Two Approaches for Fighting *Roe v. Wade*

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ABSTRACT: This essay evaluates two strategies for fighting Roe v. Wade. The author supports the notion of continuing to press the argument that Roe was wrong to recognize a fundamental right to an abortion. The alternative, which he does not support, is to argue that the Constitution presently recognizes the right to life of the pre-born child.

EDITOR'S NOTE: *This essay was supposed to appear in UFL's 2005 volume, Life and Learning XV, but by mistake the editor inadvertently left it out and would like to apologize for this error. He thanks the author for graciously allowing this essay to appear in the present volume.*

PRENOTE: What follows is my commentary[1] on the presentations by Teresa Collett[2] and Charles Lugosi[3] at the 2005 Conference. While this volume does not contain the text of their conference presentations, their arguments are clearly presented here. All direct quotations from their addresses refer to the versions available to me at the time. A published version of Professor Collett's argument is now available.[4] Professor Lugosi's full text appears in this volume .[5]

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[1] This paper is annotated and contains minor changes to my actual talk.

[2] "What *Roe v. Wade* Should Have Said," Teresa S. Collett, Professor of Law, University of St. Thomas School of Law.

[3] "Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence," Charles Lugosi, Professor of Law, St. Thomas University School of Law.

[4] Teresa Stanton Collett (dissenting), in *What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Legal Decision*, ed. Jack M. Balkin (New York: New York Univ. Press, 2005), pp. 187-95.

[5] Charles Lugosi, "Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence," 4 *Georgetown Journal of Law & Public Policy* (2006).

IT IS A PLEASURE to be asked to comment on the papers by Professor Teresa Collett and Professor Charles Lugosi. I enjoyed the opportunity to read Teresa's hypothetical dissenting opinion in *Roe v. Wade* and the excerpts from Charles's dissertation. While I disagree with some of the positions they have articulated, this disagreement should be viewed as a debate within a close family—a family united in the cause to restore legal protection to pre-born life.

I begin by applauding them for condemning the right to an abortion, which they both accurately describe as giving a pregnant woman the legal license to kill her unborn children for any or no reason. Teresa characterizes abortion as an act of oppressing the weak and vulnerable that calls for justice. Charles argues that placing pre-born human life in a "state of 'separate and unequal' is immoral, contrary to the inherent dignity of every human being, and violates the spirit of the Declaration of Independence, which declares that people are 'created' equal, not merely 'born' equal."

The source of this license to kill is, of course, the infamous *Roe* decision.[6] Teresa and Charles both criticize *Roe*, but their approaches are significantly different. Teresa focuses on the extent to which a right to abort is recognized by the Constitution. She concludes that the Constitution, properly viewed, contains no fundamental right to abort. Charles focuses on the right to life of the pre-born child. He concludes that the pre-born child has an inalienable right to life that the government is bound to protect.

Why is this distinction significant? Because the approach one takes has critical implications for the freedom of states to legislate concerning a woman's ability legally to abort. If Teresa's criticism of *Roe* had been adopted, most state restrictions on abortion would have been upheld, but nothing would compel a state to limit abortion in the first place. A state might decide to leave the abortion decision totally up to the woman. If,

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[6] *Roe v. Wade*, 410 U.S. 113 (1973). While the 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), significantly modified *Roe*, its "essential holding" was unaffected, i.e., a woman's right to obtain an abortion before fetal viability without undue State interference and her right to obtain as well an abortion post-viability, despite State prohibition, if the pregnancy endangers her life or health. Ibid. at 846.

on the other hand, Charles's criticism of *Roe* is adopted, states would not have the freedom to enact liberal abortion laws. Such laws would violate the pre-born child's right to life.

Teresa's paper is styled as a hypothetical dissent to the *Roe* decision. Because of her assigned role as a judge writing an opinion, Teresa naturally focused on the precise question presented to the *Roe* Court—the claim that the Texas law violated a right to abortion embodied in several provisions of the Constitution. Teresa's dissent refutes the argument that the Fourteenth Amendment's Due Process and Equal Protection Clauses guarantee women a right to abort. Teresa is eloquent in demonstrating the perniciousness of the view "that liberal access to abortion is necessary for the liberty and equality of women." She stresses that the early feminists, in opposing abortion, "demanded equality as full women, not as chemically or surgically altered surrogates of men."

Teresa recognizes the limited impact of her approach. If her argument is accepted, the Texas statute limiting abortion would survive the constitutional challenge, but no progress would be made toward a more dramatic and wide-ranging goal—a theory for invalidating the laws of states that adopt more liberal abortion laws. Texas had presented such a theory—that unborn children themselves have constitutional rights because of the protection given to "persons" by the 14th Amendment. Teresa expresses the inclination to agree with this argument, but concludes that the issue is not properly before the Court in the *Roe* case.

Charles was not constrained by the assigned role as a judge in an actual case. Thus, his paper ranges more broadly. As previously stated, he emphasizes the rights of the pre-born child. He writes eloquently of the "revolutionary ideas expressed in the Declaration of Independence": the Creator is the source of an inalienable right to life from the moment of creation and it is the "sacred trust of governments to safeguard" this right. The promise of the Declaration will be fulfilled only when the unborn have a recognized constitutional right to life. I fully agree with this assertion. The key question, though, is whether such a constitutional right already exists or whether the Constitution needs to be changed explicitly to recognize it. On this point, I disagree with Charles, and perhaps with Teresa as well.

Charles asserts that the Constitution already recognizes a right to life for the pre-born. He makes two basic arguments. First, that the Declaration of Independence, which speaks of an inalienable, Creator-endowed right to life, either has independent force as Constitutional law or was formally incorporated into the Constitution via the 9th Amendment. Second, that the word "person" in the Fourteenth Amendment "is broad enough to encompass all living human beings... born and unborn." I have difficulty accepting either of these arguments.

As to the Declaration of Independence, I believe that the legal sanction given in the Constitution to slavery[7] belies the contention that the Declaration was intended to have the force of law. Abraham Lincoln had as high regard for the Declaration as any figure in our national life, but even he acknowledged that its moral sentiments were aspirational. They did not have the force of law. This explains his position that slavery then existing in the Southern states was constitutionally protected. Also, if the Declaration itself (or via the 9th Amendment) is sufficient to outlaw slavery by its recognition of liberty as an inalienable right, why was it thought to be necessary to adopt the 13th Amendment abolishing slavery?

As to the meaning of "person" in the 14th Amendment, this week I read through the Amendment as though I were reading it for the first time. It is plain that its drafters were giving no thought whatever to the issue of the personhood of the pre-born. The entire historical and linguistic context of the Amendment irrefutably shows that the focus was on the position of the newly freed slaves. Section 2 on apportionment clearly is intended to overrule the provision in the original Constitution that counted slaves as three-fifths of a person. Section 3, a restriction on office-holding, and Section 4, dealing with public debts (and claims "for the loss and emancipation" of slaves), both refer expressly to "insurrection or rebellion" against the United States, a clear allusion to the recently concluded Civil War.

My approach to reading the 14th Amendment is reminiscent of Justice Scalia's view of constitutional interpretation. Scalia, of course,

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[7] U.S. Constitution, Art. I, § 2 (apportionment); Art. I, § 9 (slave trade); Art. IV, § 2 (fugitive slaves).

is an originalist. He believes in giving the text of the Constitution "the meaning it bore when it was adopted by the people."[8] Some might initially wonder why a pro-life advocate such as myself could possibly support such a narrow approach to constitutional interpretation. After all, our opponents in the battle over abortion certainly have not limited themselves in this way. *Roe* itself is a textbook example of a non-originalist perspective. Moreover, stretching the word "person" to include the pre-born is not nearly as drastic as the contortions necessary for the *Roe* Court to find an abortion license in the Constitution.[9] Isn't the goal of protecting pre-born life important enough to use any weapon at our disposal?

These points deserve serious consideration, but in the end I am not convinced and stick to an originalist approach. Why? First, as stated by Edward Whelan, I believe that an important principle "of American political philosophy is at stake."[10] Anytime that the Supreme Court recognizes constitutional rights that the American people themselves have not enshrined in the Constitution, the Court to that extent abrogates the authority of the people to govern themselves.[11] Teresa and Charles both criticize the *Roe* Court for doing this very thing by recognizing a right to abortion. Teresa in her dissent states that "a republic by its very nature is to be governed by the elected representatives of the people, not the unelected members of [the Supreme] Court." Charles argues that a 1970 prophecy of Justice Black has been proven true by the *Roe* decision:

When this Court assumes for itself the power to declare any law—state or

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[8] Justice Antonin Scalia, Remarks at the Woodrow Wilson International Center for Scholars: Constitutional Interpretation the Old Fashioned Way (March 14, 2005).

[9] See Michael Stokes Paulsen (dissenting), in *What Roe v. Wade Should Have Said*, ed. Jack M. Balkin (2005), pp. 196ff..

[10] Edward Whelan, "Supreme Confusion," *National Review Online* (April 13, 2005).

[11] See *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 787 (1986) (White, J., dissenting).

federal—unconstitutional because it offends the majority's own views of what is fundamental and decent in our society, our Nation ceases to be governed according to the "law of the land" and instead becomes one governed ultimately by the "law of the judges."[12]

If judicial restraint is an important principle, it must be honored regardless of the issue in dispute. I cannot in good conscience criticize *Roe* for judicial activism and then advocate that very same activism when it would work to my advantage. As previously indicated, I recognize that Charles (and perhaps Teresa) believe that recognizing an existing constitutional right to life for the pre-born would not constitute inappropriate judicial activism because the "plain meaning" of the word "person" in the 14th Amendment encompasses the unborn. But surely the matter is not that clear-cut. As I have argued, to me the "plain meaning" of the Amendment relates to the status of the freedmen.

Fidelity to judicial restraint is also important because abortion is not the only controversial issue that our society faces. If one advocates judicial activism on abortion, how does one criticize it in other areas? Charles, for example, criticizes the so-called mystery passage in the *Casey* decision: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion by the State."[13] We laugh, and shudder, at the open-endedness of this language, under which a judge so-inclined could find virtually any human conduct to be a constitutional right free from limitation by the state. But Charles endorses the approach of the late Professor Charles L. Black, Jr., who argued that the Declaration of Independence should be viewed as constitutional law.

Out of curiosity, I looked at Professor Black's book *A New Birth of Freedom*. I was particularly interested to see what specific interpretations Professor Black would give to the Declaration's inalienable rights of "life, liberty, and the pursuit of happiness."

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[12] In re *Winship*, 397 U.S. 358, 384 (1970) (Black, J., dissenting).

[13] 505 U.S. at 851.

Interestingly, and shockingly, I could not find a single reference to the abortion issue. But I did find a fairly extensive discussion of Black's view of the meaning of "pursuit of happiness":

> The possession of a decent material basis for life is an indispensable condition, for almost all people at all times, to the pursuit of happiness. The lack of this basis—the lack we call "poverty"—is overwhelmingly, in the whole human world, the commonest, the grimmest, the stubbornest obstacle that we know to the pursuit of happiness. I have suggested that poverty may be the leading cause of death; it is pretty certain that it is the leading cause, at least among material causes, of despair in life.[14]

So, would Black then have judges enforce a constitutional right not to be poor? I do not know how Charles would feel about this particular issue. I mention it only to point out the risks inherent in staking out a position on any one issue dependent upon judicial activism. Chickens have a well-known tendency to come home to roost.

For those of us who seek constitutional protection for the unborn, the more prudent course is to seek an explicit constitutional amendment. This approach, while more arduous than trying to put five justices on the Court, has the added advantage of requiring an extended democratic process to accomplish the task. Teresa in her dissent argues that *Roe* preempted "political dialogue in this country surrounding the practice of abortion." And Charles argues that *Roe*, "[b]y deviating from the rule of law, ...created...passion, civil disobedience, and division in society." Will these problems disappear if five justices are convinced to read the existing Constitution in a manner more supportive of the pro-life perspective on abortion? Wouldn't societal peace be infinitely more likely if constitutional protection for the pre-born were provided instead by a constitutional amendment? Opponents would no doubt be very disappointed, but they could hardly complain about the legitimacy of the process.

In conclusion, I will restate my three main points. First, *Roe* was wrong to recognize a fundamental right to an abortion. The pro-life

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[14] Charles L. Black, Jr., *A New Birth of Freedom: Human Rights, Named and Unnamed* (New York NY: Grosset/Putnam, 1997), p. 133.

movement should continue to strive to have *Roe* overturned. Second, while the Declaration of Independence does recognize a right to life for the pre-born, the Constitution at present does not. Third, the pro-life movement should continue to advocate a constitutional amendment to remedy this deficiency.