Abortion, Thinking Americans, and Judicial Politics

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ABSTRACT: Many pro-life arguments are emotional, based on a form of theology, if not religion itself. These arguments have failed to persuade those Americans who have come to terms with legal abortion. The author of this paper argues that these "thinking" Americans must and can be persuaded by the logic of the pro-life case. The author sets forth the history of abortion law in the U.S. from the Revolutionary War to the current abortion-on-demand society. He shows that modern abortion law is terribly inconsistent with other aspects of American jurisprudence because it is based on false historical claims, incorrect assertions about science, improper logic, and deceptive lawyering. He concludes by reviewing the current political situation and offering a plan of action on how pro-life forces can capitalize on the logic of their argument, the inconsistencies of the pro-choice movement, and the political will of the nation in order to help protect the most vulnerable members of society.

TO MOST PEOPLE in the pro-life community, abortion is "an unspeakable evil that harms babies, women, families, society, the culture, the country and, indeed, the international community."[1] That makes it very difficult to understand how so many of our neighbors and friends can rationalize abortion as just a choice to be left to the mother and her doctor. Yet they do.

Many people who consider themselves to be "thinking Americans" dismiss pro-life arguments as being based on someone else's view of morality. They characterize pro-life advocates as religious zealots or dangerous fanatics. Having formed such opinions, these people are unlikely to be persuaded by emotion-based pro-life arguments, most of which they have already considered and rejected. Nevertheless, if the pro-life movement is to win the political battle over abortion, significant inroads must be made with these

people.

The best way to reach these people may be by making a concerted effort to show how pro-abortion arguments are inconsistent with other cherished values, including historical analysis, modern science, and an equitable legal process. A strong appeal to reason based upon these factors might help the pro-life cause win over this soft middle that is necessary for victory in modern American politics.

A clear case illustrating the problem with modern abortion jurisprudence can be made by focusing on inconsistencies that it creates in the American legal system. Inconsistences like these are unusual in the legal system as a whole,[2] but they are very common when abortion law is compared to other law. In fact, the inconsistencies between abortion law and non-abortion law are so clear and systemic that no thinking American can fail to recognize that something is terribly wrong. Once that fact is acknowledged, it may become harder to overlook other compelling pro-life arguments.

THE ANTI-RELIGIOUS BIAS OF "THINKING AMERICANS"

Many individuals who support abortion rights have resolved the issue to their own moral and religious satisfaction.[3] As to morals, they focus on the extreme case of a young girl in a desperate situation. They may want abortion to be safe and rare, but they also want it to be legal. As for religion, they may not be believers, or they may belong to denominations that condone abortion, or (like many Catholic politicians) they may separate the teachings of their church from their political positions. In any case, the people to whom I refer tend to think of themselves as well-informed, concerned citizens ("thinking Americans"). They simply think that they have better insight than do the pro-life advocates.[4]

These thinking Americans are not bad people. The are concerned about the poor, they give to charity, and they take care of their families. They resent any implication that they are immoral, for they do not live an immoral lifestyle–-in fact they are likely to be very upstanding members of the community.[5]

Some anti-abortion arguments end up alienating them because

the arguments seem too judgmental. But for the pro-life movement to win the political battle on abortion, there will be need for significant inroads with this constituency.[6] As a group, they tend to be well informed and concerned about political issues. They are also fairly likely to vote, to campaign for their candidates, and to donate to political causes.[7]

Some thinking Americans hold a dim view of religion, particularly when religious insights relate to political controversies.[8] They may hold to Karl Marx's axiom that religion is the opiate of the masses. Stanley Fish, the widely-quoted Dean of Liberal Arts and Sciences at the University of Illinois at Chicago, reflected a similarly hostile attitude towards religion when he stated: "broadmindedness is the opposite of what religious conviction enacts and requires."[9] Too often that is the attitude that pro-choice people have about religious pro-lifers.[10]

Unfortunate as it is, many pro-abortion forces view religious pro-life advocates as zealots, and they have had some success in characterizing them in that manner. Pro-life representatives are often religious figures–-often Catholic priests or bishops.[11] While all people should be encouraged to stand up for the unborn, and no arguments need to be abandoned, it would be good to have more pro-life advocates who can make their case without invoking religion, either expressly or by implication through obvious identification with an organized church.[12]

There are, of course, many solid pro-life arguments that are unrelated to religious beliefs. Hadley Arkes of Amherst has explained that the pro-life case "is grounded finally in principled reasoning, the kind of reasoning that could be understood on its own terms without any appeal to religious faith or personal beliefs."[13] Certainly, that is true.

Writer George Orwell blasted "the myth that the pro-life position is rooted merely in religious and theological views."[14] In his book *Aspidistra*, Orwell's main character Gordon Comstock went into a public library and found a book on human embryology. In it he saw pictures of a six-week and a nine-week old fetus. He recognized the

humanity of the unborn child, identified with working-class values, and "oppose[d] abortion out of a commitment to reason and moral conscience alone."[15]

Unfortunately, most thinking Americans who are uncertain about the right to life are unlikely to have a similar revelation about human development. Most of them have already seen human developmental photos and drawings. There are, however, other insights that might help these people come to a more fully informed conclusion about abortion. The pro-life community is well advised to direct a significant amount of attention to the factors that can lead to those insights, including the way in which the U.S. Constitution has been pulled out of shape in order to provide the right to abortion.

THE CONSTITUTION, THE BILL OF RIGHTS, AND ABORTION LAW

The constitutional "right to privacy," upon which a woman's right to choose to abort her unborn child is based, does not appear in the Constitution. Abortions were well known at the time that the Constitution was drafted, and they were prohibited by the common law. Under normal rules of interpretation, this would mean that the Constitution would not overrule a state's decision to prohibit abortion. In fact, a logical alternative conclusion would be that the Constitution's various rights were applicable to unborn children, in which case the Constitution would prohibit abortion, even if a state wanted to legalize it. Unfortunately, normal rules of construction do not apply to abortion law.

Because abortion has been recognized as a constitutional right, regardless of whether the vast majority of people in a given state want to make it illegal they cannot do so. When the Constitution operates in this manner, it usually protects the minority from being victimized by the majority. With abortion, however, the true victims are the unborn children who are subject to being killed because they are a minority with no political voice. The Constitution does not protect them; it protects the people who threaten them.

In order to understand why abortion law is so inconsistent with other constitutional law, it is wise to trace the history of the Constitution from its earliest days to the present, paying particular

attention to developments that relate to abortion jurisprudence. This basic information should be known by all pro-life advocates.

A. THE REVOLUTIONARY ERA

The American Revolution ended two centuries of British rule for most of the colonies. The newly-established United States of America was at first a collection of thirteen separate, independent colonies, each of which considered itself essentially an independent nation. During the debates over the adoption of the Constitution, opponents repeatedly argued that such a document could create an oppressive, central government similar to that which had just been thrown off with the Revolutionary War. Accordingly, it was decided that the new Constitution would need a "bill of rights" that would spell out the immunities of individual citizens.[16]

On September 25, 1789, the First Congress proposed to the state legislatures 12 amendments to the Constitution–-the Bill of Rights.[17] The British had prohibited certain types of speech, limited the mail and the press, taken away the colonists' weapons, denied them jury trials by their peers, entered homes without warrants, housed soldiers in private homes, and done other things to offend the colonists. The Bill of Rights was a set of restrictions on the authority of the *federal* government, and it was designed to make certain that this new central government would never commit abuses similar to those committed by the British.[18]

The limitations contained in the Bill of Rights did not apply to the state governments. The Tenth Amendment expressly proclaims: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." In other words, at this time (prior to the Fourteenth Amendment), the Bill of Rights could invalidate a federal law that impacted on certain, specified individual rights, but it could not invalidate a state law.[19]

In 1791, when the Bill of Rights was ratified, the common law, which was followed in every state,[20] prohibited abortion after "quickening" (the mother's first perception of fetal life within her

body, usually at about 17 weeks of pregnancy).[21] Since the Bill of Rights restricted only the federal government, not the states, the Supreme Court could not have used it to overturn state laws prohibiting abortion.

B. The Civil War Amendments

Following the Civil War, three constitutional amendments were put in place to end slavery and to make certain that states would recognize the rights of all citizens. Of particular importance for the current discussion was the Fourteenth Amendment. Under this amendment, no state could deny any citizen due process or equal protection under the law.

The Fourteenth Amendment was ratified on July 9, 1868. At that time, 23 of the 28 ratifying states had anti-abortion laws on the books.[22] No one then thought that by ratifying this amendment they were overturning their anti-abortion laws, many of which had been passed in the previous few years.[23] In fact, several states passed new anti-abortion laws around the very same time that they ratified the Fourteenth Amendment.[24] By 1875, every state in the nation had adopted laws banning abortion. Even the federal government criminalized abortion. In 1873, Congress passed the so-called Comstock Act. This law made it a felony to publish, distribute, or possess "information about or devices or medications for unlawful abortion or contraception."[25] The maximum penalty was five years at hard labor plus a $2000 fine.

C. The Depression and FDR's Court-Packing Plan

In the 1930s, the United States was mired in the Great Depression. The Congress and President Roosevelt tried several "New Deal" economic plans to turn things around. The National Industrial Recovery Act of 1933 set forth price and wage fixing and established requirements regarding shipments of chickens. The National Industrial Recovery Act of 1934 provided the President with authority to prohibit interstate oil shipments if the oil was produced in excess of

state quotas. The Agricultural Adjustment Act had several provisions, perhaps the most important of which was for crop reductions—the "domestic allotment" system, which was intended to raise prices for farm commodities. Under this system, producers of seven basic commodities (corn, cotton, dairy products, hogs, rice, tobacco, and wheat) would decide on production limits for their crops. All of these acts, however, were found unconstitutional by the Supreme Court in the mid-1930s.[26]

President Roosevelt came to believe that the Supreme Court was preventing him from leading the nation out of the Great Depression. After he won the 1936 election, he decided that the problem was not the Court itself but the individuals on the Court. On February 5, 1937, in a "fireside chat" he said that the justices were "nine old men" who were overworked and needed help. He proposed to nominate up to six new justices—one new justice for every justice over seventy who did not retire.

The "court-packing" plan outraged the President's opponents, who said it was an attempt to avoid the checks and balances of our constitutional system. Even his supporters divided over the plan, and it was never adopted by Congress. Most commentators do, however, think that it had a significant political impact. The Supreme Court soon thereafter began upholding New Deal legislation, dramatically expanding the power and authority of the federal government.

Of particular significance to the abortion issue was the case of *United States v. Carolene Products Co*.[27] This case involved the "Filled Milk Act," which prohibited the shipment of skimmed milk that had been compounded with any fat or oil other than milk fat, so as to resemble milk or cream. The Carolene Products Company was indicted for violating that Act, and the key issue was whether the Act was constitutional.

In finding that the Filled Milk Act was constitutional, the Supreme Court set forth a new way to evaluate legislative enactments. If the legislation interferes only with economic interests or discrimination on the basis of non-suspect classifications, the legislation need only have a "rational basis."[28] If the legislation interferes with commercial speech or discrimination on basis of

suspect classifications like gender or illegitimate birth, the Court will give it intermediate scrutiny."[29] If the legislation interferes with fundamental rights or discriminates on the basis of suspect classifications like race or national origin, it will have to survive "strict scrutiny."[30] This became important later, because the "right to choose" abortion was deemed a fundamental right, thus laws restricting that right were unconstitutional unless they could survive strict scrutiny.

D. THE 1960S

Although the Fourteenth Amendment (unlike the Bill of Rights) applied directly to the states, the actual limitation on state authority was minimal—much less than the restriction on federal power provided in the Bill of Rights. At the time it was ratified, and for almost a century thereafter, there was no direct relationship between the restrictions on state power set forth in the Fourteenth Amendment and the restrictions on federal power set forth in the Bill of Rights. The Fourteenth Amendment was said to have an "independent potency," not based on the Bill of Rights. It required only that states recognize those fundamental rights that were necessary to the very concept of ordered liberty.

Under this test, a judge asked whether he or she could imagine a just legal system that failed to grant citizens certain rights. Using this test, states had to provide fair trials, permit free speech, free thought, and free religion, but they did not have to provide jury trials or attorneys to the defendant in most criminal cases. There was no constitutional right to remain silent. Evidence taken by state authorities pursuant to an unreasonable search or seizure was not excluded from evidence,[31] and of course there was no constitution barrier when a state sought to outlaw abortion.[32] This understanding of the Fourteenth Amendment remained constant for almost a hundred years after its ratification.

In the 1960s, the Supreme Court developed a new way to read the Fourteenth Amendment. Instead of asking whether a state law infringed on some right that was necessary to the very concept of

ordered liberty, the new test asked whether the state law infringed on some right that was considered fundamental by Americans. In other words, the judge no longer speculated about a hypothetical judicial system. Rather, he or she asked whether the infringed upon right was fundamental to the American scheme of justice.

By applying this new test, the Supreme Court reshaped state criminal legal systems. States were now required to provide juries and attorneys for most criminal defendants. The *Miranda* warnings were a direct result of this new test,[33] as was the decision that held all existing state death penalties to be unconstitutional.[34] Additionally, because the federal courts forced civil rights upon sometimes reluctant states, they earned much respect and took on a new role as defenders of individual rights against the power of the states.

The road towards legalization of abortion began with the 1965 case of *Griswold v. Connecticut*.[35] This case involved a state law prohibiting the sale of contraceptives, even to married couples.[36] This law, which was similar to those enacted in other states, reflected the thinking of almost all Jews and Christians in the early 1900s.[37] It was put in place by the Connecticut legislature as a reflection of the will of the populace of that state.

Had the Supreme Court been operating under the older approach to the Fourteenth Amendment, it would have asked whether a just system could exist which denied married couples the right to purchase contraceptives. Under such a test, the Connecticut law would almost certainly have been upheld. After all, most states had existed in this manner for many years, and numerous nations around the world still did. Under the new test, the Court asked whether the right at issue was fundamental to the American scheme of justice. This was thirty-five years after the Anglican Church had endorsed contraception for married couples, and contraception was widely used in America. As such, the Supreme Court concluded that there was an unwritten "right to privacy" that was large enough to encompass the right of married couples to purchase contraceptives. The Court found the right in emanations from the penumbra or shadow of the Bill of Rights.

On January 22, 1973, in the landmark case of *Roe. v. Wade*, the Supreme Court decided that the right of privacy which it had

discovered in the *Griswold* case was broad enough to encompass a right to abortion. The case involved a Texas statute that criminalized abortion, except when the life of the mother was put in danger. The Court held:

> A state criminal abortion statute of the current Texas type, that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.[38]

The Court acknowledged that "[t]he constitution does not explicitly mention any right of privacy," but asserted that "at least the roots of that right" could be found in various provisions, including "the penumbras of the Bill of Rights."[39] The Court held that an unborn child was not a "person,"[40] and so was not protected by the Fourteenth Amendment's right to life.[41] The Court went on to declare abortion not just a right, but a "fundamental" right.[42]

Roe's companion case, *Doe v. Bolton*,[43] invalidated Georgia's statute that allowed abortion where continuation of the pregnancy would endanger the woman's life or health, including mental health, where the fetus would likely be born with a serious defect, or where pregnancy resulted from rape.[44] Since health was defined to include all factors–physical, emotional, psychological, familial and the woman's age, it basically allowed a woman to have an abortion at any time during her pregnancy, for any reason.[45]

Prior to these 1973 cases, laws relating to abortion were almost the exclusive province of state legislatures. Reflecting the popular will, elected representatives almost always protected unborn life, though compromises–-as reflected in the Georgia law at issue in the *Doe* case–-were sometimes made in difficult cases (usually rape, incest, severe birth defect, or a threat to the life of the mother). With these two cases, the Supreme Court not only struck down the Texas statute at issue in *Roe* (which included only a life-of-the-mother exception) and the Georgia statute at issue in *Doe* (which allowed more exceptions), but also effectively struck down all state abortion

laws, regardless of how current or well-established they were.[46]

THE PROBLEMS WITH *ROE V. WADE*

By issuing the decisions in *Roe* and *Doe*, the Supreme Court seems to have been trying to end a raging national debate.[47] With more than thirty years having passed since that decision, it is clear that the case did not accomplish that objective. At least one reason for that failure is that the opinion seems to be driven by a pre-determined outcome. It does not reflect the impartial decision-making that Americans are entitled to expect from their Supreme Court.

Because of the forced interpretation and twisted logic found in *Roe* and *Doe*, abortion law is illogical and inconsistent with other areas of law. When one reviews the inconsistencies, it becomes clear that something is seriously wrong with the abortion jurisprudence that has evolved from *Roe v. Wade*.

A. DECEPTION FROM THE ATTORNEYS

The problem with *Roe v. Wade* began with the lawyers for the plaintiffs.[48] It appears that they were more interested in advancing a cause than in assisting their client. In a 1994 interview with *The New York Times*, Norma McCorvey (Jane Roe's real name) described her meeting with Sarah Weddington, the attorney who argued her case to the Supreme Court:

> "Sarah sat right across the table from me at Columbo's pizza parlor, and I didn't know [then] that she had had an abortion herself," she said. "When I told her then how desperately I needed one, she could have told me where to go for it. But she wouldn't because she needed me to be pregnant for her case. I set Sarah Weddington up on a pedestal like a rose petal. But when it came to my turn, well, Sarah saw these cuts on my wrists, my swollen eyes from crying, the miserable person sitting across from her, and she knew she had a patsy."[49]

According to McCorvey, Weddington encouraged her to say that she was raped and that is how she got pregnant. McCorvey had not been raped, and her lawyers knew it:

> Plain and simple, I was used. I was a nobody to them. They only needed a pregnant woman to use for their case, and that is it. They cared, not about me, but only about legalizing abortion. Even after the case, I was never respected–probably because I was not an ivy-league educated, liberal feminist like they were.

McCorvey went along with the lawyers, but when she later realized what the case had led to, she became concerned. She has converted to the pro-life cause and has sought to have the decision overturned.[50]

The American judicial system is based on an adversarial concept. The idea is that with two parties—each strongly arguing its own position–-the system will be best situated to reach a fair and just decision. Of course, there are obligations on the attorneys not to mislead the court. Lawyers are officers of the court, and they have ethical obligations that seem to have been violated in *Roe v. Wade*. In such a circumstance, the result reached by the court is not the fair and just result that the parties and the public are entitled to expect.

Unfortunately, the deception and lying did not end with the *Roe v. Wade* case. Abortion-industry lobbyist Ron Fitzsimmons has admitted lying "through his teeth" to protect partial-birth abortions.[51] In a candid moment, he admitted that "in the vast majority of cases, the procedure is performed on a healthy mother with a healthy fetus that is twenty weeks or more along.... It is a form of killing. You're ending a life."[52] He, of course, does not say that when he is stumping for the pro-abortion cause.[53]

B. BAD HISTORY

In *Roe v. Wade* the state of Texas argued that life began at conception and that Texas therefore had a compelling interest in protecting that life. Justice Blackmun noted that the Constitution does not define the word "person."[54] He then advanced two interrelated arguments: (1) that there has never been a historical consensus regarding "when life begins;" and (2) that it was not until the mid-nineteenth century that abortion was forbidden by American law.[55] He opined that "throughout the major portion of the 19th century, prevailing legal

abortion practices were far freer than they are today."[56] Since "medicine, philosophy, and theology are unable to arrive at any consensus" as to when a human comes into existence, Justice Blackmun declared that the Court "need not resolve the difficult question of when life begins."[57]

The result of this "non-decision" was that Texas's "theory of life" was not sufficient to override the fundamental right of a woman to have an abortion. In other words, the state could not outlaw abortion based upon its interest in protecting unborn babies, for–based upon Justice Blackmun's reading of history–-its interest was unprovable and certainly not compelling.

Justice Blackmun's recitation of history was, however, seriously flawed. Throughout history, recognition of the unborn as a "person" was largely determined by the biological and medical knowledge of the era. Before the mid-nineteenth century, scientists thought that human life began at "formation," "animation," or "quickening."[58] This developed as the legal standard largely because of a gap in scientific knowledge about human reproduction and embryology. In the nineteenth century, however, the ovum and the true nature of fertilization were finally understood. As people became increasingly aware that life began earlier than quickening, they began to revise their statutes. From the mid-nineteenth century on, virtually all American abortion laws were based on the 1827 discovery of fertilization.[59]

During the mid-nineteenth century during the so-called "Physicians' Crusade," many laws were passed designed to protect the unborn beginning at conception. Most of these laws remained in place for over a hundred years.[60] Justice Blackmun argued that these laws were designed not to protect the unborn but to protect maternal health, but he was clearly wrong.

In 1859, the American Medical Association (AMA) condemned abortion except as necessary to preserve the life of the mother. The laws that came with the Physicians' Crusade reflected the greater medical knowledge of the era and were designed precisely to protect unborn children. Arguments to the contrary–-as set forth by Justice Blackmun–-reflect bad (if not dishonest) historical analysis. They

also mean that the *Roe* decision was based on bad science.

C. BAD SCIENCE

The science of *Roe v. Wade*, like its history, is badly flawed. The decision rests on the theory that human life is not present in the mother from the time of conception.[61] Throughout *Roe* and *Doe*, the Court refers to a pregnant woman as a "mother," but it refers to the baby in the womb as "the developing young" or "potential life." In addressing the argument that the unborn child is a "person" deserving of protection under the Fourteenth Amendment's due-process clause, the Court simply glosses over the scientific evidence of the unborn baby's humanity and writes him or her off as a constitutional non-person.[62]

At the time *Roe* and *Doe* were decided, these scientific questions were at the cutting edge of human knowledge. As it turns out, however, modern scientific findings support the conclusion that human life begins much earlier, with fertilization.[63] Hadley Arkes explained: "The leading textbooks on embryology say [that life begins] when the union of two gametes, a male gamete or spermatozoon and a female gamete or mature ovum...on the medical side there is no dissent on this matter."[64] "The immediate product of fertilization is genetically already a girl or a boy—determined by the kind of sperm that fertilizes the oocyte."[65]

Maureen L. Condic, Assistant Professor of Neurobiology and Anatomy at the University of Utah, explains that from the "earliest stages of development, human embryos clearly function as organisms."[66] They are not "merely collections of human cells.... Embryos are capable of growing, maturing, maintaining a physiologic balance between various organ systems, adapting to changing circumstances, and repairing injury.... Mere groups of human cells do nothing like this under any circumstance."[67] Dr. Dianne N. Irving explains:

> To begin with, scientifically something very radical occurs between the processes of gametogenesis and fertilization -- the change from a simple part of one human being (i.e., a sperm) and a simple part of another human being

(i.e., an oocyte -- usually referred to as an "ovum" or "egg"), which simply possess "human life", to a new, genetically unique, newly existing, individual, whole living human being (a single-cell embryonic human zygote). That is, upon fertilization, parts of human beings have actually been transformed into something very different from what they were before; they have been changed into a single, whole human being. During the process of fertilization, the sperm and the oocyte cease to exist as such, and a new human being is produced.[68]

As one pro-choice commentator had to admit: "Pro-life arguments are now based on scientific evidence and the pro-choice arguments are not. That is a cultural, historical fact."[69] He went on to note the intellectual dishonesty of modern pro-choice advocates:

Nowadays, it is pro-lifers who make the scientific question of when the beginning of life occurs the key one in the abortion controversy, while pro-choicers want to transform the question into a "metaphysical" or "religious" one by distinguishing between mere biological life and "moral life."... Until recently pro-choicers might have cast themselves as defenders of rational science against the forces of ignorance and superstition, but when scientific inquiry started pushing back the moment when significant life (in some sense) begins, they shifted tactics and went elsewhere in search of rhetorical weaponry.[70]

In addition to finding that human life begins earlier than the justices knew when they decided *Roe v. Wade*, modern science has also made it possible for younger and younger babies to survive outside of the womb. In 1973, viability before 28 weeks was considered unusual. The 14th edition of L. Hellman & J. Pritchard, *Williams' Obstetrics* (1971), on which the *Roe* Court relied for its understanding of viability, stated, that "attainment of a fetal weight of 1,000g or a fetal age of approximately 28 weeks' gestation is...widely used as the criterion of viability." Recent advances, however, have made possible increasingly earlier fetal viability: "With the advance of incubators and artificial lungs, it has become possible to sustain premature babies at 20 to 24 weeks of gestational age, and that figure promises to be pushed back even further."[71] It is reasonable to believe that fetal viability in the first trimester of pregnancy may be

possible in the not too distant future.[72] "In fact it is not inconceivable that biomedical technology someday will produce an artificial womb, enabling a fetus to live "outside the mother's womb" from conception until birth, making the viability point conception itself."[73]

Of course, this science may be a bit too complex, even for thinking Americans. There is, however, an easier way to make the scientific point in a way that should be clear to any reasonably well-informed person: The "blob of cells" in the womb has DNA that is distinct from the mother's DNA. The same cannot be said of any other group of cells in the mother's body.[74]

D. BAD LAW

Deception, mangled history, and bad science ended up leading to a terribly misguided law. As Pennsylvania Senator Rick Santorum wrote, *Roe v. Wade* "twisted and tangled the Constitution beyond recognition."[75] In a recent issue of the *Harvard Journal of Law & Public Policy*, Professor Lisa Roy points out that the idea from *Roe v. Wade* that the fetus is not a person does not work in contexts outside of abortion law.[76] Obviously, she is correct.[77] The view of the fetus as not being a child was manufactured to support the abortion cause. "If the fetus is in fact a person... The abortion right cannot coexist. This was the apparent position taken by the Supreme Court in *Roe*, as evidenced by its conclusion that if the fetus is a person, then Roe's case 'collapses.'"[78]

In situations other than abortion, American law recognizes the personhood of unborn children. Professor Roy illustrates this by discussing a spinal operation to control the effects of spina bifida on a 21-week old fetus, still in his mother's womb.[79] Obviously, the mother, the surgeon, the manufacturer of the special instruments, the insurance provider, and numerous other people associated with this type of work view the fetus as being an unborn child, not something less.

Even the legal system, with the sole exception of matters related to abortion, treats unborn children as persons. For instance, because of the unwritten right to privacy, a woman and her doctor have an

absolute right to kill the fetus, with very limited interference from the state.[80] At the same time, as the recent Laci Peterson case illustrates,[81] if someone else kills the fetus, it will likely constitute some form of homicide–-probably manslaughter but perhaps murder.[82] Similarly, in most states, an unborn child at some point in his or her development, is considered a person for purposes of a civil wrongful death lawsuit.[83]

The father has no say in whether the mother exercises her option to abort,[84] but if she gives birth, he can be forced to pay child support. When the mother is a minor, she need not obtain parental consent to have an abortion.[85] A similarly aged child would need all kinds of parental permission to go on a field trip, participate in a controlled study, or be given medication at school.

It is true that an unplanned pregnancy can be an embarrassment, create a severe financial strain, and cause parents to drop out of school. That does not justify, under any normal legal analysis, abortion. "We do not take it as a justification for homicide in other instances if an aged parent, say, may strain the finances or psychological balance of a household."[86] In no situation other than abortion does a individual or group of individuals have an absolute right to kill based upon status alone.

Even when it comes to free speech, abortion is different. Restrictions that would violate the Constitution in any other context have been upheld when applied to anti-abortion demonstrators at abortion clinics. In *Hill v. Colorado*,[87] the Supreme Court upheld a ban on free speech near the entrance to abortion clinics. Justice Scalia wrote a scathing dissent in which he accused the majority of manipulating constitutional doctrine in order to provide further protection for abortions: "What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the 'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law that stand in the way of that highly favored practice."[88] Justice Kennedy also dissented, correctly noting that the decision "contradicts more than a half century of well-established First

Amendment principles."[89]

CONCLUSION: A PLAN OF ACTION

In *Federalist* #78, Alexander Hamilton said that among the three branches of government, the judiciary "will always be the least dangerous to the political rights of the Constitution." However, since the 1960s, the Supreme Court has been the biggest stumbling block in terms of protecting unborn children. Clearly, its composition is crucial to the abortion issue. Federal judges are supposed to be above politics. That is why they are given lifetime tenure. The battle over abortion, however, is no longer a legal one. It is a political battle, and the justices are not above it.[90] As such, pro-life people have to focus on the composition of the Court.

There are nine seats on the Supreme Court, and openings come up only when there is a retirement or a death. When that happens, the vacancy is filled by a Presidential appointment, with the "advice and consent" of the U.S. Senate. Obviously, this means that the abortion stance of the President is crucial.[91] Today, however, the composition of the Senate is equally important.

Advice and consent might seem to be something less than approval. Certainly, it sounds like a lesser standard.[92] Nevertheless, in order to be assured that their nominees are confirmed, Presidents have generally needed to have fifty Senators supporting them.[93] Today, however, a pro-life President may need sixty Senators in order to be assured that his nominees are confirmed.

Judicial nominees are first sent to the Senate Judiciary Committee. Before the nominee is voted upon on the floor of the Senate, there must be a vote to close debate. Under the rules of the Senate, it takes sixty votes to close debate. As such, forty-one Senators can prevent a pro-life nominee from being confirmed, and that is exactly what has happened to several pro-life candidates for lower courts who were nominated by President George W. Bush.[94] A minority of the Senate used the filibuster as a tool, not to prolong the debate–-the true purpose of the filibuster–-but to prevent votes that

would almost certainly have resulted in confirmations.[95]

If the pro-life community is to be ultimately successful, voters need to look at the Presidency, the Senate, and other political positions as well. Even though local and state politicians may have little to do with abortion policy on a day-to-day basis, they are the people who influence party platforms and who move into positions of leadership (often running for other offices later in life).[96]

Political candidates should come to realize that the pro-life position is consistent with the will of most Americans.[97] Were it not, abortion rights would not need to hang on court decisions; they would be put in place by state legislators. Pro-choice activists fight so hard over judicial nominations precisely because they know that if left to the political will of that masses, laws would protect unborn children.

A recent Zogby International poll found that only 13% of Americans believe that abortion should be available without any restriction, and 56% believe that it should never be legal or should be legal only in the case of rape, incest, or threat to the life of the mother.[98] When only 18-to-29 year-old people are asked, the percentage opposing unrestricted abortion raises to 60%.[99] The same poll shows that 49% of Americans describe themselves at pro-life, while only 45% call themselves pro-choice. That reflects a seismic change from ten years ago, when the Gallop poll showed that 56% considered themselves pro-choice and only 33% were pro-life.[100]

It is also worth noting that the 70% of Americans who support parental consent for minors and the 60% who oppose government funding of abortion represent percentages that are much higher than those of self-proclaimed Republicans or conservatives.[101] Taking all of these numbers into consideration, it can be said that "about 60 percent of the public are opposed to about 90 percent of the abortions that are performed each year under the law put in place by *Roe v. Wade.*"[102]

These popular attitudes are beginning to result in legislation that will force the judiciary to reconsider its abortion holdings. On November 5, 2003, President George W. Bush signed into law the Partial-Birth Abortion Ban of 2003.[103] It still faces very serious

constitutional challenges, though it was redrafted to try to avoid the problems that rendered the Nebraska partial-birth ban unconstitutional.[104]

On February 10, 2004, the South Dakota House of Representatives passed HB 1191 which provided:

> The legislature finds that the life of a human being begins when the ovum is fertilized by male sperm....
>
> [T]he guarantee of due process of law under the South Dakota Bill of Rights applies equally to born and unborn human beings and... there is no justification for the taking of a guiltless human life by the state or by any person....
>
> Any treatment, or administration of any drug to a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being is a felony.

Had it been signed into law, this bill would have presented the Supreme Court some unresolved questions: (1) Is the unborn child a human being? and (2) May a state find that an unborn child is a human and therefore extend the protection of the state constitution beyond the confines of the Fourteenth Amendment so as to protect that unborn life? Although it ultimately died in committee, similar legislation is likely to be reconsidered soon in South Dakota and in other states.

Stories in the news have also revealed Americans' deep concern about unborn children. The trial of Scott Peterson of Modesto for the slayings of both his pregnant wife, Laci Peterson, and their unborn son has dominated the news for some time.[105] Similarly, there was a national outcry when it was revealed that a Utah woman, Melissa Ann Rowland, allegedly delayed (for cosmetic reasons) having a Caesarean section that could have saved the life of one of her unborn twins.[106] Both of these cases raised the issue of unborn children as full humans in a manner that no thinking American could miss.

At the end of the day, science, history, and law all point in the same direction. It is up to the pro-life community to keep this issue at the forefront and help make sure that all thinking Americans are well informed. Different arguments and different information may

persuade different people. Emotional, moral, and religious arguments work with some people, but not with everyone. For some, it is best to rely on science and logic. The cause is important enough that it is worth investing all necessary time, even if that means addressing one person at a time.

The pro-life community can and will ultimately win this debate. At some point in the future, people will look back in horror at this era of abortion. At that time, as people now do with the civil rights era, they will ask where various people stood on the great moral issue of the day. Thinking Americans, it seems to me, will want to be able to say that they stood with the truth. If that alone does not persuade people who are on the fence about abortion, let it at least motivate those of us who are trying to bring them over to our side.

NOTES

1. Ann Carey, "Why the 'Culture of Death' Is Winning, *Our Sunday Visitor* (Oct. 5, 2003), at p. 18.

2. When they do exist, as when similar crimes carry significantly different penalties, the system is amended to rectify the problem. In fact, that is one of the reasons that the Federal Sentencing Guidelines were adopted. See Dove Izraeli & Mark S. Schwartz, "What Can We Learn From the U.S. Federal Sentencing Guidelines for Organizational Ethics?," available on the Internet at << http://www.nijenrode.nl/research/eibe.html>>. "The Guidelines were devel-oped by the United States Sentencing Commission, a new governmental body which came into existence in 1984. The Commission was charged with the responsibility for creating uniformity in the sentencing of offenders of federal laws."

3. Hadley Arkes, *Natural Rights and the Right to Choose* (New York: Cambridge Univ. Press, 2002), p.85: "The moral case against abortion is treated frivolously, falsely, if it is treated...."

4. People who support abortion rights may have had an abortion or have been the cause of a pregnancy that led to abortion. Their friends, wives, daughters, and mothers might have had abortions. See Mark Stricherz, "Pro-Life Powerhouse," *Columbia* (June 2004), at p. 15 (perhaps as many as 43% of women under the age of 45 have had an abortion). These people do not

feel that they or their acquaintances are immoral. As such, arguments based on the immorality are fairly easy for them to reject. Frequently, these people think that the whole issue boils down to the sexual freedom of consenting adults, and they reject traditional Christian sexual teaching as being out-of-date or out-of-touch with modern times. See Peter Kreeft, *Three Approaches to Abortion* (San Francisco: Ignatius Press, 2002), pp. 63-66.

5. A good expression of the feeling held by many of these people is attributed to an anonymous Catholic member of the U.S. Senate, reacting to the possibility that pro-choice politicians might be denied communion: "This has got to stop.... We're good people, good Christians." Amy Sullivan, "Kerry & Religion: Can He Reach 'Persuadable' Catholics?," *Commonweal* (June 4, 2004) at pp. 13-14.

6. See Stricherz, supra n4, at pp. 14-15, discussing the need to reach out to people "who don't identify with the pro-life movement."

7. See *Back to the Drawing Board: The Future of the Pro-Life Movement* ed. Teresa Wagner (South Bend IN: St. Augustine's Press, 2003), with its essays discussing the difficulty of winning the political battle over abortion.

8. Aristotle's *Rhetoric*, written 2,400 years ago, explained that there are three important aspects to any persuasive presentation: the *logos*, the *ethos*, and the *pathos*. The *logos* is the logic or reason of the argument. The *ethos* is the character or integrity of the speaker. The *pathos* is the emotional content of the presentation. Too often pro-life advocates focus primarily on the moral or religious aspect of the argument. These appeals to emotion are the *pathos* of the argument, and when listeners reject those appeals to emotion (because, for instance, they reject religious arguments), they may also come to doubt the advocate's integrity or *ethos*. Many people have unfairly questioned President George W. Bush's intelligence. These questions often seem to come when he makes reference to his religious faith.

9. Quoted in Rich Barlow's review of *The Transformation of American Religion: How We Actually Live Our Faith* in *The Boston Globe* (1 Oct. 2003).

10. As I was completing this manuscript (May 2004), the tenured faculty at my law school met to discuss our untenured faculty. The report on one untenured faculty member was that she intended to continue writing on law and religion. A colleague then noted that her previous writing, on abortion law, was not based on religion. A different colleague, who is active in Democrat party politics, replied: "with those people it always comes down to religion, doesn't it?" Even some jurists have argued that questions regarding of the existence of life in the womb and the morality of abortion are

inherently religious and thus should not be part of any court decision, state regulation, or public discussion on the issue. See, e.g., *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Stevens, J., dissenting).

11. As a Catholic myself, I am very grateful for the priests, bishops, and other Catholics who are outspoken on this issue.

12. See Mark Stricherz, "Why George Orwell was Pro-Life," *Crisis* (Jan. 2004), at p. 32.

13. Arkes, supra n3, at pp. 84-85.

14. Stricherz, supra n12, at p. 32.

15. Ibid.

16. The principal argument against establishing a bill of rights was that the new federal government was so limited that there was no reason even to consider such restrictions on the growth of the federal government.

17. The first two proposed amendments, which concerned the number of constituents for each Representative and the compensation of Congressmen, were not ratified. (Amendment 27, ratified in 1992, is similar to one of those original proposals: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.") Articles 3 to 12, however, ratified by three-fourths of the state legislatures, constitute the first ten amendments of the Constitution, known as the Bill of Rights.

18. These amendments apply only to the federal government. The post-Civil War Fourteenth Amendment made some portions applicable to states. The Supreme Court, however, has never agreed that the Fourteenth Amendment incorporates the entire Bill of Rights.

19. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Because the Ninth and Tenth Amendments are not limitations on federal authority, people sometimes refer to the first eight amendments as the true Bill of Rights.

20. See Jarvis, Bybee, Cochran, Rose, & Rychlak, *Gaming Law: Cases and Materials* (Newark NJ: LexisNexis, 2003), p. 357, quoting Nevada's reception statute, Sec. 9021 N.C.L.—a common provision for adopting British Common Law for a new American state.

21. The proper meaning and general understanding of quickening can be found in the *Oxford English Dictionary*: "to give or restore life to; to make

alive; to come into being." This understanding was manifested in common phrases like "the quick and the dead," which showed the proper contrast in meaning.

22. Within a fifteen year period (1860-1875) surrounding the ratification of the Fourteenth Amendment, 16 of the 28 ratifying states toughened their anti-abortion laws. Dates of state legislation to ratify the Fourteenth Amendment can be found online at the House of Representatives web site, http://www.house.gov/Constitution/Amend.html. See also *Roe v. Wade*, 410 U.S. 113, 175-76 (1973) (Rehnquist, J., dissenting).

23. As Justice Rhenquist explained in his dissent to *Roe v. Wade*: "By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion." 410 U.S. at 175-76 (Rehnquist, J., dissenting). From this he concluded that "[t]here apparently was no question concerning the validity of this provision or of any other state statutes when the Fourteenth Amendment was adopted." Ibid. at p. 177. As Rehnquist later pointed out, "By the turn of the [19th] century virtually every state had a law prohibiting or restricting abortion on its books." *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833, 952 (1992) (Rehnquist, J., dissenting).

24. The Ohio and Illinois legislatures, for instance, both toughened their state's anti-abortion laws in 1867, the same year they ratified the Fourteenth Amendment. Florida ratified the Fourteenth Amendment on June 9, 1868. During the same session, it revised its abortion laws to criminalize any attempted abortion at any stage of gestation. Both Vermont and New York passed tough new anti-abortion legislation in the year *following* their ratification of the Fourteenth Amendment, and New York toughened its abortion laws at least twice more within the next few years. See http://home.att.net/~pcbworks/ AbortionWR2.html. Similar events took place in Connecticut (1860), Michigan (1869), Massachusetts (1869), Nevada (1869), Louisiana (1870), Pennsylvania (1870), New Jersey (1872), Minnesota (1873), Nebraska (1873), Kansas (1874), and Arkansas (1875). Some of these states toughened their anti-abortion laws more than once during the period in question. To review the content of these laws see James C. Mohr, *Abortion in America* (New York: Oxford Univ. Press, 1978), Ch. 7.

25. "Unlawful" meant contrary to state law.

26. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), National Industrial Recovery Act of 1934); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), The National Industrial Recovery Act of 1933; *United*

States v. Butler et al (297 U.S. 1, January 6, 1936), Agricultural Adjustment Act. Similarly, the Court overturned the Guffey-Snyder Coal Conservation Act that guaranteed collective bargaining and established price and production controls by local boards. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). In 1936, the Court overturned New York's state minimum wage law. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

27. 304 U.S. 144 (1938).

28. In such case, there is a presumption of constitutionality. The governmental action must have a rational relationship to a legitimate government purpose.

29. In this case, the government action must directly advance substantial interests and clear governmental objectives and be no more extensive than necessary.

30. In this case, the legislation is presumptively unconstitutional. Government action must further a compelling government interest in the least intrusive manner. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

31. It is often forgotten today, but abortion law used to be a criminal law topic.

32. States presumably would have been free to enact abortion-rights legislation. If they did not, however, the Constitution did not require them to do so.

33. *Miranda v. Arizona*, 384 U.S. 486 (1966).

34. *Furman v. Georgia*, 408 U.S. 238 (1972).

35. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

36. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) extended the right to use contraceptives to unmarried persons.

37. The first book of the Bible reports: "So God created man in his own image, in the image of God he created him; male and female he created them. God blessed them and said to them, 'Be fruitful and increase in number; fill the earth and subdue it'" (*Genesis* 1:27-28). Under traditional teaching, when a married husband and wife engaged in sexual relations, they were complying with God's command and creating new life with God's help. A first century Christian writing, says: "You shall not murder. You shall not commit adultery. You shall not seduce boys. You shall not commit fornication. You shall not steal. You shall not practice magic. You shall not use potions. You shall not procure abortion, nor destroy a new-born

child. You shall not covet your neighbor's goods. You shall not perjure yourself" (*The Didache*, 2, 2-3). This was the understanding of every major Christian denomination from the time of Christ until the twentieth century. In the Judeo-Christian tradition upon which the nation was built, contraception and abortion were seen as evil. The two were regularly linked in the same piece of legislation.

In the 1930 Lambeth Conference, the Anglican Church declared that artificial contraception was not sinful "where there was a clearly identified moral obligation to limit or avoid parenthood." Within a matter of years, every major Protestant denomination stopped condemning artificial contraception, and many began to actively promote it. This led to a general shift in American attitudes towards contraception, and that played a central role in the development of abortion law.

A full exploration of the reasons for this shift in thinking by Christian leaders is beyond the scope of this paper. It should, however, be noted that at the same time that Margaret Sanger was developing the Birth Control League (now Planned Parenthood) to promote contraception and abortion, secular/scientific ideas were replacing more traditional religious ideas around the globe, particularly in Nazi Germany.

38. *Roe v. Wade*, 410 U.S. at 164. While the right to abortion could hardly have been considered fundamental to the American scheme of justice as the laws were then in force, the Court may have thought that a pro-abortion trend that had picked up momentum with the *Griswold* case. In 1967, Colorado became the first state to allow abortion for cases of rape, incest, or threat to the mother's life. By 1970, 14 states allowed abortion in certain circumstances, and by 1973 four states permitted abortion virtually without restraint. Carolyn Gerster, "In the Beginning," *National Right to Life News* (Jan. 2003).

Despite these developments, most state legislatures did what they could to protect unborn children. In 1967, reform measures that would permit abortion in limited situations were turned back in Arizona, Georgia, New York, Indiana, North Dakota, New Mexico, Nebraska, and New Jersey. In 1969, such bills failed to get out of committee in Iowa and Minnesota, and they were defeated outright in Nevada and Illinois. In 1970, exceptions to the abortion prohibitions based on therapeutic reasons were defeated in Vermont and Massachusetts. In 1971, bills to repeal the anti-abortion laws were voted down in Montana, New Mexico, Iowa, Minnesota, Maryland, Colorado, Massachusetts, Georgia, Connecticut, Illinois, Maine, Ohio, and North Dakota. In 1972, the Massachusetts House by a vote of 178 to 46 passed a measure that would have bestowed the full legal rights on fetuses from the moment of conception. At the same time, the supreme courts of

South Dakota and Missouri upheld state anti-abortion laws. Also that same year, the only two states to hold referenda on abortion, North Dakota and Michigan, rejected the proposals by 78% and 61%, respectively.

39. 410 U.S. at 152.

40. Justice Blackmun spoke of unborn children as "potential life." Ibid. at 150. He said that while the state has a "compelling interest" in the mother's health from the beginning of her pregnancy, a similar interest in "potential life" does not exist until the third trimester of the pregnancy. Iibd. at 159-61. At this point, Blackmun wrote: "the state, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother." Ibid. at 114.

For the purpose of showing how a state might regulate abortions, Blackmun set forth a trimester scheme. In the first trimester of pregnancy, a state could enact virtually no regulation. In the second trimester, the state could enact some regulation, but only for the purpose of protecting the mother's health. In the third trimester, after viability, a state could "proscribe" abortion, provided it made exceptions to preserve the life and "health" of the woman seeking an abortion. Ibid. at 164-65.

41. One of the two dissenting justices in *Roe*, Byron White, revisited–in another dissent (*Thornburgh v. ACOG*, 476 U.S. 747 (1986))–the question of the "privacy right," protected as a "fundamental liberty" under the Due Process Clause of the Fourteenth Amendment. According to legal precedent, to be a "fundamental liberty" the specific right must either (1) be "implicit in the concept of ordered liberty," without which "neither liberty nor justice would exist," or (2) be "deeply rooted in this Nation's history and tradition." Justice White concluded that under either definition *Roe v. Wade* was illegitimate.

42. A state may not restrict a fundamental right unless it is protecting a "compelling" state interest. If a right is not deemed "fundamental" by the Court, a state may limit that right by demonstrating that its legislative restriction has a "rational basis" in promoting a state interest. It is considerably easier for a state law that infringes on a given right to be upheld using the "rational basis" test than if a "compelling interest" must be shown. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

43. 410 U. S. 179 (1973).

44. This provision essentially did away with the third trimester option of proscription that had been set forth in *Roe*. See supra n40. Chief Justice Warren Burger, in his concurring opinion in *Roe* and *Doe*, wrote: "Plainly,

the Court today rejects any claim that the Constitution requires abortion on demand." 410 U.S. at 208. With the hindsight of more than 30 years, we can now say that he was wrong.

45. One famous abortionist publicly asserted that an abortion request automatically creates a "health" need because the woman would be distraught if her request were denied. See Richard E. Coleson, "Thirty Years of Supreme Court Abortion Decisions," *National Right to Life News* (Jan. 2003), quoting "one famous abortionist."

46. Justice Byron White filed a vehement dissented, in which he was joined by Justice William Rehnquist. White labeled *Roe* an exercise of "raw judicial power" (410 U.S. at 222). He also expressed concern about the Supreme Court's image. The Court was planning to nullify all existing capital punishment laws around the same time it decided *Roe v. Wade*. Taken together, those two rulings would send the message that the Supreme Court valued the life of convicted felons over the lives of innocent babies.

47. For a discussion of the arguments that were taking place at the time *Roe v. Wade* was decided, see Richard Westley, *What a Modern Catholic Believes About the Right to Life* (Chicago: The Thomas More Press, 1973), pp. 27-60.

48. Both of these women now believe that they were taken advantage of, and they are both now active in the pro-life community.

49. Alex Witchel, "At Home With Norma McCorvey: Of Roe, Dreams And Choices," *The New York Times* (July 28, 1994).

50. Susan Finch, "Appeals court takes on abortion case; Ex-plaintiff 'Roe' wants to revisit landmark ruling," *Times-Picayune* (Feb. 21, 2004); "Ten reasons for pro-life hope," editorial, *Our Sunday Visitor* (Oct. 5, 2003). McCorvey never had an abortion; by the time the Supreme Court decided her case, her third child was two years old.

51. Kathryn Jean Lopez, "Pro-life victory over partial-birth abortion looms," *Our Sunday Visitor* (Oct. 5, 2003), at p. 3.

52. Ibid.

53. Pro-choice activists certainly have friends in the press. Former *Time* reporter Nina Burleigh volunteered that she would gladly give President Bill Clinton oral sex for keeping abortion legal. Mike Rosen, "Liberal Media's Notable Quotes," *Denver Rocky Mountain News* (Dec. 29, 2000).

54. He then explained that the word "person," as used in the Constitution, in

nearly all instances, "has application only postnatally" (*Roe*, 410 U.S. at 157). That hardly comes as a surprise, nor it is enlightening as to the matters that were at issue in the case.

55. Ibid. at 133-34.

56. Ibid. at 158.

57. Ibid. at 159. Of course, in establishing the trimester scheme that it did, *Roe* necessarily resolved the question of when life begins, at least legally. See Lisa S. Roy, "*Roe* and the New Frontier," *Harvard J. of Law & Public Policy* 27 (2003): 339, 347n35. Ironically, and sadly in this comparison, corporations are persons for the purpose of the Constitution. Cf. *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985): "It is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment"; and *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497, 558-559 (1844).

58. See supra n21. Justice Blackmun's majority opinion in *Roe v. Wade*, 410 U.S. 113 (1973), acknowledged the quickening standard, but he incorrectly took it as evidence of a longer tradition according to which abortion was only regarded as a crime after viability. Because of this, he used viability as a standard for when a state could regulate abortion. Of course, the concept of viability is so vague that it is "impossible to make heads or tails out of it." Gregg Easterbrook, "Abortion and Brain Waves," *The New Republic* (Jan. 31, 2000), at p. 24.

59. Gerster, supra n38.

60. Ibid.

61. 410 U.S. at 150.

62. In *Steinberg v. Brown*, 321 F. Supp. 741 (W.D. Ohio, 1970) a three judge federal district court upheld an anti-abortion statute, stating that privacy rights "must inevitably fall in conflict with express provisions of the Fifth and Fourteenth Amendments that no person shall be deprived of life without due process of law." Relating the biological facts of fetal development, the court stated that "those decisions which strike down state abortion statutes by equating contraception and abortion pay no attention to the facts of biology. Once new life has commenced," the court wrote, "the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state and duty of safeguarding it." Yet in commenting on the unborn person argument in *Roe*, Justice Blackmun wrote that "the appellee conceded on re-argument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment" (410

U.S. at 157).

63. "A Pro-life Report Card," *Our Sunday Visitor* (Oct. 5, 2003), at p. 18: "Technological advances prove human life begins at fertilization."

64. "The Capacity is There," *Newsweek* (June 9, 2003), at p. 46.

65. Dianne N. Irving, "When Do Human Beings Begin? 'Scientific' Myths and Scientific Facts," *International Journal of Sociology and Social Policy* 19/3-4 (1999): 22-47.

66. Maureen L. Condic, "Life: Defining the Beginning by the End" (May 2003), at p. 50: "The ability to act as an integrated whole is the only function that departs from our bodies at the moment of death, and is therefore the defining characteristic of 'human life.'" Ibid. at p. 54.

67. Ibid. at p. 52. According to yet another expert in the field: "The human embryonic organism formed at fertilization is a whole human being, and therefore it is not just a 'blob' or a 'bunch of cells.' This new human individual also has a mixture of both the mother's and the father's chromosomes, and therefore it is not just a 'piece of the mother's tissues.... Scientifically there is absolutely no question whatsoever that the immediate product of fertilization is a newly existing human being. A human zygote is a human being. It is not a 'potential' or a 'possible' human being. It's an actual human being–with the potential to grow bigger and develop its capacities." Irving, supra note 65. "The human embryo, who is a human being, begins at fertilization—not at implantation." Ibid. See also Bruce Alberts et al., *Molecular Biology of the Cell* (2d ed. 1989), pp. 502-06.

68. Irving, supra n65.

69. See "The Pubic Square," *First Things* (Feb. 1999), pp. 68-80, quoting Stanley Fish. Hadley Arkes further explained that in the current debate "people are not arguing over the science, they're arguing over the social definition of a human being." "The Capacity is There," *Newsweek* (June 9, 2003) at p. 46.

70. See "The Pubic Square," *First Things* (Feb. 1999) at pp. 68-80.

71. Arkes, supra n3, at p. 123. Arkes goes on to suggest that "it would become reasonable to ask a pregnant woman simply to carry the newly conceived child for a few months more, when the woman may not even be 'showing' and the child can be saved." Ibid. Of course, as Arkes also notes, this might quickly expand to asking the mother to carry the child to term, giving it the best chance at life.

72. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 457-58 (1983), O'Connor, J., dissenting; *Colautti v. Franklin*, 439 U.S. 379, 387 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52, 64 (1976). A boy named Joseph Herring was born to Tammy Herring in Heidelberg Germany at twenty-three weeks. That is five weeks earlier than the accepted age of viability in *Roe*. Neonatal specialists have helped Joseph overcome complications, and at last report he is reportedly doing well and developing normally. Pro-life Infonet, "Comments on Miracle Baby" at <<http:// www.prolifeinfo.org/ news082.html>> citing "Born 3 1/2 Months Early, Miracle Child Battles for Life," *Stars and Stripes* (Jan. 25, 2001).

73. James Kidd, "X Marks the Spot," *This Rock* (May/June 2004), at pp. 12, 15. This raises a point first brought to my attention several years ago by a former colleague. He asked pro-choice women whether the idea of an artificial womb would be an acceptable alternative to abortion. He said that the uniform answer was "no." These women did not want a child of theirs to be out somewhere in the world; they wanted it killed. I remain uncertain about the ramifications of this information, but I find it interesting.

74. See *Williams v. State*, 263 Ga. App. 597; 588 S.E.2d 790 (2003); *Commonwealth v. Rocha*, 57 Mass. App. Ct. 550; 784 N.E.2d 651 (2003); *People v. White*, 211 A.D.2d 982; 621 N.Y.S.2d 728; (N.Y. App. Div. 1995).

75. Rick Santorum, "Life First," *Crisis* (Jan. 2004), at p. 61. Important developments since the *Roe* and *Doe* decisions include: *Planned Parenthood v. Fitzpatrick* 401 F. Supp. 554 (E.D. PA. 1975) (Parents, husbands need not consent to abortion); *Planned Parenthood Association of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (law requiring the consent of parents in the case of minors, and husbands in the case of a married woman, ruled unconstitutional); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (outlawing restrictions that "impose an undue burden" on a woman's right to an abortion); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (Nebraska's partial birth abortion law ruled unconstitutional); *Beal v. Doe*, 432 U.S. 438 (1977) (abortion funding under Medicaid); *Maher v. Roe*, 432 U.S. 914 (1977) (equal protection required in funding abortion); *Poelker v. Doe*, 432 U.S. 519 (1977) (public hospitals and abortion); *Bellotti v. Baird II*, 443 U.S. 622 (1979) (minor's right to privacy includes abortion); *Planned Parenthood v. Minnesota*, 448 U.S 901 (1980) (funding of Planned Parenthood for abortion activities); *Harris v. McRae*, 448 U.S. 297 (1980) (Hyde restriction of Medicaid funds); *Williams v. Zbaraz*, 448 U.S. 358 (1980) (equal protection and "therapeutic" abortions); *H.L. v. Matheson*, 450 U.S. 398 (1981) ("Mature" minors and parental notification); *Planned*

Parenthood v. Kempiners, 700 F.2d 1115 (7th Cir. 1981) (informed consent and abortion funding); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (abortion regulations rejected); *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983) (abortions may not be restricted to hospitals); *Bolger v. Young Drug Products Corporation*, 463 U.S. 60 (1983) (contraceptive ads in the mail); *Planned Parenthood v. Heckler*, 712 F.2d 650 (D.C. Cir. 1983) (parental notification and access to contraceptives): *Babbitt v. Planned Parenthood of Central and Northern Arizona*, 479 U.S. 925 (1986) (state funding of organizations that provide abortion or abortion counseling); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (upholding restrictions on public funding, use of public facilities for abortion and abortion counseling); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) (parental notification upheld); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (notification of both parents is not required); *Rust v. Sullivan*, 500 U.S. 173 (1991) (government has no obligation to pay for women to exercise their abortion rights); *Bray v. Alexandria Women's Clinic*, 506 U.S. 263 (1993) (federal civil rights laws do not provide class protection to women seeking abortion); *Madsen v. Women's Health Center*, 512 U.S. 753 (1994) (buffer zones around abortion clinics do not infringe on free speech rights); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997) (upholding fixed protest-free buffer zones around abortion clinics); *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding protest-free floating "bubble zones" around abortion clinics).

In 1993, President Bill Clinton signed five executive orders allowing fetal tissue research and harvesting, RU486 research, abortion counseling in federally funded family planning clinics, and abortion services in U.S. military hospitals. The following year, President Clinton signed into law the Freedom of Access to Clinics Entrance Act (FACE), which prohibited pro-lifer protesters from demonstrating near the entrance of an abortion facility.

76. Roy, supra n57.

77. The fundamental holding of *Roe v. Wade* was reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). At issue in the case were several provisions of the Pennsylvania Abortion Control Act which required that a woman provide informed consent prior to having an abortion and that she be provided with information at least 24 hours prior to the procedure. In the case of a minor, the Act provided that she must obtain a parent's consent, but she could bypass that requirement before a judge if consent could not be obtained. The Act further required a married woman to sign a statement indicating that she had notified her husband. Each of these provisions contained an exemption for situations deemed to be medical emergencies under the Act. The Act also imposed

certain reporting requirements for abortion clinics.

78. Roy, supra n57, at 343.

79. Ibid. at 340-41.

80. "Take partial-birth abortion: If the abortionist performing the procedure pulls the baby out another two inches before killing him, the abortionist can be legally prosecuted for murder." Kidd, supra n73, at 12, 13.

81. Because of California's fetal homicide law, adopted in 1970, "defendant Scott Peterson of Modesto has been charged with the slayings of both his pregnant wife, Laci Peterson, and their unborn son." Joyce Howard Price, "States aim at fetal homicide; Legislatures move to protect unborn victims," *The Washington Times* (Feb. 16, 2004).

82. See ibid. (iIn Arkansas, killing the fetus after 12 weeks or greater gestation is murder); "Defining the Unborn," *National Catholic Register* (April 11-17, 2004) at p. 20 (reporting on an unborn victims of violence bill passed by the Kansas House of Representatives). Unborn children are also usually considered persons when it comes to inheritance laws. See 1 W. Blackstone, *Commentaries* *130.

Some mothers have faced criminal charges for exposing their unborn children to illegal drugs or other dangers. See, e.g., Rick Brundrett, "Mother's conviction upheld: Justices rule Regina McKnight is guilty of homicide by using cocaine that killed her fetus," *TheState.com* (South Carolina's home page), January 28, 2003. The great irony is that the mother could turn around and have a abortion, during which time the fetus would be considered a non-person.

83. Michael Slezak, "A Quick Fetus is a Person, Mississippi Court Rules," *Corporate Legal Times* (Dec. 2003), (discussing a Mississippi Supreme Court decision that moved the time of "personhood" from viability to the earlier stage of quickening.

84. *Planned Parenthood v. Fitzpatrick* 401 F. Supp. 554 (E.D. PA. 1975) (Parents, husbands need not consent to abortion).

85. *Planned Parenthood Association of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (law requiring the consent of parents in the case of minors, and husbands in the case of a married woman, ruled unconstitutional)

86. Arkes, supra n3, at p. 84.

87. *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding protest-free floating

"bubble zones" around abortion clinics); *Madsen v. Women's Health Center*, 512 U.S. 753 (1994) (buffer zones around abortion clinics do not infringe on free speech rights); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997) (upholding fixed protest-free buffer zones around abortion clinics)

88. 503 U.S. at 741. In 2003, the Court ruled in *Scheidler v. National Organization for Women* that anti-abortion protesters could not be punished under the Hobbs Act or under the Racketeer Influenced and Corrupt Organizations Act (RICO), but the decision was decided on statutory (not First Amendment) grounds. Frighteningly, NOW had convinced a federal trial judge and a three-member appellate panel that Operation-Rescue style sit-ins and other protests were extortion and therefore constituted "racketeering" under RICO.

89. 503 U.S. at 765. Recently, the San Francisco Board of Supervisors voted to curtail the free-speech rights of pro-life protesters even further. The rule had been that before the police could cite demonstrators for harassment, women seeking an abortion had to inform protesters to cease their expression; alternatively, women had to instruct them that they want to be left alone. Under the new law, the onus is on the protesters: they must first get the consent of women seeking an abortion before exercising their free-speech rights. See Maria Kennedy, "Are We Such A Threat? San Francisco Restricts Pro-Life Activism," *San Francisco Faith* (Nov. 2002), on the Internet at <<http://www.sffaith.com/ed/articles/2003/1103mk.htm>>. Reporting on this incident, the Catholic League for Political and Civil Rights said: "This is a textbook case of how extremists operate in the U.S. If they can't defeat their ideological adversaries in the court of public opinion, they reach for censorship. The idea that protesters must first obtain permission from those whom they seek to persuade is preposterous. That this is happening in San Francisco–home of violent pacifists–makes the story even more ironic. Our response was to call the ACLU asking what they were going to do about it. After all, they are the champions of free speech for everyone from Nazis to child pornographers. But guess what? The ACLU has no interest in challenging this gag rule. That's because abortion rights mean infinitely more to the free speech crusaders than anything else." "Censoring Prolife Speech in San Francisco," *Catalyst* (Oct. 2003).

90. "These days, if you announce that the Supreme Court is doing politics rather than law you will provoke more yawns than protests." Smith, supra n77, at p. 17; see the text at n88, supra (Justice Scalia's dissent). It is worth noting that Justice White expressed concern about the Supreme Court's image in 1973. The Court was planning to nullify all existing capital

punishment laws around the same time it decided *Roe v. Wade*. Taken together, those two rulings would send the message that the Supreme Court seemed to prefer killing the innocent rather than the guilty. Even more clear is the warning in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 861-69 (1992) that any decision to override *Roe v. Wade* would be viewed as a surrender to political pressure and would undermine the legitimacy of the Court. See also Smith, supra n77, at p. 18 ("*Casey* was manifestly a compromise–a legal compromise and, for at least some justices, a moral compromise.")

91. Presidents usually try to find nominees who will reflect their general view of the Constitution (and all other things legal). Customarily, however, nominees are not expected to answer specific questions about issues that might come before the Court. One night, after a long poker game, I asked Justice Scalia whether he had been asked about his position on abortion before he was nominated. He replied that he had not. Recently, however, there seems to be many blatant promises, especially from pro-choice politicians, that they will nominate only those judicial candidates who share their views on abortion.

92. The "advice and consent" power has historically been exercised in a deferential way–Presidents have traditionally seen their nominees get confirmed. As others have written, Alexander Hamilton would roll in his grave to learn that the President's power to nominate judges (which Hamilton embedded in the Constitution) is no longer treated with Senatorial deference.

93. Ties are broken by the Vice President, so it has traditionally been unnecessary to have more than fifty Senators supporting the President.

94. Three of the first were Miguel Estrada (nominated to the U.S. Court of Appeals for the District of Columbia), Priscilla Owen (nominated to the 5th U.S. Circuit Court of Appeals), and Alabama Attorney General Bill Pryor (nominated to the U.S. 11th Circuit Court of Appeals). Pryor (who was quite open about his pro-life position) was seated on the court with a recess appointment. The other two eventually withdrew their candidacies.

95. When someone mentions "filibuster," the image that immediately comes to mind is that of Jimmy Stewart arguing to the point of collapse in the motion picture *Mr. Smith Goes to Washington*. In the film, Stewart ("Mr. Smith") continues talking in order to keep the debate going. If he stops, even just to rest, debate will end and the Senate will vote on the matter that he wants to delay. The key point, for him, is not preventing the vote, which he knows will ultimately take place, but to prolong the debate until he can

get new information to the other Senators. Unfortunately, that is not how Senate filibusters work today. The filibuster is a Senate procedural rule (Senate Rule XXII). The idea behind it is that if a significant minority of the Senate thinks that debate should continue, it will not be cut off by an early vote; debate is only ended when 60 or more Senators agree that it is time to vote. Thus, as few as 41 senators can keep an issue from "coming to the floor."

96. The pro-life community has to support pro-life candidates. If that means that they are charged with being one-issue voters, so be it. Some issues are that important. Moreover, it will be a rare case when a pro-life candidate offers nothing more to the voter than a pro-life position. It is important to note, however, that party affiliation should not be taken as a substitute for a candidate's position on abortion. In recent years, the Republican Party has been the most visible pro-life party in the United States. The Democrat Party has generally been the pro-abortion rights party. There have, however, been candidates in both parties who depart from the party platform on this issue. Pro-life Democrats should be encouraged, and the pro-life community should try to bring that party into the fold. Conversely, pro-life voters should be prepared to abandon Republicans who take a pro-abortion position. This is true, regardless of whether it means voting for a third-party candidate who has little chance of winning or a Democrat candidate who also holds pro-abortion views. Unless pro-abortion Republicans realize that they will lose significant support if they abandon the pro-life position, the party could shift on this issue. The pro-life community cannot afford to let that happen. Howard Phillips, chairman of the Conservative Caucus, substantially agrees. "Clearly," Phillips writes in *Time for Constitutional Fidelity: The Constitution Party*, "the pro-life movement needs to switch from a strategy of partisan loyalty to one of constitutional fidelity.... *If Republicans are confronted with electoral defeat in close elections, they may* decide to act against abortion—or to be replaced by candidates who will, who will make and act on constitutional pro-life commitments." (emphasis in original.)

97. "The election of 2002 was very nearly a referendum on abortion–two-thirds of the new members of the Senate and the House of Representatives hold pro-live views." Cathleen A. Cleaver, "Want Peace? End Abortion," U.S. Conference of Catholic Bishops.

98. Quoted in "USCCB Official Says: Pro-Abort March Out of Step with America," *The Wanderer* (May 6, 2004).

99. Ibid.

100. Ibid.

101. Richard John Neuhaus, "While We're At It," *First Things* (May 2004), at p. 73.

102. Arkes, supra n3 at p. 86. Most of the thinking Americans about whom I have been writing are, however, willing to make certain exceptions to a general prohibition against abortion. This is very controversial within the pro-life movement. The "no exception" approach to a ban on abortion is more logically consistent than the alternative, but political matters are not always decided on logic alone. Abortion is a very emotional issue. If agreement to a general prohibition against abortion hinges upon making a political compromise to accept some abortions (to save the life of the mother, in the case of rape, etc.), that should be viewed as an incremental advancement, not an acceptable final resolution. Once the general prohibition is in place, more people may see the logical inconsistency of this position develop greater respect for all human life. See also Mattei Radu, "Chastity & the Prolife Movement," *New Oxford Review* (May 2004), at p. 34.

103. President Bush has said the country is not ready to overturn *Roe vs. Wade* and that he will work to pass legislation both sides can agree on such as abstinence education, parental notification, increased adoption, and a ban on partial birth abortion.

104. Rick Santorum, supra n75, at p. 61.

105. See Price, supra n81.

106. Although she was charged with homicide, she ultimately pleaded guilty to child endangerment. "C-Section Mom Makes Plea Deal," *Foxnews.com* (April 07, 2004): prosecutors dropped the murder charge based on her "mental health history."