends cultures, religions, and tribes. Today, following the Judeo-Christian tradition, Catholic burial practices in America have a rich history and are continuing to evolve. My life's work as the CEO of a funeral and cemetery management organization has given me a unique perspective on this ancient and yet ever new industry.

Over the course of time, burial practices have become more liturgically ordered. No longer mere rituals for communal grief, Christian funeral rites were built on the knowledge that death is followed by eternal life. ". . . . The Church intercedes on behalf of the deceased because of its confident belief that death is not the end nor does it break the bonds forged in life. The

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Church also ministers to the sorrowing and consoles them in the funeral rites with the comforting word of God and the sacrament of the eucharist" (Order of Christian Funerals, #4). By focusing on the passion, death, and ultimate resurrection of Christ, Catholic funerals put the deceased into the context of Christ's empathy—a man who suffered with and for us, and who himself experienced death. For a divine figure to offer empathy and to show us how to die well was an innovation in human history. Burying the dead became known as a corporal work of mercy.[2]

Down through centuries, beyond its religious significance, burying the dead took on vital importance related to hygiene and municipal real estate issues. For example, highly transmissible diseases like yellow fever and cholera were rampant in Manhattan in the mid-19th century. Hazardous and unsanitary conditions made a cemetery worker's job dangerous. The transition from the old church graveyards to "park land" specifically set aside was a necessity. Looking across the East River to plentiful farmland in northern Brooklyn and western Queens, the New York City Council passed the Rural Cemetery Act of 1847, which allowed for easier purchasing of tax-free property designated for use as a cemetery.

Part of a larger group of statutes that facilitated cooperation between municipalities and charitable organizations, the Rural Cemetery Act turned the burial of human remains into a commercial endeavor. A subsequent "land rush" brought churches and speculators across the river to acquire land and build what is known today as the Cemetery Belt of Brooklyn and Queens (easily visible from the air for its sheer size). It is estimated that there are over 5,000,000 people buried in Queens alone, more than double the 2.4 million people living there today. But the hygiene issues related to burials that cities such as New York, Chicago, Boston, and San Francisco faced in the 1850s were nothing compared to the challenge America was about to face with the onset of a major conflict.

If there was a single event in our history that radically changed the funeral and cemetery industry, it was the Civil War. Fought throughout cities, towns, villages, and even individual farms across the country, the war's death tolls reached numbers theretofore unseen. This conflict gave rise to the standardization of the coffin manufacturing industry and rigorous municipal rules on burying the dead that still inform our thinking today.

Over the centuries, the overwhelming majority of the many millions of burials have been marked by tremendous respect for the individual who has died and a recognition of our common human bond. It is concerning, then, that our postmodern society is not simply doing away with religious ritual but in fact losing touch with death itself.

San Francisco has essentially prohibited cemeteries from existing in its city limits, as Joseph Bottum[3] reminded us, adding that "The significance of life derives from the presence of the future, while the richness of life derives from the presence of the past." This richness of life is lost when billionaires[4] and enthusiasts of transhumanism like Larry Ellison, Peter Thiel, and Sergey Brin pursue quixotic bids to somehow end mortality. The anti-aging industry will rake in about $67 billion[5] this year. Our culture is doing all it can to discard our finite, mortal nature.

Of course, this desire to defeat mortality is as old as civilization itself. Remember the *Homeric Hymn to Aphrodite*, the Greek myth of Tithonus, husband of Eos, who asked for (and was granted by Zeus) eternal life. However, Eos forgot to ask that her husband also be granted eternal youth, so he was forced to live an eternity of constant and miserable decay, eventually begging for death. Fighting mortality has been a fool's errand from time immemorial, yet we spend untold fortunes and brainpower trying to overcome death. Surely some wonderful medicines, technology, and health practices will result—that would prove some consolation to those seeking an endless lifespan.

Now, to be fair, not all Silicon Valley billionaires try to cheat death. "For death puts life into context," said Apple founder Steve Jobs in his famous commencement speech at Stanford in 2005. In that same speech he proclaimed the following just after his first bout with cancer and six years prior to his own death:

> This was the closest I've been to facing death, and I hope it's the closest I get for a few more decades. Having lived through it, I can now say this to you with a bit more certainty than when death was a useful but purely intellectual concept: No one wants to die. Even people who want to go to heaven don't want to die to get there. And yet death is the destination we all share.
>
> No one has ever escaped it. And that is as it should be, because death is very likely the single best invention of life. It is life's change agent. It clears out the old to make way for the new. Right now the new is you, but someday not too long from now, you will gradually become the old and be cleared away. Sorry to be so dramatic, but it is quite true. Your time is limited, so don't waste it living someone else's life.

In his masterful encyclical letter *Lumen Fidei*, Pope Francis writes that death, "Can be experienced as the ultimate call to faith, the ultimate 'Go forth from your land' (Gen 12:1), the ultimate 'Come!' spoken by the Father, to whom we abandon ourselves in the confidence that he will keep us steadfast even in our final passage" (*Lumen Fidei* #56). Death reminds us not just of our humanity, but of our final destination and journey.

The ways we prepare for death and lay to rest our loved ones communicate the value we assign to human life and to each other's immortal souls. Pope John Paul II initiated a dramatic "New Evangelization" within the Catholic Church: a revolutionary call to laypeople to live out their daily lives in such a way as to influence the culture and lead people to the good news of the Gospel. And it was in the context of this call to extensive and creative evangelization that I founded Catholic Funeral & Cemetery Services (CFCS) ten years ago with a small group of six employees.

After an increasingly successful business career, I eventually merged the private company I owned with a large, publicly traded company. After remaining on board for a few years to streamline the transition, I sought other challenges to pursue. It was around this time that my bishop asked me to look at his diocese's failing cemetery operation. Cemetery operations? My friends were incredulous. Why did I want to leave a successful career to become a "cemetery guy"? Put simply, the problem was great and the opportunity was profound. I could see that there was a clear set of business problems to solve, and I was equipped to address them. Today CFCS employs over 600 people in more than 30 dioceses providing management operations and funeral home and cemetery services across the U.S. and Puerto Rico.

What made the proposition so compelling to me was the challenge of learning how to equip the Church to accompany people when they most needed support and presence. If we could restore humanity to the end of life, we might unlock an unprecedented tool to evangelize and re-dignify death.

Mass attendance nationally has been falling for decades, and the Covid-19 pandemic has exacerbated this trend. A recent study from the Center for Applied Research in the Apostolate revealed that 73 percent of Catholic young adults "somewhat" or "strongly" agree that they can be a good Catholic without attending Mass every Sunday; prior to the Covid-19 pandemic, just 13 percent of Catholic young adults surveyed reported attending mass at least once a week. Meanwhile, burials at cemeteries are on the rise (the Census Bureau projects that total annual U.S. funerals will increase from 2.8 million this year to 3.1 million by 2030 as the general population of the United States ages).[6]

During the Covid-19 pandemic, most people who experienced a death reported being prevented from taking part in the traditional mourning process, in some cases by being unable to see their loved one after death, and in other cases by being prevented from saying goodbye. Liturgically, we have always felt the need to respect the dead. Nation states have adopted this as well by showing tremendous respect for war dead, even sending the remains of rival warriors home. (Incidentally, this is one of the shocking things about recent

reports of the Russian army bringing mobile incinerators to Ukraine for battlefield deaths in order to cover true numbers of deaths arising from that conflict. In cases like these we see disrespect for human persons continuing after death, which rightly causes condemnation.)

Closer to home, poverty, tragedy, and isolation continue to afflict many Americans. We have found that the best way to address social problems while caring for the dead is through targeted programs. Therefore we have launched several "Mission Programs" to tackle specific issues, and continue to expand upon them as needs arise. The "Mother Teresa Program," for instance, allows us to provide dignified, sacred funeral and cemetery services to those who would otherwise be unable to pay for them. Funded by donations, this program is available to many community members, as well as victims of violent crimes. The "All Souls Remembrance Program" exists to allow a dignified committal in our All Souls Remembrance Crypt to anyone, of any faith, at any of our cemeteries. This program is available at no charge and ensures that remains can be permanently interred within the consecrated grounds of a Catholic cemetery, in accordance with the Order of Christian Funerals.

The experience of someone helped by the "All Souls Remembrance Program" may bring home its value. One day I received a call from a woman whose parents' cremated remains had long been inhabiting her home. After her parents passed away, she kept intending to bring their remains from her home in California back to New York to be buried, but never got around to it. Then she heard of our program and called to ask about it. Her story poured out of her like a confession. She felt bad about delaying this nagging responsibility for so long, but hadn't known what to do. When she learned about our program, she felt released from a sense of guilt and expressed her gratitude for this welcoming outreach by the Church. At last she could find closure for a concern she had carried with her for years. Through this program we have been able to meet people like this woman where they are and help them with their pain, guilt, or any other emotion God wishes to heal.

Another need we have identified is addressed by our Precious Lives Program. Through it we have created a special burial section, offered free of charge, for babies and children. Within these special burial areas, parents and families can come to express their profound feelings of grief and loss. Often they bring with them mementoes and toys. Some years ago, one family decided on a specific gravesite for their three-year-old son, who had died unexpectedly. It was separated by a fence from the baseball field of a Catholic high school. After the burial had taken place, the family realized that the grave was actually fifteen feet away from the one they had intended to bury

him in. But when I met with them at the site to discuss the matter, I found they had suddenly changed their minds about the location they wanted for their child's resting place. Arriving before me, they saw a baseball unexpectedly sail over the fence and come to rest right on the little patch of grass growing on their child's grave. At that moment they knew their son was exactly where he was meant to be, because in life the three-year-old had loved tossing a little baseball back and forth with his parents.

Programs like these are important, and are a feature of our nature as a ministry. "Corporate Social Responsibility" programs cannot reach or engage the human person at their most meaningful level: the dignity inherent to them as people. But we can. Nonetheless, the corporate world does have a lot to teach us. My COO is a former McKinsey consultant; my corporate team includes high performers from the automotive industry, the legal profession, and other competitive, idea-rich businesses. Over 90 percent of our new hires are from outside the funeral industry. This helps fuel innovation and breathe new life into this generally stagnant industry.

And our mission to minister continues. I am continually motivated by my own childhood experience with the trauma of death. Fortunately, families who experience the pain of a loved one's suicide no longer have to feel the added pain of the Church not burying the deceased in a Catholic cemetery. In the 1980s the Church amended the practice of refusing burial to those who die by suicide. With a better understanding of the complexity and role of mental health issues as a factor leading to suicide, the Church now leaves open the possibility for redemption and the need for a proper burial on their sacred grounds. I am very grateful for this.

At CFCS, our corporal work of mercy to bury the dead extends especially to those unloved and unclaimed; we have buried the unclaimed remains of hundreds of individuals after acquiring shuttered funeral homes. It happens quietly but at a far greater scale than many realize.

We have also been challenged to think outside the box for pressing burial needs related to geography. In Hawaii, the Diocese of Honolulu fought with the State of Hawaii for over forty years as Catholics were forced to be buried in non-Catholic cemeteries. Finally, we were successful in overcoming this issue by being permitted to build columbaria (structures that house cremated remains) in parishes around the diocese to allow for Catholic burials right at their church.

Whatever form this work takes, it is poignant and emotional. We often say that we exist not to bury the dead but to serve the living. The famous biblical story of Lazarus being raised from the dead hides an incredibly important component that often gets overlooked. It is recorded in John 11:35 and is

the shortest verse in the Bible: Jesus wept. The miracle grabs the headline but, quietly, for Jesus this shows an incredible ability to feel the pain of his friends. This empathy is the heartbeat of our work and one we try to emulate. It isn't easy for our staff and we are constantly seeking new ways to handle stress that comes from a tipping point experience of dealing with hundreds of cases of sadness per year as compared to the stress that comes from a single, shocking event. They aren't quite the same stressors.

Each new generation thinks it is living through the most unique, different, and important time in history. For individuals, this is always true. Our life is the only one we are able to live. The constant is civilization: how we choose to live together. Established rites and rituals around care for the dead have always been a hallmark of humanity and of civilization. We will continue looking at the Church's ancient practices through our modern eyes to serve God's people, one by one. It is more a mission than a business, but we are most successful when we merge both.

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BOOKNOTES

THE DEEP PLACES: A MEMOIR OF ILLNESS AND DISCOVERY

Ross Douthat
(Convergent Books, 2021, hardcover, 224 pages, $26; Kindle $14.95)

Reviewed by Brian Caulfield

Halfway through this book, I called a friend who has had Lyme disease for more than four years. "Do you," I urgently wanted to know, "suffer the kind of pain that Ross Douthat describes in his book?" My friend paused, as if hesitant to reveal a secret she had lived with too long to let out. Yes, she finally admitted, his story read like a diary of her own Lyme experience. "He puts into words," she told me, "the pain and suffering I thought no one would ever be able to understand." At that moment, I realized I was speaking to someone I didn't really know. For all her silent suffering, I thought, my friend clearly was headed for sainthood.

Pain is central to Douthat's narrative of chronic Lyme disease, which many medical experts claim does not exist, some writing it off as psychosomatic—it's all in his head and the heads of legions of others who insist lingering Lyme is the source of their long-term suffering. Indeed, without Douthat's gripping descriptions of his own pain, *The Deep Places* would read much like the many medical mysteries on offer in *Reader's Digest* and TV magazine shows. Interesting, yet forgettable.

The pain that Douthat describes has a personality, a persistent, even sinister presence; hidden in the sinews of the self but ready to emerge when a new treatment reactivates the infection or some unknown trigger in the middle of the night makes the patient feel as if his head were exploding, or his joints ballooning, or his heart beating out of his chest. Call it an insane pain, one that rises from deep inside its victim, causing him to moan, rock in a fetal position, rush out into the cold to stamp his feet. Pain that drives him to self-medicate with heavy doses of antibiotics—going so far as to order them from veterinarians for his phantom pets—and snake-oil-seeming treatments that a credentialed Harvard graduate and columnist for the *New York Times* would be expected to shun while dutifully following the science. All the pain, shame, suspicion, and unspeakable misery that Douthat endured for years, along with a measure of sober reflection and gallows humor, are clearly recalled and minutely detailed in this unusual book, subtitled *A Memoir of Illness and Discovery*.

My wife and I have raised two children in Connecticut. For the past 20 years, Lyme and the deer ticks that spread it have been a shadow in our suburban backyard, a short drive from the town that gave the disease its name. We've checked for ticks and the signature bullseye red marks on the skin and, fortunately, have never had an incident in our family. But we know people who have been infected, some recovering after the prescribed rounds of antibiotics, others, like my friend and her family, suffering generations of infection—in her case, mother, daughter, and granddaughter. I have long believed the testimony of chronic Lyme patients, and Douthat's book gives eloquent voice to their plight and a rational basis to doubt the judgment of the medical establishment, which tends to discount conditions it cannot treat or cure.

Yet Douthat also understands why doctors, and even friends and family members, can doubt his physical symptoms. As a professional journalist hot on a lead, he delves into the deep places, indeed, asking himself questions that probe persistent existential mysteries: When is an illness real and when is it imagined, or real *and* imagined? Who are we as individuals who suffer, and in that capacity, what demands can we make on others? How can a patient not take the infection personally when he senses little parasites—spry Lyme spirochetes—hiding in his body tissue, exponentially replicating, flaring up in protest to treatments, and then retreating to build reinforcements?

In considering these questions, and others that can't be covered in a brief review, Douthat lays his self as bare as a person can in print. He writes as an advocate for chronic Lyme patients and makes a compelling case that they need more than sympathy from friends and dismissive prescriptions from physicians: Take 30 days of antibiotics and don't call me after that because there's nothing more I can do for you. In a particularly moving passage, he estimates the number of people in America who are suffering unremitting pain from unresolved conditions. Hundreds of thousands, by his count, have been abandoned by medical science and left to live out their days in chronic pain, with many, Quixote-like, draining their savings to chase a cure that may never materialize.

How far has Douthat gone to find that cure? Picture the erudite author clandestinely ordering a Rife machine, named for a scientist who claimed a century ago that precise radio frequencies could disrupt certain viruses and cure infectious diseases. This desperate yet hopeful patient quietly carries the laptop-size machine up the back steps to his home office, hiding it from his suspicious wife, who has been pushed to the brink by his self-help antics. He turns it on, tunes to the frequency recommended online by other chronic Lyme sufferers, and grabs the handles to aim the electromagnetic field at his

body. After several sessions, he lets his wife know, "casually that, by the way, we had a new housemate, about the size of a particularly bulky laptop, that, I would be spending a fair amount of time with going forward. This was not my best marital decision." Wry moments like this one are sprinkled throughout the story, providing welcome relief for both author and reader.

In other sections, Douthat seeks to find meaning in his suffering, drawing on his (Catholic) faith, ancient and modern philosophy, and a wide swathe of literature for understanding. He reports meditating on the suffering of Job, relating an incident that occurred after he went to Confession and was saying his penance in the church. Struck with a sudden spasm of pain, he lay down on the pew to hide his writhing from those entering for the noon Mass. But his ears perked up at the first reading. It was from the Book of Job, when Satan asks God for permission to torture Job in order to test his fidelity. In one of the more perplexing of passages, God answers, "Behold, he is in your hands; only spare his life."

With his pain receding, Douthat laughs out loud in the pew. Job learned the hard way one of the most difficult biblical teachings: God allows suffering for some greater good that only he knows and which will be revealed to those who persevere in his plan. Picking up on God's command to Satan to spare his servant's life, Douthat concludes his "not-yet-finished-story":

> I have lived for six years with invaders in my flesh, I have seen the world from way down underneath, I have done things I couldn't have imagined, I have fought and fought and fought.
>
> And I am still alive.

That is a happy ending in this vale of tears.

—Brian Caulfield writes from Connecticut.

FROM THE WEBSITE

THE ANSWER TO *ROE* IS NUREMBERG

Jason Morgan

In the twentieth century, transgression outstripped the framework of crime. The maddest dreams of the maddest men of the past could never have conjured up the horrors of modern mass killing—Ravensbrück, Auschwitz, Buchenwald. It was in numb recognition of the inability of traditional notions of criminality to encompass such radical transgression that the Allies convened the International Military Tribunal at Nuremberg in occupied Germany after the war. The details of the Nazi government's heinous offenses were read into the record, almost as though the trial's purpose was to preserve for a later time—one that might make sense of such depravity—the bewildering scope of evil that a once civilized nation had unleashed. Often struggling to find words to describe the deeds committed, the prosecution and the justices painstakingly laid out the truth about the wholesale killing and rampage to which the Nazis had given themselves over.

The Nuremberg tribunal was imperfect, to be sure. There were political and legal compromises, and far from all of the Nazi atrocities were put to paper and broadcast to the public. But it was generally understood that some attempt had to be made to reckon with a hatred that went beyond previous bounds. At Nuremberg, the battered conscience of humanity took stock of the profound evil that can invade the human heart.

I have been thinking of the Nuremberg tribunal as I try to understand the recent *Dobbs* decision overturning *Roe* v. *Wade*. In May, when I read the leaked version of *Dobbs*, I felt both euphoric and trepidatious. Euphoric, because it seemed the wanton American infanticide of the past five decades might really and truly be over. Trepidatious, because I thought that depriving the baby-killing industry—and its academic, government, and media supporters—of the money and power that came from perpetuating our American holocaust would lead to yet more violence in the streets, maybe even to civil war. Trepidatious also lest Supreme Court justices who appeared ready to join the leaked *Dobbs* majority should falter, allowing *Roe* to dig its claws even deeper into the American establishment and psyche.

I still fear the prospect of violence in the streets. Indeed, it has already started—pro-life centers, churches, and other places of light in the dark reaches of *Roe* have been firebombed and vandalized. God forbid this should go on for another moment. Though I suspect those who are terrorizing peaceful

defenders of unborn children care very little for the commandments of God.

But I am much less euphoric about *Dobbs* than I was just a month ago. *Roe* is dead, and I thank God I have lived to see its downfall. And, yes, it may be that, as Gerard Bradley writes at *First Things*, *Dobbs* can be seen as setting up future court victories that will grant constitutional personhood to all human beings, thus invalidating state laws that sanction abortion.

But still I am troubled. If abortion is the taking of an innocent life, then the answer to fifty years of abortion—to more than 60 million innocent lives stolen for money—is not *Dobbs*, but Nuremberg. *Dobbs* remands the question of abortion to the several states, making the democratic process the arbiter of infanticide. Is that a fitting end to the explosion of baby killing in our time? May one say that abortion is allowed so long as there has been a proper referendum on continuing with the killing the innocent?

My answer to both questions is "No." *Dobbs* doesn't produce euphoria in me anymore. It sobers me. There is still a very, very long road ahead. Children continue to be cut into pieces in the United States—legally. While I am glad that the scale of the slaughter has been attenuated, it's no time for celebrating as long as the scalpels and suction pumps are in action.

What we must do next is face squarely the hatred and death and transgression that have poisoned our national life since 1973. This will require going beyond the Constitution, because *Roe* wasn't just unconstitutional; *Roe* was wrong. It unleashed evil.

At Nuremberg, the world tried to find a way to acknowledge that a great evil had overtaken Europe. With *Dobbs*, though, my sense is that the full measure of the evil that has contaminated our own country has not been plumbed—that the attempt, in fact, has not yet even been made.

—Jason Morgan is associate professor at Reitaku University in Kashiwa, Japan.

SWORDS TO PLOWSHARES

Tara Jernigan

As I write, America is reeling from yet another mass shooting. My social media has been overflowing with disturbing images—e.g., a dump truck emptying piles of waste labeled "thoughts and prayers"—along with loud calls for more gun control and equally loud calls to protect gun rights. I've long been reluctant to write on this topic, because there simply are no words. I do not know what to say. As much as we call ourselves to awareness of the vast number of lives taken by abortion, I expect none of us can mentally

assimilate the shocking loss of so many young lives in one mass shooting.

Nonetheless, I am writing today because there is one thing I do know, one thing I can put into words, one idea I can assimilate: In moments when other people are suffering, the least possible Christian response is to stand up for one's rights. It is wholly, profoundly, un-Christlike.

I know those are strong words, but I hope you will indulge me a moment while I explain. After all, no one should make such a claim without backing it up—on that I expect we agree. So, let me ask: What belonged to Christ by right? In the second chapter of his letter to the Church at Philippi (which, I might add, was a Church that would have wholly understood the Second Amendment argument, having been a military colony praised and elevated for its loyalty to secular government), Paul clearly states that Jesus is "one substance with the Father." By right, every earthly and heavenly glory was his. By right, Jesus was (is) to be worshipped, glorified, and praised.

Jesus, seeing human suffering, did not stand on his rights, but emptied himself of them. He emptied himself of his equality with God, his heavenly rule, the praise of angels and archangels, and all the company of heaven. He emptied himself in order to live with us in our pain and filth. "He made himself nothing," says Paul (v. 7), to become one of us, to die mocked, spat upon, naked and exposed, cursed even, on a cross.

It is for this reason Paul (in previous verses) instructed the military colony at Philippi to assume the same mindset as Jesus: "in humility value others above yourselves, not looking to your own interests, but each of you (look) to the interests of the others." (vv. 3-4) The Philippians understood rank and honor and rights. Forming their identity in the secular politics of the day, they had proven themselves loyal to the authorities in Rome and had been honored for their loyalty. They knew they had rights—more even than average Roman citizens had—because of their loyalty. They were due their worldly honors. Paul was not denying that they were entitled to these things; he was telling them to lay their rights aside.

I am left with only one answer: In the face of suffering, we must lay aside our rights. In the presence of racism, we must step out of our cocoons and to the extent that we are able enter into the experiences of racial minorities. In the face of poverty, we must step into places of hunger and desperation and use our resources to feed and encourage others. In the face of the violence of abortion, we must open our hearts and homes to protect vulnerable women and their unborn babies.

Why should it be different in the event of gun violence? Fellow Christians, in the face of mass shootings, please stop standing on your Second Amendment rights. The early Church could not have imagined that any Christian

should wish to own or use a weapon that allows its owner, with little training or forethought, to take multiple human lives in seconds. The very concept of assault weapons would appall those Fathers who intimately owned the meaning of the Scripture which laments, "Yet for your sake we are killed all the day long; we are regarded as sheep to be slaughtered." (Ps. 44:22, ESV) It does not matter if it is our right to own these weapons; our right is only there so that we can empty ourselves of it and go sit with those who are suffering.

I come from a long line of gun owners. I grew up in rural Appalachia. I understand the desire to own guns for hunting and to defend your home from an intruder. My father and uncle owned guns for such purposes, as did their parents before them. Nonetheless, I also understand that you do not need an assault weapon to hunt for food. Responsible gun owners seek out training, maintain their weapons in good repair, and keep them in safely-locked storage when not in use. Responsible gun owners see their guns as valuable tools. They are not afraid of background checks that keep guns from the hands of irresponsible and unstable people. They are not afraid of training that equips them to better use their own tools. In the hands of a responsible owner, guns are like cars, both useful and potentially dangerous. There should be no need for the state to interfere with responsible gun owners, and the Second Amendment exists to protect these people.

Nonetheless, responsible Christian gun owners need to know when to put their weapons and their secular rights away and sit with the suffering. I will agree with you that "guns don't kill people, people do." I will agree with you that this is as much a mental-health issue as it is a gun-control issue. I will agree with you that Americans have a constitutionally protected right to own their own gun—responsibly. Nonetheless, I will challenge you by insisting that sometimes rights are for setting aside, sacrificially, for the sake of your neighbor.

In the end, I will not agree with your choice to cling to your rights rather than to embrace those who grieve. You have rights, not for your sake, but to lay them aside for others. Look not to your own interests but look instead to the needs of those who suffer, who fear, and who mourn. This is the Christ-like response.

—Tara Jernigan is a vocational deacon at Christ Anglican Church, New Brighton, Pennsylvania. She teaches Biblical Languages to high school students at Veritas Scholars' Academy and serves as an adjunct instructor for Trinity School for Ministry. Tara and her husband have two teenagers and one adult son.

APPENDIX A

[*Francis X. Maier is a senior fellow in Catholic studies at the Ethics and Public Policy Center. The following column was published July 7, 2022, on the website of* First Things *(www.firstthings.com) and is reprinted with the magazine's permission*.]

The Scent of a Soul

Francis X. Maier

Creighton Abrams, easily the best U.S. commanding general in Vietnam during the war, had a simple principle for dealing with cranks and nasty critics: "Never wrestle with pigs; the pigs love it, and you get dirty." It's sound advice, if sometimes hard to follow, given the toxic nature of today's public discourse. But persons are never "pigs." Even thoroughly bad people have an ember of human dignity buried somewhere in their lives, and treating individual persons with contempt violates a basic sense of decency.

On the other hand, words, behaviors, and collective efforts—things like corporations, lobbies, or political parties; or, say, publications—can and sometimes do qualify as unquestionably piggish.

More on that in a moment. But first, a story.

The late, great J. P. McFadden at *National Review* magazine was my first real boss back in the 1970s. Jim was a remarkable man of integrity: husband, father, and after the *Roe* decision in 1973, a lion in the pro-life movement and founder of the *Human Life Review*. I asked him once why he worked against abortion so diligently. And he answered me this way: We're all sinners; we're all going to die; we're all going to be judged; and we all need a healthy fear of the Lord. But when we are judged, he said, if we've fought for the unborn and the disabled, at least we'll have plenty of witnesses for the defense.

It's a sentimental image, perhaps even childish; but it felt vivid and true to me, especially since I had a young wife at home expecting our first child. I've never forgotten it. So much so that decades later, I shared it with a friend, who borrowed it for a text he published. That text and its imagery—as predictably as the sun coming up and as toxically as acid rain—drew a shower of derisive snark from one of the prominent writers at the *National Catholic Reporter.* I've never forgotten that, either. Nor will I. In its needless malice, it captured the discomfort of many on the Catholic left when it comes to the issue of abortion and its refusal to go away.

Abortion creates a lot of aerodynamic drag for anyone trying to keep pace with the bullet train to a sunnier future. Church teaching on the dignity of unborn life culls the progressive herd; it separates out those who take the word "Catholic" seriously, motivating some, embarrassing others. Abortion is not like other issues. It doesn't play nice with other priorities because it always kills a developing life. It's foundational. It can't be discreetly smothered by a bundle of other important concerns.

But back to my story.

Along with his other virtues, Jim McFadden was a brilliant, eccentric, sometimes

bafflingly difficult leader—but also a profoundly good one. Jim led me to the work of Graham Greene, C. S. Lewis, Chesterton, Péguy, Solzhenitsyn, and Tolkien. I owe him a debt of gratitude that I can never repay, but it's a debt I'm grateful to have. He helped shape the course of my family's life. He put us on a path to 49 years in pro-life work. We've welcomed and loved a son with Down syndrome and three grandchildren with disabilities. And we're blessed with an adopted son whose own daughter—now 16 years old—has severe mental and physical challenges, but is nonetheless precious in his eyes and in ours.

Whenever I read vindictive nonsense about the pro-life movement in articles like the ones here and here [https://www.ncronline.org/news/opinion/editorial-wake-dobbs-decision-its-time-anti-abortion-catholics-become-truly-pro-life and https://www.ncronline.org/news/opinion/what-has-demise-roe-v-wade-cost-catholic-church], I think of our son and his daughter. There's nothing Republican or right-wing or unresponsive to the needs of women about changing a crippled daughter's adult diaper at 6 a.m.—and doing it faithfully, with love. Every day. This is what the word "pro-life" means. And I mention it not because my family's experience is unique, but because it's not. There are hundreds of thousands of other such stories, and many others that are far more demanding, among the families that animate today's pro-life witness and public policy thinking.

The efforts of such people, spanning half a century in the face of relentless hatred and media disdain, toppled a *Roe* regime that had destroyed more than 60 million developing human lives and left emotional scars on countless women. The many good people who helped make that victory possible deserve our respect and thanks, not mean-spirited criticism, pious posturing, and moral ambivalence. Any religious publication—the *National Catholic Reporter* is hardly alone—that traffics in such effluence has a diseased spirit. And such a spirit warrants the kind of anger Jesus himself showed in Mark 3:5.

It's very true that we all have obligations of Christian service beyond the unborn child. It's very true that people in the pro-life movement need to avoid being suckered into foolish and corrupting alliances. And it's also very true that, before criticizing others, the Catholic left might profitably examine its own long record of carnal relations with the Democratic Party—starting with JFK, and hitting a full throttle of passion after Mario Cuomo's flaccid 1984 remarks on abortion and the duties of public office at Notre Dame. To put it another way: It's right and fitting for the pot to call the kettle black, as long as the pot fesses up to its own generous coating of dirt. We have leaders like Nancy Pelosi and Joe Biden for a reason.

The Catholic guerrilla war over morally acceptable abortion policy has gone back and forth for my entire 44-year career. And like all intra-family conflicts, the tone is often ugly and piggish. But if the struggle can't be avoided, the tone surely can. It's funny what the mind remembers at moments like this. Toward the end of the HBO series *Rome*, a dying enemy whispers something barely audible to Octavian, the calculating and ambitious soon-to-be Augustus Caesar. What she says is simply this: "You have a soul that stinks." Speaking only for myself, I'd like to avoid that particular cologne. I wish others felt the same.

APPENDIX B

[*Helen Alvaré is Associate Dean for Academic Affairs and the Robert A. Levy Endowed Chair in Law and Liberty at Antonin Scalia Law School, George Mason University. The following column was published on June 26, 2022, in The Hill (www.thehill.com) and is reprinted with permission.*]

Dobbs Decision Shows US Can Be Both Powerful and Humane

Helen Alvaré

Friday's decision in *Dobbs* v. *Jackson Women's Health Organization* is a win for the United States, democracy, the Constitution, women and, yes, the pro-life movement in all its wild diversity and unrelenting spirit—as well as for human rights movements overall.

The Supreme Court's decision overturning *Roe* v. *Wade* and *Casey* v. *Planned Parenthood* is a win for the United States, which is now no longer one of the very few countries in the world that allow abortion throughout pregnancy for any reason whatsoever. Yes, many states will continue to allow legal abortion under some or all conditions. But now one of the most powerful, prosperous, free nations on the globe no longer considers the "right" to destroy unborn human beings as a fundamental liberty. This demonstrates that a country can be powerful but humane.

It is a win for democracy. The *Dobbs* majority convincingly demonstrates that five members of the Supreme Court have no right to read their own predilections about abortion into a document that belongs to the people. The people ratified the Constitution and the Bill of Rights. At the time of the passage of the 14th Amendment—the claimed ground of the abortion right invented in *Roe* and *Casey*—and during every year until *Roe*, the people voted in their state legislatures to ban most or all abortions. It is impossible, then, for a Supreme Court to say that the people's understanding of "liberty" has ever included a right to abortion that might be read into the "liberty" guarantee of the 14th Amendment. If the people want a constitutional right of abortion, they can vote to place it in the Constitution. Until then, no judge can invent one.

It is a win for human life not because *Dobbs* promises constitutional protection for unborn human beings, but because for the first time in 49 years, citizens have the chance to argue effectively to protect that life and to try to convince a majority of their fellow Americans. Since *Roe*, no such argument has been permitted a chance of winning.

It is a win for women, who have increasingly been pressured to live as if their natural ability to bear children, and their desire to rear them, are disabilities. A disability affecting their potential for education. A disability impairing their economic and employment opportunities. A disability respecting their entire social equality. No. American society—including our economy—should now be required to face the fact that women get pregnant and need help and support then and throughout

their parenting. It is a scandal that so many American institutions, especially corporations, act as if all women should model the "ideal male worker" and come to the public square free of child care responsibilities.

It is a win for the unrelenting efforts of pro-life scholars for over 49 years. This body of scholarship never simply stamped its feet and demanded that everyone adopt a moral respect for unborn life. It argued the biological case for their humanity and their right not to be killed. It argued about the history and meaning of the 14th Amendment's "liberty" clause. It made the case that traditional judicial respect for past precedents—stare decisis—could not apply to past decisions that are egregiously wrong, legally unworkable and totally devoid of respect for the text of the Constitution, for history and for precedent. Today, the majority's opinion in *Dobbs*, which relies upon this impressive trove of scholarship, vindicates these 49 years of effort.

Finally, it is a win for the diverse and underfunded pro-life movement, as well as for every human rights movement—such as the cause of abolition—that just kept going in the face of unrelenting opposition. Millions of American women and men have brought us to this day. Whether the leading pro-life organizations or the smaller ones representing Democrats, pro-life feminists, non-violence activists, gays and lesbians, and hundreds more groups.

Despite opposition from billionaire pro-choice funders, the leading media, academia, the entertainment industry and popular culture—they never gave up. May other human rights movements take heart from this day and persist unto their own victories.

APPENDIX C

[*David Forte is Professor Emeritus at Cleveland State University and is on the Board of Scholars at the James Wilson Institute. This article was published on June 21, 2022, at The Catholic Thing (www.thecatholicthing.org) and is reprinted with permission.*]

Samuel Alito's Prophetic Vision

David F. Forte

In a few days, we'll know if Samuel Alito's leaked draft in *Dobbs* v. *Jackson Women's Health Organization* will survive as the majority opinion and become the "law of the land." Whatever happens, Alito's draft will stand as one of the greatest and most courageous declarations by a Supreme Court Justice. It's a purifying document, cleansing the Court of many wrongheaded and pretentious rationalizations in the past.

The opinion is prophetic—in the classical sense of the word. We often speak colloquially of prophecy as predicting the future. But in Scripture, prophets were not primarily clairvoyants, although some issued warnings of what might come (Jonah to the people of Nineveh), or statements of God's great and good things (Isaiah about the coming of the Messiah).

A prophet, then, isn't a fortune teller, but a truth speaker. He speaks to those enraptured by their own power, so wrapped up in their unchecked will as to commit grave wrongs. So did Nathan speak to David, Elijah challenge Ahab, Esther expose Haman, and John the Baptist condemn Herod. For his part, Alito ("rudely" his critics charge) exposes Harry Blackmun's hubris in *Roe* v. *Wade* who concocted not only a "right" that has no warrant in history or the Constitution, but also an analysis of pregnancy lacking internal logic and bearing little relation to medical reality.

In Scripture, prophets were not known for circumspect language in declaring the truth. Elijah's words were "as a flaming furnace." Similarly, Justice Alito has long been noted for his embrace of the facts behind a case, as ugly or distressing as those facts may be.

In *Stevens* v. *United States*, for example, as the sole dissenter, Alito described the tortured screams of a kitten being killed in a pornographic crush video, though the majority struck down the congressional act forbidding such videos on First Amendment grounds.

In *Brown* v. *Entertainment Merchants Association*, he wrote of video games in which:

> Victims by the dozens are killed with every imaginable implement, including machine guns, shotguns, clubs, hammers, axes, swords, and chainsaws. Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools. Severed body parts and gobs of human remains are graphically shown.

The Court struck down a California law that prohibited the sale of such games to minors (Justice Alito concurred only because part of the law was vague).

And in *Snyder* v. *Phelps*, he recoiled against the majority's shielding those who harassed parents' burying their fallen son from taunts and signs such as "God Hates You," "You're Going to Hell," "God Hates Fags," "Semper Fi Fags," and "Fags Doom Nations."

More than any other Justice in recent memory–certainly more than Justice Antonin Scalia—Alito condemns the moral harm wrought by unduly rigid judicial reasoning: the moral harm of animal cruelty, of allowing juveniles to impersonate mass murderers, of permitting malicious persons to turn a father's grief into agony, or, in the case of *United States* v. *Alvarez*, of giving a free pass to those stealing the honor of fallen heroes by pretending to be a Medal of Honor holder.

Terming abortion "a profound moral question," Alito goes again to the root of what the purpose of law is.

In *Dobbs*, Alito's tone stems from his umbrage at those of his fellow justices who have forsaken their calling for power, even enshrining such power in solipsistic formulas such as Justice Kennedy's "mystery passage."

Alito "makes straight the paths" to the truth by clearing away the false idols that the Court erected to justify the right to kill the innocent, and—thereby—gravely wounding the Court itself, and dividing the nation into bitter factions.

He leaves none of the judicial falsehoods untouched:

• *Roe*'s discussion of the history of abortion "ranged from the constitutionally irrelevant . . . to the plainly incorrect." In fact, history shows that abortion has always been treated in the law as some kind of wrong.

• "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision."

• The plurality opinion in *Planned Parenthood* v. *Casey* greatly modified *Roe* while contradictorily claiming to uphold stare decisis.

• "*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences."

• Instead of ending the dispute, as the Court self-righteously claimed, it has "inflamed" the issue and made it ever more "bitterly divisive."

• There is no equal-protection right to an abortion, for the regulation of abortion is not a sex-based classification.

• The rules of stare decisis do not weigh in favor of keeping this deeply flawed precedent.

• The viability is indeterminate, and "has nothing to do with the status of a fetus."

• The critical question to be addressed by legislatures is whether an unborn human being is at stake. No precedents cited by opponents meet this question.

Justice Alito has winnowed the precedents and has thrown away the chaff. But a prophet is not a ruler, and a judge is not a legislator. It's not his calling, he believes, to cross over to a promised land where unborn life is protected by law. His sense of vocation compels him to stay on his side of the water, but he points the way for the

States and for the people.

Legislatures, he declares, need meet only a rational test to protect those moral goods that are simply common sense:

> respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety, the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

If Alito's draft opinion becomes law, how will Americans respond to the Justice's invitation? Some assuredly will do as David did to Nathan: listen to him. Others, like Herod, will seek to cut off the prophet's head.

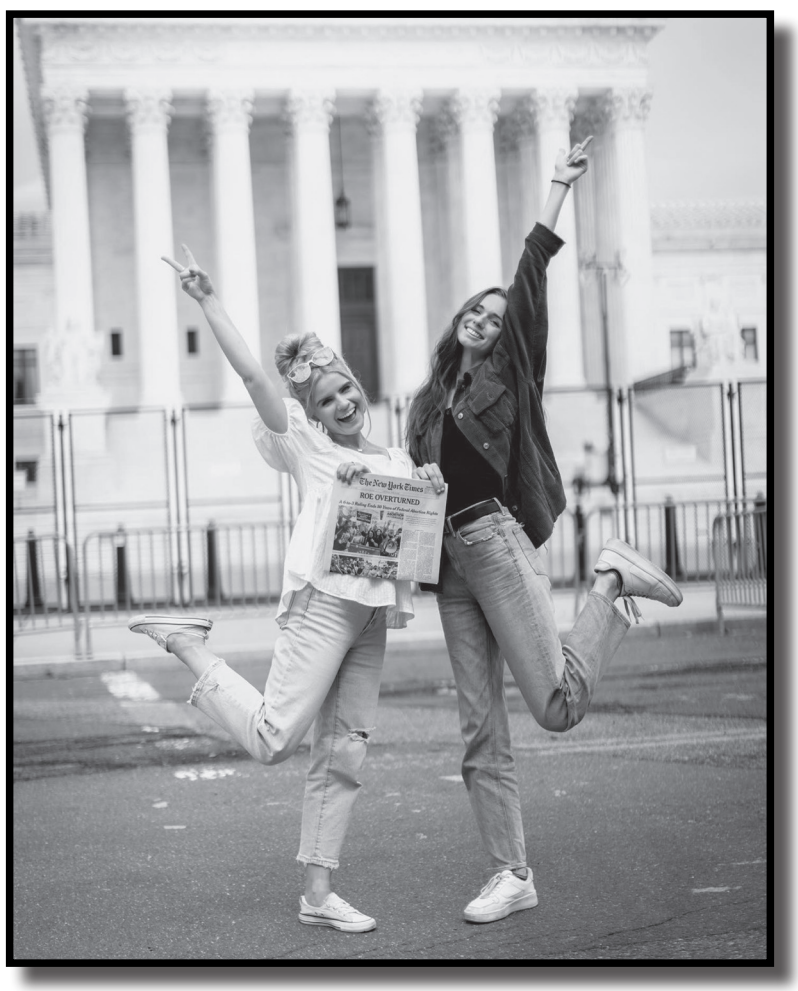

photo credit: Students for Life of America

APPENDIX D

[*Kody Cooper is UC Foundation Assistant Professor of Political Science at the University of Tennessee at Chattanooga and author of* Thomas Hobbes and the Natural Law *(University of Notre Dame Press, 2018). This article was published on July 8, 2022, at The American Mind (www.americanmind.org), the website of the Claremont Institute, and is reprinted with permission.*]

The *Dobbs* Dissent:The Case for Abortion Falls Apart

Kody Cooper

The landmark *Dobbs* case has consigned *Roe* and *Casey* to their rightful place on the ash heap of history. The Court repudiated its previous judicial fiats, which had arrogated the power to decide abortion policy for the whole country, thus restoring the American people's democratic authority to deliberate and vote upon the issue.

Such a decision should have been 9-0, but, predictably, there were three dissenters. The dissent deserves our detailed attention because it reveals how pro-abortion jurisprudence relies on distortion, half-truths, falsehoods, fallacies, and even slurs.

Constitutional Fabric

The heart of the dissent's argument is that abortion is part of a seamless constitutional fabric of "bodily integrity, familial relationships, and procreation," which, they contend, are so tightly interwoven with *Roe* and *Casey* that the pro-abortion precedents cannot be cut away without unraveling the whole. The dissenters allege that the Court's conservative reasoning—which seeks to limit substantive due process rights to those deeply rooted in history and/or the concept of ordered liberty—would potentially subvert various rights conceived of as aspects of "autonomous decision making" over personal life decisions. Contrary to the majority's assurances, the dissent suspects that this ruling threatens rights held to be constitutionally protected, such as contraception, consensual homosexual relations, and gay marriage. This argument has been echoed widely in the media.

The dissent repeatedly invokes *Griswold* v. *Connecticut* (1965) and its immediate progeny as manifestations of the alleged seamless fabric of family autonomy cases. (Indeed, the term "contraception" is invoked at least thirty times by the dissenters, suggesting that the idol of sexual satisfaction remains enthroned in their opinion.) But, curiously, they never mention the parental rights in education cases *Meyer* v. *Nebraska* (1923) and *Pierce* v. *Society of Sisters* (1925), the very precedents that anchor *Griswold*.

The silence is deafening because those cases show why the "seamless fabric" argument fails. The right in *Pierce* to educate one's child was "coupled with the high duty . . . to recognize and prepare him for additional obligations." In other words, the natural right in question was vindicated within a classical, teleological natural law framework of the natural duties and obligations of parents toward their children. But by *Griswold*, the Court had lost the framework of classical natural law. The majority, in that case, inserted the justices' own liberal conception of marriage into constitutional law. It was anti-teleological and thereby upended the

earlier approach of *Meyer* and *Pierce*. *Roe* completed the inversion by pitting the rights of parents against their children.

In short, the truth is that *Roe* is not part of a seamless garment of autonomy and familial relationship jurisprudence. It is antithetical to the earliest substantive due process cases in this area.

The dissent thus turns out to be spinning only a half-truth. Yes, the Court's reasoning casts some doubt on the soundness of the reasoning of substantive due process holdings that the Court did not bother to ground in historical practice and/or ordered liberty. But, since its family autonomy jurisprudence is more of a messy patchwork quilt, cutting away one particularly ugly patch does not necessarily entail unravelling the whole. We have no reason to question the sincerity of the majority's moderate path, which treats *Roe* and *Casey* as sui generis and leaves in place those substantive due process liberties that do not involve egregious externalities (mass killing) the American people seem to have made their peace with.

Body Ownership

Perhaps sensing the weakness of their seamless-garment argument, the dissent also invokes first principles to ground the putative abortion right. In this vein, the dissent contends that "Everyone, including women, owns their own bodies," which is supposed to ground the abortion right. Besides being an exercise in bad grammar, this "body ownership" thesis fails to persuade for four reasons.

First, the dualist theory of personhood implied by the body ownership thesis is not in the Constitution. The dissent does not even dare to suggest that it is. How could they? There is no evidence that 18th and 19th century Americans were broadly persuaded by a Cartesian philosophical anthropology, in which consciousness or some similar higher-order brain functioning is the necessary condition of personhood. On the contrary, most state legislatures had outlawed the killing of the unborn by the time of the 14th Amendment. In short, the dissent has no response to one of the majority's most powerful arguments: the Constitution provides no warrant for imposing the dualist theory of personhood on the whole nation.

Second, it is false. Your body is not like your Ford F-150, a sort of vehicle you ride around in and rightfully switch out parts or swap for a new one at will. True, fueling both your car and your body is exceptionally expensive in Biden's America. But, the likeness ends there. You are your body, just as you are your soul: the latter does not own but rather pervades and animates the former.

Third, even if you did own your body, that would not justify the right to abortion: an unborn body inside your body is not your body.

Fourth, the dissent subverts its own argument. A point made by the majority (and one I have made elsewhere) is that the dissent's account of autonomy, taken literally, would provide a license for all sorts of criminal behavior, including drug use and prostitution. The dissent's reply? "That is flat wrong." But why is it flat wrong? We are not told. It is simply asserted, without argument.

The People and the "Dark Ages"

The dissent also seeks to cast doubt on the whole enterprise of originalism by arguing that "the People" did not ratify the Constitution and the 14th Amendment, but men did. Yet again, this is distortion by way of half-truth. Yes, the ratifiers were men. But the dissenters do not even entertain the idea that the adult male husbands, fathers, sons, and brothers who voted for ratification understood women to be equal in dignity and natural rights. The question is surely not their sex but the validity of the claims they made in the Constitution they adopted—claims which, as Justices of the Supreme Court, the dissenters are sworn to uphold.

If an unjust and evil patriarchy essentially taints those features of the Constitution that were voted upon by men, then nothing of the Constitution prior to the 19th Amendment remains morally binding. Such an argument would provide a veritable license for progressive judges to rewrite nearly the entirety of the Constitution as they see fit under the guise of interpretation—which one might suspect is the real goal of the malleable standard of substantive due process the dissent adopts.

Curiously enough, given their critical eye toward our constitutional history, the *Dobbs* dissenters offer a cursory defense of *Roe*'s reliance on the common law going back to medieval times (a history that was fabricated). But the gesture turns out to be halfhearted as the dissenters go on to scoff at the idea of interpreting the Constitution in light of the "Dark Ages." The use of this term is breathtakingly ignorant of the richness of medieval civilization. (To begin to see why, one need only consider the extraordinary scientific knowledge, technical and artistic skill, aesthetic insight, and personal and civic virtue that went into (say) the construction of one medieval castle.) The slur also displays ignorance of our constitutional order's indebtedness to it. Such ignorance could be forgiven in young pupils who have never been taught about it. But one would have thought such language was beneath sitting Supreme Court justices.

And it seems, more than mere chronological snobbery, that the slur was intended as red meat to be gleefully consumed by its progressive readers. How is the intentional dismissal of premodern Christian civilization as darkness not anti-Christian, and specifically anti-Catholic, bigotry? For all of its faults and shortcomings, one can at least say this about the medieval civilization that the Catholic Church built: it never legalized and performed the killing of sixty million innocent, unborn persons.

"Coerced Pregnancy"

The fact that reasoning in *Roe* and *Casey* was so detached from any basis in the text, logic, structure, and historical understanding of the Constitution is sufficient to overrule them. But the *Dobbs* Court also recounts the pro-life contention that various legal and factual developments have undermined *Roe*'s justificatory logic. For example, pregnancy and child leave is guaranteed to most workers, while safe haven laws and the widespread demand for adoption guarantee that a pregnant woman has the freedom to give her child up without killing him. The dissent dismisses these developments, arguing that "few women denied abortion will choose adoption." Rather,

the vast majority will "shoulder the costs of childrearing" and thereby "experience the profound loss of autonomy and dignity that coerced pregnancy and birth always impose." And they emphasize the impact the decision will have on poor women.

The dissent here fallaciously lumps together the vast majority of "unintended" pregnancies, which are the result of consensual sex, and the tiny minority of cases of pregnancies resulting from rape. Obviously, the latter claim to coercion is different in kind than the former. The dissent claims that women in the former category will always experience a violation of their dignity when the law prohibits abortion. They simply ignore the inconvenient evidence that regulation of fertility through abortion has no correlation with social and economic equality. In fact, a *Washington Post* story published just days before *Dobbs* dropped profiling a teen mother named Brooke as one of the first post-heartbeat law Texans to have babies that she "never planned to carry to term," demonstrates why legal proscription of abortion does not necessarily violate women's dignity and autonomy, including women who are not wealthy.

The *Post* narrates a standard boy meets girl and gets her pregnant story. When she and her mother went into a crisis pregnancy center seeking an abortion, the sonogram revealed twins, upon which her mother exclaimed: "This is a miracle from the Lord. We are having these babies." Brooke then married her boyfriend, who hung up the skateboard and entered the Air Force in order to provide for them. Brooke came to love her babies more than anything in the world, and her imagined "alternate life," in which she spent her money on movie tickets and Whataburger instead of baby items, "didn't matter anymore."

If there is a sound account of autonomy, it is not one in which an agent achieves her dignity by choosing on the basis of mere subrational emotions (like base fears or concupiscible desires for creature comforts), as if mere choice itself sufficed to confer value. Instead, autonomy should be understood as responsiveness to reasons, and the reasons for action are apparent here: children, when clearly seen, are recognized as gifts from God, of whom we are stewards, and they need a mother and father committed to one another to provide for them. In other words, it is objectively good to welcome children and embrace the responsibilities of parenthood.

So, once again, the exact opposite of the dissent's contention turns out to be the truth. Brooke's story proves when human beings embrace the goods of marriage and parenthood, and the hard work necessary to provide for children, they achieve their dignity as rational agents.

Failing all of this, the dissent doubles down on *Casey*'s claim that stare decisis requires the Court to adhere even to questionable precedent or risk tarnishing the legitimacy of the Court. Even in *Casey* itself, it was absurd for a bare plurality of justices to act as if they were upholding a longstanding and unanimous tradition rather than simply hiding behind a controversial decision in *Roe* which, at the time, was not even 20 years old.

But to invoke stare decisis in the *Dobbs* dissent, as if the Court's legitimacy depends on setting *Roe* in stone, is fundamentally dishonest. The dissenters know all too well that the Court's legitimacy has been in question since *Roe* and that

no matter how it ruled the Court would risk its legitimacy in the minds of at least some of the American people. Moreover, the Court's legitimacy is grounded not in precedent but on the same foundation that authorizes it, the Constitution itself. Hence, when a precedent clearly and egregiously conflicts with the Constitution, the Court's legitimacy requires that the former give way to the latter. Riffing on Samuel Johnson, we are left with an inescapable conclusion: stare decisis is the last refuge of a scoundrel.

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DOBBS* V. *JACKSON WOMEN'S HEALTH ORGANIZATION

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