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ADVANCING THE CULTURE OF LIFE THROUGH FAITHFUL CITIZENSHIP

TERESA STANTON COLLETT*

One of the fundamental questions that people of faith confront is how to describe our condition. Are we Catholics who are citizens of America, or are we Americans who are members of the Catholic Church? While this may seem to be mere semantics, the ordering of the question contains a subtle, but important, revelation of priorities. Both formulations presume the compatibility of religious and national identity. The first question assumes our essential identity arises from our relationship with Christ through His Church, while the second assumes our foremost loyalty lies with our nation. The effect of this ordering on the actual political positions of any individual is unclear, and the legitimacy of public assumptions

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1. This is due in part to the individualistic theology embraced by many Americans. "Amerians do, however, take a very independent approach to religion. Their faith must make sense to them, and it must reflect the values of freedom that they assume in their daily social and political lives." GEORGE GALLUP, JR. & JIM CASTELLI, THE PEOPLE'S RELIGION: AMERICAN FAITH IN THE 90'S 90 (MacMillan Publishing Company 1989). While religious affiliation in the contemporary United States is largely voluntary, affiliation with any particular religious community does not equal personal acceptance of any particular tenet or teaching of that community. The United States Supreme Court, recognizing this difficulty, commented:

   The church's jurisdiction [over members] exists as a result of the mutual agreement between that body and its member. "All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it." That relationship may be severed freely by a member's positive act at any time. Hadnot v. Shaw, 826 P.2d 978, 987 (Okla. 1992) (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1872)). Cf. Menora v. Illinois High Sch. Ass'n, 527 F. Supp. 632, 636 (N.D. Ill. 1981) ("Membership or affiliation [with the American Jewish Congress] is not equivalent to agreement with the positions the organization's governing body may choose to take.").

   This is true, in part, because of the American emphasis on the supremacy of individual conscience. The danger of over-extending this view of human conscience is described by Pope John Paul II:

   The individual conscience is accorded the status of a supreme tribunal of moral judgment which hands down categorical and infallible decisions about good and evil. To the affirmation that one has a duty to follow one's conscience is unduly added the affirmation that one's moral judgment is true merely by the fact that it has its origin in the conscience. But in this way the inescapable claims of truth disappear, yielding their place to a criterion of sincerity, authenticity and "being at peace with oneself," so much so that some have come to adopt a radically subjectivistic conception of moral judgment.

   Pope John Paul II, The Splendor of Truth (Veritatis Splendor) § 48-49 (August 8, 1993), available
based upon that ordering is deeply contested. Nonetheless, it is clear that the prioritizing of religious and political identity will influence a person’s process of decision making and ultimately his or her decisions. This article is addressed to those who understand human nature in a way that is consistent with the teachings of the Catholic faith and give primacy to that understanding over the ideas embedded in much of contemporary American political culture.

This article provides a brief summary of the principles that should guide Catholics in their political decision making and illustrates the application of those principles to our obligation to build a culture of life within a civilization of love. The first section of this article discusses human nature and the obligation to do good and avoid evil. The concepts of freedom, truth, good and evil are defined and their connections briefly discussed. Section two of the article introduces Catholic political theory regarding the citizen’s right and duty to participate in democracy and the limited role of the state in advancing the good of the human person and the

at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jpii_enc_06081993_veritatis-splendoren.html (last visited June 5, 2008). It is compounded by the absence of any concept of magisterial authority in most religious sects, and the weak understanding of and adherence to the teachings on the magisterial authority by members of sects having such a doctrine. For example, the teachings of the Roman Catholic Church contain the concept of magisterial authority. The law of God entrusted to the Church is taught to the faithful as the way of life and truth. The faithful therefore have the right to be instructed in the divine saving precepts that purify judgment and, with grace, heal wounded human reason. They have the duty of observing the constitutions and decrees conveyed by the legitimate authority of the Church. Even if they concern disciplinary matters, these determinations call for docility in charity.


2. Consider the debate surrounding the presidential candidacy of John F. Kennedy, which led him to address his faith in a public speech:

. . . I am not the Catholic candidate for President. I am the Democratic Party’s candidate for President who happens also to be a Catholic. I do not speak for my church on public matters—and the church does not speak for me. Whatever issue may come before me as President—on birth control, divorce, censorship, gambling or any other subject—I will make my decision in accordance with these views, in accordance with what my conscience tells me to be the national interest, and without regard to outside religious pressures or dictates. And no power or threat of punishment could cause me to decide otherwise.

human community. Section Three provides a sketch of American constitutional law regarding life issues. Section Four disputes the claim advanced by some Catholics that a candidate’s views on abortion is irrelevant because ordinary citizens can not influence an issue that the courts have declared to be a matter of constitutional law. The article concludes with an examination of the potential impact of faithful citizens in building a culture of life through involvement in national and state politics.

I. HUMAN NATURE AND THE OBLIGATION TO DO GOOD AND AVOID EVIL

Scripture teaches that the human person is made in the image of God and for communion with God and other persons. Because this is our nature, the primary relationship in every person’s life is his or her relationship with God. This is true, whether the person acknowledges God and willingly participates in relationship with him, or denies God and rejects his friendship. The capacity to accept or reject God’s friendship is an integral part of our created nature, evidencing God’s desire that we come to him freely as children, and not as slaves. The eternal drama of


I think it’s possible in the next term of the president that they will directly or indirectly confront the issue of abortion, but they may not,” Casey said. “But I’m certain that they will confront the issues - what are we going to do about the war, what about a $10 trillion debt, what about health care, the recession?


7. “All who are led by the Spirit of God are sons of God. You did not receive a spirit of slavery leading you back into fear, but a spirit of adoption through which we cry out, ‘Abba!’ [that is, ‘Father’]. The Spirit himself gives witness with our spirit that we are children of God. But if we are children, we are heirs as well: heirs of God, heirs with Christ, if only we suffer with him so as to be glorified with him.” Romans 8:14-17; see also Galatians 4:1-7 (stating that followers of
human history is defined by our individual and collective decisions to draw near to God and thus fulfill our human nature or withdraw from God, often in an attempt to define our own destiny. By choosing to draw near to God we are following the basic moral precept, “do good and avoid evil.”

This precept, however, is a contested norm in contemporary society, because of an unwillingness to acknowledge that objective standards of good and evil exist. Few people would embrace the idea that a person should “do evil and avoid good,” but many argue that only the individual can determine what is good and what is evil. This is an ancient error as evidenced by the conversation between Eve and the serpent in the Garden of Eden. “[Y]ou will be like gods who know what is good and what is bad.”

Some secularist philosophies go beyond this to argue, “you will be like gods who decide what is good and what is bad.” Absent objective standards for good and evil, decisions have value only to the degree that they represent authentic expressions of the person’s will.

Three justices of the United States Supreme Court expressed this understanding of human nature in Planned Parenthood v. Casey. “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 of the State.” Thus, the person comes into being only through the processes of choosing, and freedom becomes the primary object of public morality.

This is a distorted understanding of public morality. Freedom is valuable, but its value does not lie in the “freedom to make any choice.” It lies in the freedom to make good choices; to fully appropriate into one’s being the value of goodness and to participate in the creation of future possibilities of goodness. “The more one does what is good, the freer one

God’s law are His sons and heirs); John 1:12-13

10. Genesis 3:5.
12. When nothing beyond the individual is recognized as definitive, the ultimate criterion of judgment becomes the self and the satisfaction of the individual’s immediate wishes. The objectivity and perspective, which can only come through recognition of the essential transcendent dimension of the human person, can be lost. Pope Benedict XVI, Address to Catholic Educators (April 17, 2008), http://www.zenit.org/rssenglish-22328 (last visited June 5, 2008).
14. Id. at 851.
15. “Only in freedom can man direct himself toward goodness. Our contemporaries make much of this freedom and pursue it eagerly; and rightly to be sure. Often however they foster it perversely as a license for doing whatever pleases them, even if it is evil.” Second Vatican Council, supra note 7, at § 17.
becomes. There is no true freedom except in the service of what is good and just. The choice to disobey and do evil is an abuse of freedom and leads to ‘the slavery of sin.’”¹⁶ Freedom, then, must be directed to the good, or it degenerates into license which harms both the person and the community.¹⁷

But if freedom must be directed to the good, how do we know what is good and what is evil? Good and evil are not subjective constructs that merely reflect the desires or appetites of the individual.¹⁸ The good is that which leads to human flourishing; evil is that which diminishes human flourishing. In coming to know God through Jesus Christ, the Holy Spirit, the Scriptures and the traditions of the faith, the Christian comes to know good from evil.¹⁹ Good reflects our embrace of God and the fullness of life.²⁰

II. POLITICAL STRUCTURES AND PURSUIT OF THE GOOD

Participation in the political process is one of the means by which Catholics pursue both the good of the person and the common good. The “common good embraces the sum of those conditions of the social life whereby men, families and associations more adequately and readily may attain their own perfection.”²¹ The common good is not the aggregation of individual goods, but rather the right ordering of society.²²

As citizens living in a democratic republic, Americans have both the right and the duty to promote the common good by directing the

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¹⁶. CATECHISM OF THE CATHOLIC CHURCH, supra note 1, at § 1733); see also Galatians 5:13 (“My brothers, remember that you have been called to live in freedom—but not a freedom that gives free reign to the flesh. Out of love, place yourselves at one another’s service.”).

¹⁷. See U.S. Conference of Catholic Bishops Secretariat for Doctrine and Pastoral Practices, Doctrinal Note on Some Questions regarding the Participation of Catholics in Political Life: A Synopsis, § IV.7 (2002), http://www.usccb.org/dpp/synopsis.htm (last visited June 5, 2008) (“Freedom without truth is license and destructive of society.”); Second Vatican Council, supra note 7, at § 17 (“For its part, authentic freedom is an exceptional sign of the divine image within man. For God has willed that man remain ‘under the control of his own decisions,’ so that he can seek his Creator spontaneously, and come freely to utter and blissful perfection through loyalty to Him.”).

¹⁸. “Revelation teaches that ‘the power to decide what is good and what is evil does not belong to man, but to God alone.’” Pope John Paul II, The Splendor of Truth, supra note 1, at § 35. Jesus makes this clear in his response to the rich young man who seeks his counsel: “Why do you call me good? No one is good, but God alone.” Matthew 19:19.

¹⁹. GERMAIN GRISEZ & RUSSELL SHAW, FULFILLMENT IN CHRIST: A SUMMARY OF CHRISTIAN MORAL PRINCIPLES 49-51 (University of Notre Dame Press 1991) (defining good and bad as follows: “The Christian tradition has developed a better account of the bad. Badness is real, not illusory. It is a real absence in things of what ought to be... To be good is for something to be fully, to be all it should be—no lacks, no privations.”); Id. at 80 (defining the morally good: “In voluntarily acting for human goods and avoiding what is opposed to them, one ought to choose and otherwise will those and only those possibilities whose willing is compatible with a will toward integral human fulfillment.”).

²⁰. “I came that they might have life and have it abundantly.” John 10:10.

²¹. Second Vatican Council, supra note 7, at § 74.

²². Id.
government’s policies. This is done primarily by voting and communicating with public officials.

Indeed, all can contribute, by voting in elections for lawmakers and government officials, and in other ways as well, to the development of political solutions and legislative choices, which, in their opinion, will benefit the common good. The life of a democracy could not be productive without the active, responsible and generous involvement of everyone, albeit in a diversity and complementarity of forms, levels, tasks, and responsibilities. As observed by the United States Conference of Catholic Bishops, “... responsible citizenship is a virtue, and participation in political life is a moral obligation.”

In making political judgments, citizens properly adhere to their understanding of human nature, of what constitutes good and evil, and the role of government in realizing various goods and combating assorted evils. “[P]olitics are concerned with very concrete realizations of the true human and social good in given historical, geographical, economic, technological and cultural contexts.”

Knowledge of good and evil, combined with a right understanding of freedom, does not answer the question of the state’s role in encouraging people to seek the good. It is often assumed that belief in the capacity to know good from evil necessarily results in a belief that the state must require goodness of its citizens, but this is not so.

It is widely held that the inner logic of such an affirmation [of a substantive concept of the human good derived from our understanding of God and his plan for humanity] tends inexorably toward policy authoritarianism, and thus that such an affirmation necessarily constitutes some kind of incipient fascism. Yet, although widely asserted, the truth of this claim is by no means self-evident. From the premise that we can know the human good it does not automatically follow that it is the right—much less the duty—of government to compel all to embrace it. If some substantive conceptions of the good life may foster an authoritarian politics, others may foster a commitment to government that is sharply limited in its scope and responsible to those it governs.

There are many human goods that are beyond the capacity of government to provide—friendship and love are clear examples—and it would be useless, if not dangerous, for government to attempt to provide such goods. But while government can not provide friendship or love, it

can encourage or discourage the attainment of these goods. Laws requiring strict segregation of the races clearly impeded the ability of persons of different races to enter into friendships, \(^{28}\) and contemporary divorce laws allowing unilateral dissolution of marriage have diminished the ability of married couples to persevere in their vows of lifelong love and fidelity. \(^{29}\)

It is equally important to note that all evils can not be eradicated by government. As Thomas Aquinas observed:

Human law is imposed on the multitude, a part of which is composed of men imperfect in virtue. Thus all the vices from which the virtuous abstain are not punished by human law, but only the more grievous ones which most people can avoid, and especially those which can hurt others, without the prohibition of which human society could not be preserved. Thus homicide, theft and the like are prohibited by human law. \(^{30}\)

There are some vices, while harmful to the person engaging in them, that legal prohibitions are incapable of restraining or that, because of the means necessary to restrain them, will result in even greater evils. Much of American free speech jurisprudence is supported by this reasoning. While it is clear that some speech is hurtful to others or advances foolish or evil ideas, empowering the government to permanently silence citizens poses too great a threat to the processes of collective self-governance to outlaw "bad speech." \(^{31}\)

That said, as Aquinas notes, there are some evils that a just government must combat. Chief among these is the evil of violence directed at the innocent. A government that failed to enact or generally enforce laws against murder would have failed in one of its most fundamental obligations—stability and security of a just order. \(^{32}\) As Aquinas notes, this failure would imperil the continuance of the government and society. Similarly a government is fundamentally flawed if its protections against

\(^{28}\) The novel, HUCKLEBERRY FINN, explores this dilemma in its description of Huck and Jim's journey down the Mississippi River. MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN 273 (Scholastic Inc. 1990) (1885).

\(^{29}\) Establishing this fact is difficult empirically due to the large number of confounding factors in each divorce. Experts, however, agree that the adoption of unilateral divorce causes a significant upsurge in the number of divorces the first ten years after enactment. Compare Norval Glenn, Further Discussion of the Effects of No-Fault Divorce on Divorce Rates, 61 J. MARRIAGE & FAM. 800 (1999), and Ira Ellman & Sharon Lohr, Dissolving the Relationship Between Divorce Rates and Divorce Laws, 18 INT'L J. ECON. 341 (1998), with Douglas W. Allen, The Impact of Legal Reforms on Marriage and Divorce, in THE LAW AND ECON. OF MARRIAGE AND DIVORCE 191 (Antony W. Dnes & Robert Rowthorn eds., 2002), and Rogers et al., Did No-Fault Divorce Legislation Matter? Definitely Yes and Sometimes No, 61 J. MARRIAGE & FAM. 803 (1999), and Justin Wolfers, Did Unilateral Divorce Laws Raise Divorce Rates? A Reconciliation and New Results, 66 AM. ECON. REV. 1802 (2006).

\(^{30}\) THOMAS AQUINAS, SUMMA THEOLOGIAE I-II, q. 96, a. 2.

\(^{31}\) See R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (ordinance prohibiting speech which "arouses anger, alarm or resentment in others" was unconstitutional and could not form the basis for punishing the burning of a cross in the yard of a black family); Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) (striking down provisions of the Communications Decency Act prohibiting internet distribution of pornography to children).

\(^{32}\) CATECHISM OF THE CATHOLIC CHURCH, supra note 1, at § 1909.
murder or violence are limited to only a portion of society. Yet this is the state of affairs in America today. This is true, not because it represents the will of the citizens or their elected representatives, but rather because a tiny, yet powerful, group of men declared it must be so.

III. JUDICIAL USURPATION OF THE LIFE ISSUE

In 1973, a majority of the United States Supreme Court declared that the Constitution prohibited extending legal protection to the unborn. The text of the Constitution and its amendments do not explicitly address the question of abortion. Nor is there a textual “right to privacy,” which is the foundation of the judicially-created right to abortion.

Yet, in spite of the Constitution’s silence on abortion, the Court struck down the laws of forty-six states protecting the unborn. Equating interpretations of explicit Constitutional provisions protecting the privacy of the home and of criminal defendants to the judicially-created right to use and sell contraception, the Roe majority ruled,

...this right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.

As one prominent scholar of constitutional law has observed, “Roe simply stringcites a series of privacy cases involving marriage, procreation, contraception, bedroom reading, education, and other assorted topics, and

33. Cf. DeShaney v. Winnebago County, 489 U.S. 189 (1989) (rejected liability arising under the Constitution for government officials’ failure to protect children, even in cases when officials have notice that the children’s lives are threatened).


36. In the 1960s, the Supreme Court gave the term “privacy” a central role in the interpretation of the Third and Fourth Amendment. See e.g., Katz v. U.S., 389 U.S. 347, 350 n. 5 (1967) (“[t]he Third Amendment’s prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion.”); Terry v. Ohio, 392 U.S. 1, 8-9 (1968) (stating that the Fourth Amendment protects areas in which one has a reasonable expectation of privacy from unreasonable searches and seizures).


then abruptly announces with no doctrinal analysis that this privacy right ‘is broad enough to encompass’ abortion. *Ipse dixit.*”39 The Court’s inability to definitively identify the constitutional text or historical interpretation requiring it to overturn the abortion laws of forty-six states evidences the vacuous nature of *Roe*’s analysis.40

The Court rejected any claim of constitutional status on behalf of the unborn child as unsupported by the text of the Constitution.41 According to Justice Blackmun, the Court’s differing treatment of constitutional text is justified because no prior case had held “that a fetus is a person within the meaning of the Fourteenth Amendment.”42 He failed to explain how the absence of this judicial precedent differed from the absence of any Supreme Court precedent holding that abortion was constitutionally protected. The justice further opined that a contrary ruling would be inconsistent with the Texas law, which allowed abortion for the purpose of saving the life of the mother.43

The absence of any prior holding establishing the constitutional personhood of a fetus is not surprising in light of the state of medical knowledge during the first 150 years of this nation’s constitutional existence. Yet careful examination of the development of Anglo-American law prior to *Roe* evidences ever-increasing attempts to protect the life of the

41. The majority correctly identified the Constitution as addressing the rights of “citizens” or “persons,” but limited those terms to human beings who survive birth.

The Constitution does not define ‘person’ in so many words. Section 1 of the Fourteenth Amendment contains three references to ‘person.’ The first, in defining ‘citizens,’ speaks of ‘persons born or naturalized in the United States.’ The word also appears both in the Due Process Clause and in the Equal Protection Clause. ‘Person’ is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art. I, s 2, cl. 2, and s 3, cl. 3; in the Apportionment Clause, Art. I, s 2, cl. 3; in the Migration and Importation provision, Art. I, s 9, cl. 1; in the Emolument Clause, Art. I, s 9, cl. 8; in the Electors provisions, Art. II, s 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, s 1, cl. 5; in the Extradition provisions, Art. IV, s 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in ss 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally.


The Court has yet to explain how human beings within the womb fail to qualify as “persons” under the terms of the Constitution, while corporations and other artificial legal beings are constitutional persons for some purposes. *Cf. Power Mfg. Co. v. Saunders*, 274 U.S. 490, 495-97 (1927) (holding that a corporation is a constitutional person for purposes of the Equal Protection Clause). Professor Lugosi explores this judicial deficiency in his article, Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119 (2007). One suspects finding that the unborn child is a constitutional person would not have been difficult, had the Court employed the same level of creativity and ingenuity it showed in finding a right to abortion in the liberty clause of the Fourteenth Amendment or the right to prescribe and use contraception emanating from the “penumbras of the Bill of Rights.” *Cf. Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

42. *Id.*
43. 410 U.S. at 157, n. 54.
unborn child due to advancing medical knowledge about the nature of pregnancy and the characteristics of the unborn child. Unlike their eighteenth-century counterparts, doctors and scientists in the nineteenth and twentieth centuries were in the process of acquiring sufficient scientific knowledge about pregnancy to conclude that the unborn child was a separate human being from conception and therefore worthy of legal protection. The Court’s reliance upon the absence of an eighteenth-century case holding that the unborn child was a “constitutional person” when deciding a case in the 1970s is as foolish as if the Court were to conclude that the absence of a case holding that the internet is a means of human communication removes the internet from free speech protections contained within the First Amendment.

As for the second point, it is difficult to predict what the Court’s view would have been had it taken seriously Texas’s claim of competing constitutional interests, notwithstanding Justice Blackmun’s cavalier dismissal, “[b]ut if the fetus is a person who is not to be deprived of life without due process of law, and if the mother’s condition is the sole determinative factor, does not the Texas exception appear to be out of line with the Amendment’s command?”. The constitutionality of a state’s failure to protect the life of the unborn was not before the Court in Roe, and it is unlikely to have arisen under the Texas statute at issue in the case.

If such a case had been presented to the Court in the early 1970s, most likely it would have come from courts in Alaska, the District of Columbia, Hawaii, New York or Washington, since these jurisdictions had eliminated virtually all restrictions on abortion during the first half of pregnancy. It is possible that an unborn child (through his or her father or other next friend) might have sought an injunction to stop the mother from obtaining an abortion, arguing that the state had a constitutional obligation to protect the child’s life. Such a claim might have been rejected due to the absence

47. 410 U.S. at 157, n. 54.
49. Whether the Court would ever recognize the constitutional personhood of the unborn is the subject of a debate between Professor Nathan Schlueter and Judge Robert Bork. See
of any state action,\textsuperscript{50} or by adopting a narrow procedural interpretation of the due process clause of the Fourteenth Amendment.\textsuperscript{51} Any claim that the Equal Protection clause was violated by omitting the unborn from laws protecting the life of infants and other born persons might have been answered by denying that unborn children and born children are similarly situated due to the unborn child’s physical location within the mother’s body.\textsuperscript{52}

Or just maybe the Court would have found that the vulnerability of the unborn and the newborn are sufficiently similar to require equal protection of both (at least in cases when the abortion is not necessary to protect the life of the mother)\textsuperscript{53} and enjoined the threatened abortion.

**Expansion of Roe’s Flawed Reasoning**

In the nineteen years between the creation of a right to abortion in *Roe* and the reaffirmation of its constitutional status in *Planned Parenthood v. Casey*, \textsuperscript{54} the Court issued opinions regarding abortion at least twenty-three times.\textsuperscript{55} This is largely due to the legislative, as opposed to judicial, nature

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\textsuperscript{51} See M.L.B. v. S.L.J., 519 U.S. 102, 117 n.8 (1996) (“Although the termination proceeding in this case was initiated by private parties as a prelude to an adoption petition, rather than by a state agency, the challenged state action remains essentially the same: M. L. B. resists the imposition of an official decree extinguishing, as no power other than the State can, her parent-child relationships.”).

\textsuperscript{52} DeShaney v. Winnebago County, 489 U.S. 189 (1989) (rejected liability arising under the Constitution for government officials’ failure to protect children, even in cases when officials have notice that the children’s lives are threatened).


\textsuperscript{54} See Teresa Stanton Collett, *The Courts’ Confused (and Confusing) Understanding of the Creation and Taking of Human Life*, 68 Mont. L. Rev. 265, 279-82 (2007) (discussing the law governing the killing of non-aggressors in order to preserve life); *Cf. HCA v. Miller*, 118 S.W.3d 758 (Tex. 2003) (rejecting battery claim by parents of prematurely born infant due to life-sustaining efforts of the hospital); *Stewart-Graves v. Vaughn*, 170 P.3d 1151 (Wash. 2007) (rejecting parents claim of medical malpractice due to successful resuscitative medical treatment of infant who was born without a heart beat, and survived with severe and permanent disabilities).

\textsuperscript{55} 505 U.S. 833 (1992).
of the majority’s opinion in *Roe*, and the public’s resistance to the seemingly unlimited nature of the abortion right that emerged from the Court’s definition of “health” in *Doe v. Bolton.*

Numerous other commentators have described the remarkable performance of the Court as the “[n]ation’s ‘ex officio medical board,’” striking down laws requiring parental consent prior to performance of abortion on a minor, overturning state requirements that a second physician be present during a post-viability abortion to provide immediate medical care for any child surviving the abortion and invalidating bans on abortion by saline amniocentesis, notwithstanding clear evidence that other methods of abortion were available that were safer for the mother. A detailed review of all of the Court’s abortion cases is not required, however, to establish the point that the Court erected an ambitious regulatory scheme.

*Sullivan, 500 U.S. 173 (1991).*

During the confirmation hearings of Justices Alito and Roberts, Senator Arlen Specter claimed that the Court had 38 occasions to overrule *Roe.* See Confirmation Hearing on the Nomination of Samuel Alito To Be Associate Justice of the United States Supreme Court: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 321 (2006) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary) (“Do you agree that *Casey* is a super precedent or a super stare decisis as Judge Luttig said?”); Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 144-45 (2005) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary) (asking Judge Roberts whether Roe qualified as a “super-duper precedent in light . . . of 38 occasions to overrule it”). Our numbers differ due to additional cases between 1992, the year Casey was decided, and 2005, the year of the hearings regarding Justice Roberts, and in part because of my exclusion of cases declined by the Court.

56. *Roe,* 410 U.S. at 173 (Rehnquist, J., dissenting) (“But the Court’s sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court’s opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.”

57. 410 U.S. 179 (1973). “We agree with the District Court, 319 F.Supp., at 1058, that the medical judgment may be exercised in the light of all factors-physical, emotional, psychological, familial, and the woman’s age-relevant to the well-being of the patient. All these factors may relate to health.” *Id.* at 192.


on the faulty foundation of Roe. Examination of Planned Parenthood v. Casey\textsuperscript{62} and Stenberg v. Carhart\textsuperscript{63} will suffice.

THE HUBRIS OF CASEY

Notwithstanding the Court's increasing demands that states end their attempts to restrict (or at least regulate) abortion, state legislatures throughout the country continued to pass various abortion-related laws. Pennsylvania passed one of the most comprehensive abortion laws in the country in 1989. It was largely modeled after the Ohio city ordinance rejected by the Court in Akron v. Akron Center for Reproductive Health, Inc.\textsuperscript{64} The Pennsylvania law required that women be provided specific types of information prior to obtaining their consent to abortions; that a forty-eight hour waiting period be observed prior to performance of the abortion; that a parent consent prior to the performance of an abortion on a minor; that the husband be notified prior to the performance of an abortion on the wife; and that abortion providers report various information including the type of procedure performed, the duration of gestation prior to the abortion, and the existence and nature of complications.\textsuperscript{65} When abortion providers challenged the constitutionality of the law, the law was vigorously defended in every court, including the Supreme Court of the United States.

Unfortunately, at that time only four of the justices were prepared to overrule Roe and return the issue to the people;\textsuperscript{66} two were adamant that Roe be retained;\textsuperscript{67} and three were ambivalent about the Court's application of the Constitution to the regulation of abortion but persuaded that the institutional integrity of the Court required continued protection of the practice.\textsuperscript{68} With opinions on the Court so divided, the ambivalent justices prevailed and the plurality opinion of Justices O'Connor, Kennedy and Souter became the controlling rule of law.\textsuperscript{69} These justices were unwilling to affirm the initial correctness of Roe, instead declaring majestically, "the immediate question is not the soundness of Roe's resolution of the issue, but the precedential force that must be accorded to its holding."\textsuperscript{70}

Supporters and opponents of abortion rights have criticized the plurality opinion as unprincipled.\textsuperscript{71} At least one legal scholar has characterized it as

\begin{itemize}
  \item \textsuperscript{62} 505 U.S. 833 (1992) (plurality).
  \item \textsuperscript{63} 530 U.S. 914 (2000).
  \item \textsuperscript{64} 476 U.S. 747 (1985).
  \item \textsuperscript{66} 505 U.S. at 912-14 (Stevens, J. dissenting); 505 U.S. at 923 (Blackmun, J. dissenting).
  \item \textsuperscript{67} Id. at 871 (plurality).
  \item \textsuperscript{68} Id.
  \item \textsuperscript{69} Marks v. United States, 430 U.S. 188, 193 (1977) ("[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.").
  \item \textsuperscript{70} Casey, 505 U.S. at 871.
  \item \textsuperscript{71} See e.g. Steven G. Calabresi, Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v.
the worst Supreme Court decision ever,\textsuperscript{72} not withstanding other excellent candidates for that title include \textit{Dred Scott v. Sandford}\textsuperscript{73} and \textit{Korematsu v. United States}.\textsuperscript{74} Perhaps the passage from \textit{Casey} receiving the most negative attention is the plurality’s extravagant statement of the judicially-created right of decisional privacy.

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. 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 of the State.\textsuperscript{75}

This “sweet mystery-of-life passage”\textsuperscript{76} has been derided by legal commentators,\textsuperscript{77} who have characterized it as “popular mythology,”\textsuperscript{78} the

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\textit{Casey}, 505 U.S. at 851. Based on this statement, the Court invalidated the Pennsylvania requirement that a husband be notified of his wife’s intention to obtain an abortion, absent the wife providing the physician a written statement that (1) her spouse is not the father of the child; (2) her spouse, after diligent effort, could not be located; (3) the pregnancy is a result of spousal sexual assault, which has been reported to law enforcement; or (4) she has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual. \textit{Id.} at 893–94; 18 Pa. Consol. Stat. Ann. § 3209 (West 2008).
\end{quote}

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\textit{Ilid.} at 588 (Scalia, J. dissenting).
\end{quote}

\begin{quote}
\textit{E.g.,} Bradley P. Jacob, \textit{Back to Basics: Constitutional Meaning and “Tradition”}, 39 Tex. Tech. L. Rev. 261, 275 (2007) (“Other constitutional rights in the popular mythology are not found anywhere in the Constitution itself, but the misperception is certainly understandable because the United States Supreme Court has declared that people have a constitutional right to privacy, to abortion, to homosexual sodomy, and even to ‘define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.’” (quoting \textit{Casey}, 505 U.S. at 851)); John M. Breen & Michael A. Scaperlanda, \textit{Never Get Out’ a the Boat: Stenberg v. Carhart and the Future of American Law}, 39 Conn. L. Rev. 297, 312 (2006) (“The Court is able to ignore this violence because, in the case of abortion, it has abandoned the idea of ordered liberty in favor of a maximal conception of human freedom.”); Kenneth L. Grasso, \textit{The Rights of Monads or of Intrinsically Social Beings? Social Ontology and Rights Talk}, 3 Ave Maria L. Rev. 233, 237–38 (2005) (characterizing the language from \textit{Casey} as creating a “‘m[egaright] of individual autonomy” (quoting \textit{Casey}, 505 U.S. at 851)); Patrick McKinley Brennan, \textit{Against Sovereignty: A Cautionary Note on the Normative Power of the Actual}, 82 Notre Dame L. Rev. 181, 191 (2006) (“It is the same Supreme Court that in one breath, per Justice Kennedy in a breathtaking bit of anti-metaphysics, identifies the ‘heart of liberty [as] the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,’ that, in a next breath,
product of “philosopher-kings,”79 “startling,”80 “radical”81 and representing “the view that moral relativism is a constitutional command.”82

The Court subsequently attempted to limit the reach of this passage in Washington v. Glucksberg,83 a case rejecting the claim of a constitutional right to physician-assisted suicide. Yet the language reemerged as a constitutional justification for finding all criminal prohibitions of sodomy unconstitutional in Lawrence v. Texas.84

Even more troubling than the plurality’s puerile philosophizing is the Justices’ demand that the American people submit to the Court’s judgment regarding abortion.

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.85

The contending sides might have more respect for the Court’s mandate if the Court could definitively identify the text of the Constitution compelling its decision. Absent such identification, there seems little justification for accepting the Justices’ political judgment as superior to that of other citizens.

The plurality then suggests that any hope of the citizenry that abortion would be returned to the political process is diminished in direct proportion to public criticism of the Court’s usurpation of the issue. “[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question.”86 As Justice Rehnquist notes in his critique of the plurality, “when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was per the same Justice Kennedy, makes metaphysical claims that would delight the medieval mind.” (quoting Casey, 505 U.S. at 851)).

78. Jacob, supra n. 78, at 275.
82. Richard S. Myers, Same-Sex “Marriage” and the Public Policy Doctrine, 32 CREIGHTON L. Rev. 45, 63 (1998).
84. Lawrence, 539 U.S. at 572 (quoting Casey, 505 U.S. at 851).
85. Casey, 505 U.S. at 866 (plurality).
86. 505 U.S. at 867.
incorrect, unless opposition to the original decision has died away.\textsuperscript{87}

Justice Scalia leveled an even sharper criticism:

The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges-leading a Volk who will be “tested by following,” and whose very “belief in themselves” is mystically bound up in their “understanding” of a Court that “speak[s] before all others for their constitutional ideals”—with the somewhat more modest role envisioned for these lawyers by the Founders.\textsuperscript{88}

Justice Scalia then quoted the Federalist Papers as establishing the founding fathers’ less exalted understanding of the role of the judiciary.

Complaints of overreaching by judges have a long history in our nation. Thomas Jefferson was one of the early critics of the United States Supreme Court.

[T]he judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means provided for their removal gave them a freehold and irresponsibility in office; that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions, nevertheless, become law by precedent, sapping, by little and little, the foundations of the constitution, and working its change by construction before any one has perceived that that invisible and helpless worm has been busily employed in consuming its substance.\textsuperscript{89}

Abraham Lincoln expressed similar dissatisfaction with judicial overreaching in his first inaugural address. “If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.”\textsuperscript{90}

The \textit{Casey} plurality’s abstract reasoning and complete disregard of the primacy of democratic process in resolving difficult questions regarding our common life has led some to publicly question whether the American people remain in control of the nation’s collective destiny. Introducing a symposium in the November 1996 issue of \textit{First Things}, “The End of Democracy? The Judicial Usurpation of Politics,” Fr. Richard John Neuhaus wrote:

This symposium addresses many similarly troubling judicial actions that add up to an entrenched pattern of government by

\textsuperscript{88} \textit{Casey}, 505 U.S. at 833 (1992) (Scalia, J dissenting) (emphasis added).
\textsuperscript{89} Letter from Thomas Jefferson to Monsieur A. Coray (Oct. 31, 1823).
judges that is nothing less than the usurpation of politics. The question here explored, in full awareness of its far-reaching consequences, is whether we have reached or are reaching the point where conscientious citizens can no longer give moral assent to the existing regime.  

In commenting on Casey and other opinions from the same judicial term, Judge Robert Bork observed, "[t]his last term of the Supreme Court brought home to us with fresh clarity what it means to be ruled by an oligarchy. The most important moral, political, and cultural decisions affecting our lives are steadily being removed from democratic control." Princeton Professor Robert George joined him in questioning the effect of Casey on the American political system:

To say that the worst abuses of human rights have come from the least democratic branch—the judiciary—is true, but of increasingly questionable relevance to the crisis of democratic legitimacy brought on by judicial action in the cause of abortion and euthanasia. In practice, the American scheme of constitutional democracy invests the courts with ultimate authority to decide what the Constitution is to mean. Judicial action and appointments can, and sometimes do, become major issues in national elections. The refusal of the courts over more than twenty-three years to reverse Roe v. Wade must, then, be accounted a failure of American democracy.

All of these concerns were expressed before the Court rejected the partial-birth abortion bans of thirty-one states on the basis of one physician’s testimony and speculation by supporting experts.

INDIFFERENCE TO EVIDENCE IN CARHART I

If the Casey plurality opinion exemplifies new heights of judicial arrogance in its demands that the American people submit to its judgment regarding the legal status of the unborn and the morality of abortion, the majority opinion in Carhart I reflects new lows in judicial respect for facts when adjudicating constitutional disputes.

As described by the majority, the issue before the Court in Carhart I was "whether Nebraska’s statute, making criminal the performance of a ‘partial birth abortion,’ violates the Federal Constitution, as interpreted in Planned Parenthood of Southeastern Pennsylvania v. Casey . . . and Roe v.

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91. The Editors, *Introduction* to THE END OF DEMOCRACY 3 (Mitchell S. Muncy, ed. 1997). See also Charles W. Coleson, *Kingdoms in Conflict* in THE END OF DEMOCRACY 41 at 47 (Mitchell S. Muncy, ed. 1997) ("At what point does the government become sufficiently corrupt that Christians must actively resist it? And, Has the United States, under its current judicial regime, reached such a point?").


Ultimately the majority found that the statute was unconstitutional because it contained no exception for procedures performed to protect a woman’s health since “substantial medical authority supports the proposition that banning [this] particular abortion procedure could endanger women’s health.” Yet the evidence presented to the trial court reveals that the Nebraska legislature’s conclusion that no health exception was required was well supported by “substantial medical authority.”

The plaintiff, Dr. Carhart, was the only witness who had ever performed partial-birth abortions (also known as “D&X” or “intact D & E” abortions), and he testified that he only chose to perform a D&X when the fetus presented in breech or where repositioning the fetus from a side presentation resulted in a breech presentation. If the partial-birth abortion procedure was medically superior to dismemberment abortion, it would seem that Dr. Carhart would have repositioned the fetus to allow use of the superior method, yet he did not do so. This fact suggests that his use of the procedure was more a matter of convenience than of medical necessity.

None of the experts called to testify on the plaintiff’s behalf had any experience with the procedure. Dr. Stubblefield, the expert relied upon extensively by the trial court “has not performed this procedure himself, nor has he viewed anyone else perform it.” Similarly, Dr. Carhart’s other expert, Dr. Hodgson, “performed or supervised at least 30,000 abortions,” and yet had never intentionally performed an intact D&X. Notwithstanding these experts’ lack of experience with or use of the

94. 530 U.S. at 929-30.
95. 530 U.S. at 938. The majority further determined that the statute was unconstitutional because the definition of the proscribed procedure “covers a much broader category of procedures” than partial-birth abortion. 530 U.S. at 939. The Court interpreted the statute to include dismemberment (or dilation and evacuation “D & E”) abortions, which “together with a modified form of vacuum aspiration used in the early second trimester) accounts for about 95% of all abortions performed from 12 to 20 weeks of gestational age.” 530 U.S. at 924. While the second holding required judicial gymnastics to avoid application of the common canons of construction requiring courts to adopt narrowing constructions to avoid constitutional infirmity, it is not the focus of this article’s critique.
96. 972 F. Supp. at 522 n.20.
97. Dismemberment abortion is a descriptive name for the “dilation and evacuation” procedure used in post-first trimester abortions. An abortion text provides the following instructions to those seeking to learn the procedure.
To locate fetal parts, rotate the instrument right or left while concurrently closing and opening the forceps. Upon feeling the calvarium or other fetal tissue, close the jaws firmly about it and draw it through the canal using a combination of compression and rotation. Repeat this maneuver until all major fetal parts are extracted and identified.
W. Martin Haskell, et al., Surgical Abortion After the First Trimester in A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION, 123, 134 (Maureen Paul, et al., eds. 1999). The abortion provider is cautioned to make sure that all fetal parts are removed to avoid post-operative infection. “After completion of the D&E abortion, examine the pregnancy tissue. Although complete reconstruction is not always possible, verify the presence of major fetal parts, including pelvis, torso, calvarium, and extremities.” Id. at 137.
99. Id. at 1105.
100. Id.
procedure, both Drs. Stubblefield and Hodgson were confident that some circumstances existed in which the protection of a woman's health would require its use.

The American College of Obstetricians and Gynecologists (ACOG) expressed similar unsubstantiated confidence. "A select panel convened by the ACOG could identify no circumstances under which this procedure [intact D&X] . . . would be the only option to save the life or preserve the health of the woman. An intact D&X, however, may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman, and only the doctor, in consultation with the patient, based upon the woman's particular circumstances can make this decision." 101

A more objective opinion was expressed by the American Medical Association (AMA) when it stated that "there does not appear to be any identified situation in which intact D&X is the only appropriate procedure to induce abortion." 102 Based on this conclusion, the AMA issued statements supporting the federally proposed Partial-Birth Abortion Ban of 1997, House Resolution (HR) 122. The AMA press release described partial-birth abortion as "broadly disfavored--both by experts and the public . . . . It is a procedure which is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development." 103 The AMA Board of Trustees Fact Sheet on HR 1122 stated that "[i]ntact D&X is not an accepted 'medical practice' . . . . the Board's expert scientific report recommends against its use." 104

The conclusion of the AMA is supported by public statements of recognized abortion experts. "'I have very serious reservations about this procedure,' said Colorado physician Warren Hern, M.D. The author of Abortion Practice, the nation's most widely used textbook on abortion standards and procedures, Dr. Hern specializes in late-term procedures. He has been critical of D&X, stating, "'[y]ou really can't defend it." 105

The "substantial medical authority" relied upon by the majority in overturning the partial-birth abortion bans passed by thirty-one states 106 was

101. Id. at 1105 n. 10 (quoting a statement by the American College of Obstetricians and Gynecologists from January, 1997).
103. Press Release, American Medical Association, AMA Supports H.R. 1122 As Amended, Statement by Nancy W. Dickey, MD, Chair of the AMA Board of Trustees (May 20, 1997).
104. American Medical Association, AMA Board of Trustees FACT SHEET on HR 1112 (June 1997). Notwithstanding the AMA's clear reliance upon the absence of evidence of the safety and necessity of the procedure, and its refusal to rely on mere speculation, the district court characterized the AMA's statements as "irrelevant" and "political rhetoric." 972 F. Supp. at 525 n.27.
106. See Carhart I, 530 U.S. at 979 (Kennedy, J. dissenting) ("Ignoring substantial medical and ethical opinion, the Court substitutes its own judgment for the judgment of Nebraska and some 30 other States and sweeps the law away.").
the testimony of a single physician plaintiff and unsubstantiated speculation by his experts and a professional association. Similar to Casey's command that the people submit to the Court's judgment regarding the legality of abortion, Carhart I commanded Americans to accept physicians initiating childbirth for the purpose of killing the child immediately before he or she emerged from the womb. Such was the state of abortion law prior to the appointment of the two newest justices of the United States Supreme Court, Chief Justice John Roberts and Justice Samuel Alito.

**CARHART II**

Six years after ruling in Carhart I, the Court again took up the question of whether the Constitution prohibited bans on the partial-birth abortion procedure. Consolidating appeals from the Courts of Appeals for the Eighth and Ninth Circuits, the Court considered "whether, notwithstanding Congress's determination that a health exception was unnecessary to preserve the health of the mother, the Partial-Birth Abortion Ban Act of 2003 is invalid because it lacks a health exception or is otherwise unconstitutional on its face." Similar to the evidentiary record in Carhart I, none of the physicians testifying at the trials could identify a single instance in which they had intentionally performed a D&X abortion because it was the medically superior method of abortion in protecting the health of the mother.

In contrast to Carhart I, a peer-review study of partial-birth abortion existed, but was inconclusive as to whether D&X was superior to D&E. Dr. Chasen, an early advocate of D&X abortion and the author of the study, testified that there was no difference between the partial-birth and dismemberment abortions in the mother's blood loss, procedure time, or short-term complication rates. Dr. Chasen admitted that the study did not prove that D&X is superior to D&E, and also testified that the study could not claim that D&X was "as safe as" D&E.

107. See Carhart I, 530 U.S. at 979 (Kennedy, J. dissenting) ("D & X's stronger resemblance to infanticide means Nebraska could conclude the procedure presents a greater risk of disrespect for life and a consequent greater risk to the profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect. The Court is without authority to second-guess this conclusion."). The difficulty in distinguishing the practice of partial-birth abortion from infanticide is the primary point argued in the amicus brief filed in the Supreme Court on behalf of the States of Louisiana and Mississippi. Brief of Amici Curiae La. and Miss. in Support of Petitioners, 2000 WL 228483 (U.S. 2000).


109. Nat'l Abortion Fed'n. v. Gonzales, 437 F.3d 278, at 308 (2nd Cir. 2006) (Straub, J. dissenting) ("the plaintiffs and their experts agreed that they had never encountered a situation where D & X was the only available procedure or where the mother's health required a D & X").


111. Carhart v. Gonzales, 413 F.3d 791, 803 (8th Cir. 2005) ("The study found no significant difference in blood loss, procedure time, or short-term complication rates between the procedures.").

112. Nat'l Abortion Fed'n. v. Gonzales, 437 F.3d 278, at 308-09 (2nd Cir. 2006) (Straub, J.
The study showed that for the small group of women for whom subsequent pregnancy information was available, spontaneous birth occurred in 2 of 17 (11.8%) of the D&X group, and 2 of 45 (4.4%) of the D&E group. Although this difference may be statistically insignificant given the few patients in the study, it was sufficient to signal a cause for concern for some of the experts. The study also showed that the D&X group experienced a higher rate of cervical laceration (2.4%) than the D&E group (.8%). Dr. Sprang derived this number from the data in the Chasen study. While the sample size was too small to be statistically significant, it "tends to show that D&X has the potential to cause more trauma to the cervix."\(^{113}\)

These facts led the federal district court in New York to conclude:

After hearing all of the evidence, as well as considering the record before Congress, the Court does not believe that many of Plaintiffs' purported reasons for why D & X is medically necessary are credible; rather they are theoretical or false. In addition, Dr. Chasen's study was initiated with the knowledge that Congress was considering a partial-birth abortion ban. Not only did the study fail to prove the alleged safety advantages of D & X over D & E, it raised serious questions about the potential health risks to women that D & X poses, namely, the risk of future preterm births due to increased cervical dilation during a D & X.\(^{114}\)

Nonetheless, the court felt constrained by *Carhart I*’s “substantial medical authority” standard and struck down the federal Act.

The Government contends that the lack of a health exception does not make the Act unconstitutional if, looking at the congressional record supplemented by the trial testimony, the Court determines that Congress was reasonable in its finding that D & X is never medically necessary to protect a woman’s health. *Stenberg* does not countenance that approach. Instead, the relevant inquiry (assuming, as the Court does, that *Turner* applies) is whether Congress reasonably determined, based on substantial evidence, that there is no significant body of medical opinion believing the procedure to have safety advantages for some women. *See Stenberg*, 530 U.S. at 937, 120 S.Ct. 2597. Under that standard, Congress’s factfindings were not reasonable and based on substantial evidence.\(^{115}\)

The Court of Appeals for the Second Circuit affirmed.\(^{116}\) Thus Justices Thomas and Kennedy were prophetic when they said that the standard adopted in *Carhart I* would render abortion law subject to the veto of a single physician or allow a single abortion provider to set “abortion policy for the State . . . not the legislature or the people.”\(^{117}\)

\(^{113}\) *Id.* at 309.


\(^{115}\) *Id.* at 488.

\(^{116}\) *Nat'l. Abortion Fed'n.*, 437 F.3d 278.

\(^{117}\) 530 U.S. at 965 (Kennedy, J. dissenting).
The Supreme Court granted review. By the time oral arguments were presented to the Court, the Courts of Appeals for the Second, Eighth and Ninth Circuits had declared the Act unconstitutional. In a bitterly divided five to four vote, the Supreme Court reversed the lower courts, holding that the Act was sufficiently clear to give physicians adequate warning of the conduct that was prohibited, that Congress was within its constitutional authority to proscribe this particular abortion technique and that the prohibition did not unduly burden women's right to obtain abortions. In reaching these conclusions, the majority made clear that the state's power to regulate abortion is not limited to cases where medical opinion is undivided.

As illustrated by respondents' arguments and the decisions of the Courts of Appeals, Stenberg has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty.

A zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession. Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations.

The Court's recognition of legislative authority is significant in determining the constitutionality of other abortion-related regulations in the absence of unanimous medical opinion.

118. Nat'l Abortion Fed'n., v. Gonzalez, 437 F.3d 278 (2nd Cir. 2006); Carhart v. Gonzales, 413 F.3d 791, 803 (8th Cir. 2005); Planned Parenthood Fed'n. of Am. Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006). Due to the timing of the opinion, the opinion of the Second Circuit was not before the Supreme Court. This omission is unfortunate since the evidentiary record developed in United States District Court for New York is much more comprehensive that those of the California and Nebraska courts. Compare National Abortion Federation v. Ashcroft, 330 F.Supp.2d 436 (S.D.N.Y.2004); Planned Parenthood Federation of Am. v. Ashcroft, 320 F.Supp.2d 957, 1019 (N.D.Cal.2004); and Carhart v. Ashcroft, 331 F.Supp.2d 805, 1011 (Neb.2004).


120. Id. at 1632-33.

121. Id. at 1637.

Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. See Hendricks, supra, at 360, n. 3, 117 S.Ct. 2072. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.

122. Carhart, 127 S.Ct. at 1638 (internal citations omitted).

123. Examples of such regulation include laws requiring women be informed of the possibility that a fetus feels pain after 20 weeks of development or that some research supports the conclusion that abortion increases the risk of breast cancer.
Justice Ginsburg's dissent attacks the majority for its disregard of precedent, its use of evocative language and its willingness to defer to Congressional findings of fact. She accuses the majority of holding an outdated and misogynistic view of women, and denying the role of abortion in promoting sexual equality. The fact that three justices joined her in asserting this last point evidences an attempt to relocate the constitutional grounding of abortion rights. What began as a right grounded in the privacy of the patient-physician relationship subsequently became a woman's liberty interest encompassed in the due process clause. To redefine the right as emanating from the Equal Protection Clause of the Fourteenth Amendment would permit heightened scrutiny of all abortion-related laws, which in turn would result in a repudiation of Casey's claim of greater respect for legislative judgments dealing with this deeply divisive issue. Such a future, however, requires the persuasion of at least one additional justice that women's equal status in society requires access to abortion.

IV. THE ROLE OF NATIONAL POLITICS IN BUILDING A CULTURE OF LIFE

Supporting reversal of Roe and the eventual protection of unborn children requires Catholics to consider presidential and senatorial candidates' stances on abortion, since it is the President who has the power to nominate and, with the advice and consent of the Senate, appoint justices of the Supreme Court. The differing treatment of partial-birth abortion

125. Id. at 1650.
126. Id. at 1653-54.
127. "This way of thinking reflects ancient notions about women's place in the family and under the Constitution-ideas that have long since been discredited." Id. at 1649.
128. Id. at 1641-42.
129. Roe, 410 U.S. at 163.
130. Casey, 505 U.S. at 869.
132. Casey, 505 U.S. at 878.
133. U.S. Const. Art. II, § 2. Compare Press Release, Barack Obama, Obama Statement on the 35th anniversary of Roe v. Wade (Jan. 22, 2008) ("With one more vacancy on the Supreme Court, we could be looking at a majority hostile to a women's fundamental right to choose for the first time since Roe v. Wade. The next president may be asked to nominate that Supreme Court justice. That is what is at stake in this election."); available at http://www.barackobama.com/2008/01/22/obama_statement_on_35th_annive.php; with Press Release, Hillary Clinton, On Anniversary of Roe, Clinton Announces Agenda for Reproductive Health Care (Jan. 22, 2008), available at http://www.hillaryclinton.com/news/release/view/?id=5404 ("When I'm President, I will appoint judges to our courts who understand that Roe v. Wade isn't just binding legal precedent, it is the touchstone of our reproductive freedom, the embodiment of our most fundamental rights, and no one - no judge, no governor, no Senator, no President - has the right to take it away."); and John McCain, Remarks of John McCain at CPAC (Feb. 7, 2008), available at http://www.johnmccain.com/Informing/News/Speeches/B639AE8B-5A9F-41D5-88A7-874CBF8A2C40.htm ("I intend to nominate judges who have proven themselves worthy of our
bans by the Rehnquist and Roberts courts evidences the importance of the Justices' interpretative approach to the Constitution. A court dominated by Justices who embrace the idea of a "living constitution" too often will find constitutional barriers to the political outcomes they dislike, while ignoring constitutional text in affirming government actions of which they approve. Justices embracing the textualist approach to constitutional interpretation may refuse constitutional protection to long-enduring practices because of the absence of a controlling text or a sharply limited reading of the text. Which approach is most favorable to the development of a culture of life generally is a question of some debate. On the pre-eminent issue of abortion, however, only justices adopting the trust that they take as their sole responsibility the enforcement of laws made by the people's elected representatives, judges of the character and quality of Justices Roberts and Alito, judges who can be relied upon to respect the values of the people whose rights, laws and property they are sworn to defend.

134. Justice Brennan is often recognized as one of the foremost defenders of this approach based on his speech to the Text and Teaching Symposium at Georgetown University on Oct. 12, 1985. Reproduced in ORIGINALISM, A QUARTER CENTURY OF DEBATE 55-70 (Calabresi, Steven G. ed., Regnery Publishing, Inc. 2007). Justice Breyer has articulated a related, but slightly more pragmatic, theory of constitutional interpretation. STEPHEN BREYER, ACTIVE LIBERTY (Alfred A. Knopf 2005).


135. See Lawrence, 539 U.S. 558. (Constitution forbids criminalization of non-commercial private consensual sexual activity between adults).


137. One of the most prominent proponents to this mode of constitutional interpretation is Justice Scalia. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997). Much of the contemporary debate regarding the modes of constitutional interpretation was initiated by a speech to the American Bar Association on July 9, 1985 by then United States Attorney General Edwin Meese, III. The speech is reproduced in ORIGINALISM, A QUARTER CENTURY OF DEBATE, supra note 13.

138. See Troxell v. Granville, 530 U.S. 57 (2000) (Washington statute providing that court may order visitation rights for any person when visitation may serve best interest of child, violated substantive due process rights of mother). Justice Scalia dissented on the basis that a parent's right to direct the upbringing of a child is not found in the text of the constitution. Id. at 91-93.


141. This is explained by Pope John Paul, II in the encyclical, Evangelium Vitae [Gospel of Life]:
textualist view have evidenced a willingness to return the question to the
democratic process.\textsuperscript{142} This suggests that Catholics should support the
appointment of Supreme Court Justices who recognize the absence of any
textual basis for \textit{Roe} and its progeny,\textsuperscript{143} as well as the importance of
democratic processes in resolving the contested question of whether the
unborn are entitled to the status of "constitutional persons."\textsuperscript{144}

The positions of presidential candidates on abortion are also relevant to
the appointment of many cabinet members, who as members of the
executive branch exercise substantial influence on federal policy regarding
abortion.\textsuperscript{145} The Attorney General of the United States is charged with
defending federal laws against constitutional challenges. A lukewarm
defense of laws seeking to restrict or regulate abortion can be deadly both
to the laws and to those the laws are designed to protect.\textsuperscript{146} The Secretary
of Health and Human Services directs the Centers for Disease Control and

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\textsuperscript{142} No justice has expressed support for the view that the unborn are constitutional persons.

\textsuperscript{143} "We believe that Roe was wrongly decided, and that it can and should be overruled
consistently with our traditional approach to stare decisis in constitutional cases." \textit{Casey, 505
U.S. at 944 (Rehnquist, C.J., dissenting). This opinion was joined by Justices White, Scalia, and
Thomas.}

\textsuperscript{144} In her response to Justice Scalia's essay, \textit{Common-Law courts in the Civil-Law System:
The Role of United States Federal Courts in Interpreting the Constitution and Laws}, Professor
Mary Ann Glendon reminds us:

\begin{quote}
Tyranny of the majority does sound alarming. It conjures up visions of peasants with
their pitchforks storming the scientist's castle. Small wonder that it is a favorite slogan
of those who would prefer to forget that one of the most basic American rights is the
freedom to govern ourselves and our communities by bargaining, education,
persuasion, and, yes, majority vote.
\end{quote}

Mary Ann Glendon, \textit{Comment} in \textit{ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL
COURTS AND THE LAW} 95, 113 (Amy Gutmann ed., 1997).

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} New Hampshire Attorney General Peter Heed's initial defense of that state's parental
notice law is an example of the harm that can arise from a luke-warm defense. The Attorney
General presented no challenge to the plaintiffs' affidavits regarding the need for a health
exception in the law. \textit{Defendant's Memorandum of Law in Support of Objection to Request for
Declaratory and Injunctive Relief, 2003 WL 25494036 (Dec. 3, 2003). See also Planned
Attorney General filed an objection, and the plaintiffs filed a reply. No surreply was filed. The
parties have agreed that the court may decide the plaintiffs' requests for a declaratory judgment
and permanent injunctive relief on the merits based on their present filings.") The implications
from this failure are discussed in Teresa Stanton Collett, \textit{Judicial Modesty and Abortion, 59
physician-intervenor did not give him standing to appeal judgment striking down Illinois abortion
law after state attorney general settled the case).
Prevention, which accumulates information regarding the incidence and effects of abortion.\textsuperscript{147} The Secretary of State advises the President and represents the United States in matters related to foreign affairs, including the impact of proposed treaties and actions within the United Nations regarding the international law of abortion.\textsuperscript{148} These are just a sampling of the decisions that the President and members of the executive branch make, which impact the prevalence of abortion in our country and the world.\textsuperscript{149}

Presidential support and veto of legislation are equally important to think about when considering the importance of a presidential candidate's position on abortion. President Clinton repeatedly vetoed federal partial-birth abortion bans, notwithstanding clear majorities in both legislative

\textsuperscript{147} There is no national requirement for data submission or reporting regarding induced abortions. See Department of Health and Human Services Centers for Disease Control and Prevention, \textit{CDC's Abortion Surveillance System: FAQ} (Jan. 21, 2008), available at http://www.cdc.gov/reproductivehealth/DataStats/Abortion.htm (last visited June 7, 2008). Four states have no reporting requirement; three states and the District of Columbia have only voluntary reporting requirements. Of the forty-six states having some requirement, only twenty-nine include medical (non-surgical) induced abortions. Alan Guttmacher Institute, \textit{State Policies in Brief: Abortion Reporting Requirements} (May 1, 2008), http://www.guttmacher.org/statecenter/spibs/spib_ARR.pdf (last visited June 7, 2008). The most recent CDC report involves abortions performed in 2004. See \textit{supra} note 147. Statistics related to abortions performed in 2005 are available from researchers at the Alan Guttmacher Institute, the research affiliate of Planned Parenthood. Rachel K. Jones et al., \textit{Abortion in the United States: incidence and access to services, 2005}, 40 Persp. on Sexual & Repro. Health 6 (2008), also available at http://www.guttmacher.org/pubs/journals/4000608.pdf. A current bill in the United States House of Representatives would require the Secretary of Health and Human Services, acting through the Director of the National Institutes of Health (NIH) and the Director of the National Institute of Mental Health (NIMH), to expand and intensify NIMH research and related activities with respect to post-abortion depression and psychosis. \textit{Post-Abortion Depression Research and Care Act of 2007}, H.R. 1457, 110th Congress (2007), GovTrack.us (database of federal legislation) http://www.govtrack.us/congress/bill.xpd?bill=h110-1457 (accessed May 4, 2008).

\textsuperscript{148} An example of this is President George W. Bush's reinstatement of the "Mexico City policy."

The Mexico City Policy announced by President Reagan in 1984 required nongovernmental organizations to agree as a condition of their receipt of Federal funds that such organizations would neither perform nor actively promote abortion as a method of family planning in other nations. This policy was in effect until it was rescinded on January 22, 1993. It is my conviction that taxpayer funds should not be used to pay for abortions or advocate or actively promote abortion, either here or abroad. It is therefore my belief that the Mexico City Policy should be restored. Accordingly, I hereby rescind the "Memorandum for the Acting Administrator of the Agency for International Development, Subject: AID Family Planning Grants/Mexico City Policy," dated January 22, 1993, and I direct the Administrator of the United States Agency for International Development to reinstate in full all of the requirements of the Mexico City Policy in effect on January 19, 1993.


\textsuperscript{149} For a contrary view regarding the importance of abortion in deciding which presidential candidate to support, see Susan J. Stabile, \textit{One Catholic's Thoughts on Voting for a President}, 47 J. Catholic Legal Studies 303 (2008).
chambers supporting the legislation. President George W. Bush proudly signed the ban when presented to him. Both of President Bush's former opponents, in contrast, would have vetoed the ban, insisting that the law contain a health exception.

Congressional elections are also important in extending legal protections to the unborn. The absence of prolife majorities in both houses has stymied attempts by Congressional leaders to insure interstate enforcement of state requirements of parental involvement in young girls' decisions to obtain abortions. Similarly, there has been no movement on proposed national legislation insuring that women, prior to obtaining abortions in the second half of their pregnancies, are informed of the growing scientific consensus that fetuses feel pain after twenty weeks of development. Efforts to expand existing protections of health-care

150. President Clinton than vetoed HR1833, "Partial-Birth Abortion Ban of 1995," on April 10, 1996. Congress attempted to override the veto but after gaining enough votes in the Housed they failed in the Senate with a vote of 57 to 41. President Clinton vetoed HR 1122, "Partial-Birth Abortion Ban of 1997," on October 10, 1997. Again an over-ride was attempted. The House again had enough votes for the 2/3 majority that was required and voted to override the veto on July 23, 1998. The Senate again was unable to get the needed 67 votes and the veto was defeated 64 - 36, only 3 votes short.


152. "On the issue of partial-birth or so-called late-term abortion, I would sign a law banning that procedure, provided that doctors have the ability to save a women's life or to act if her health is severely at risk. [But] the main issue is whether or not the Roe v. Wade decision is going to be overturned. I support a woman's right to choose; my opponent does not." Al Gore, Presidential Debate, Boston MA (Oct. 3, 2000), transcript available at http://www.cnn.com/ELECTION/2000/debates/transcripts/u221003.html.


professionals’ right to refuse to participate in abortion-related procedures and processes have been rebuffed, while Congressional efforts are growing to enact the Freedom of Choice Act, federal legislation requiring abortion remain freely available. Clearly, significant progress could be made in protecting unborn children and their mothers if electing prolife public officials were a priority in our national politics.

V. THE IMPACT OF STATE POLITICS ON BUILDING A CULTURE OF LIFE

The importance of politics in extending legal protections to the unborn also requires faithful citizens to attend to state politics. National initiatives to restrict abortion and educate women regarding the nature of abortion and the unborn are of vital importance, but the majority of abortion restrictions and regulations are passed on the state level. As many as twelve States would have enforceable abortion prohibitions on the books if Roe were overruled. Arkansas would prohibit all abortions. Arizona, Michigan, Oklahoma, Rhode Island, Texas, West Virginia, and Wisconsin would allow abortions only to preserve the life of the mother. Utah would allow abortions to preserve the mother’s life or to avoid grave medical harm, or in cases in which the child was conceived through rape or incest or suffered genetic deformity. Three states (Louisiana, North Dakota, and South Dakota) have “trigger” statutes, which were passed after Roe, with the stated intention of reinstating broad prohibitions on abortion in the event Roe is reversed. Illinois, Kentucky, and


158. Id. at 7-8.
159. Id. at 6-7.
160. Id. at 21-22.
161. Id. at 30.
162. Id. at 31-32.
163. Id. at 33-34.
164. Id. at 37.
165. Id.
166. Id. at 34-35.
167. Id. at 18-19.
168. Id. at 28-29.
169. Id. at 32-33.
170. Id. at 15-16.
171. Id. at 17-18.
Missouri have "statements of intent" which, while in and of themselves would not restore a prohibition, foreshadow legislative efforts to do so in the absence of Roe. "In 2007, 29 abortion restrictions were enacted in 14 states, capping a rapid rise in the number of new laws since 2000. Between 1985 and 1999, states passed an average of 11 new abortion restrictions each year." These state laws, however, are subject to both state and constitutional requirements. Under current interpretation of the United States Constitution, government need not provide taxpayer funding for abortions. While state legislatures may not prohibit all abortions, they have the authority to require that "a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child'" as well as "the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father and a list of agencies which provide adoption and other services as alternatives to abortion." Laws may require that a woman receive this information at least twenty-four hours before performance of an abortion. Abortion providers may be required to obtain parental consent or provide notice to parents prior to performing abortions on minors. Clinics may be subjected to reasonable health and safety regulations.

Some state supreme courts, however, have exceeded the United States Supreme Court in the promotion and protection of abortion. These courts have interpreted their state constitutions as requiring state taxpayer funding of abortions and access to private hospital facilities by abortion

172. Id. at 23-24.
175. Casey, 505 U.S. at 881.
176. Id.
177. Id.
179. "Unfortunately in clinics sometimes there is the cattle herd mentality where a number of patients are brought in, sent through procedures, and tender love and care is not given to them as much as in the private office." Women's Med. Ctr. of N.W. Houston v. Archer, 159 F.Supp. 2d 414, 428 (S.D. Tex. 1999) aff'd in part rev'd in part 248 F.3d 411 (5th Cir. 2001) (court's summary of testimony by Dr. Tad Davis).
180. E.g. Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995); New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998); Women's Health Center of W. Va., Inc. v. Panepinto, 446 S.E.2d 658, 661 (W. Va. 1993), and Planned Parenthood of Middle Tennessee v. Sundquist., 38 S.W.3d 1 (Tenn. 2000). "Hawaii, Maryland, New York and Washington voluntarily help low-income women pay for abortions. Thirteen states are under court orders to fund all or most
providers. Laws requiring parental involvement in a minor’s decision to obtain an abortion, as well as requirements that abortions be performed by physicians, have been struck down as violating state constitutional provisions. All told, California and nine other states have controlling judicial opinions that create state constitutional protection of abortion.

These rulings suggest the importance of active participation in judicial elections in the majority of states in which judges are subject to voter approval. Electing or approving judges who seek to rely upon the text of the state constitution when interpreting that document, will, in a majority of cases, insure that citizens and their elected representatives remain in control of decisions regarding the legality of abortion. Judges who rely upon the “spirit” of the constitution are more likely to insulate these decisions from the political process while protecting the practice from restriction or regulation.

The composition of state legislatures also determines whether the unborn are afforded legal protection. State legislatures having strong prolife majorities can attempt to challenge current judicial limits on abortions.” Christine Vestal, States Probe Limits of Abortion Policy, STATELINE.ORG (June 11, 2007), http://www.stateline.org/live/ViewPage.action?siteNodeld=136&languageId=1&contentId =121780.

184. See e.g. Valley Hospital Ass’n v. Mat-Su Coalition for Choice, 948 P.2d 963, 969 (Alaska 1997) (defining the scope of the fundamental right to an abortion as “similar to that expressed in Roe v. Wade”); Comm. to Defend Reproductive Rights v. Myers, 625 P.2d 779 (Cal. 1981) (“all women in this state--rich and poor alike--possess a fundamental constitutional right to choose whether or not to bear a child.”); In re T.W., 551 So.2d 1186, 1196 (Fla. 1989) (“we have determined that a woman’s right to decide whether or not to continue her pregnancy constitutes a fundamental constitutional right”); Moe v. Secretary of Admin. & Finance, 417 N.E.2d 387, 398 (Mass. 1981) (“we have accepted the formulation of rights that [Roe] announced as an integral part of our jurisprudence”; Women of the State of Minn. v. Gomez, 542 N.W.2d 17, 27 (Minn. 1995) (“the right of privacy under the Minnesota Constitution encompasses a woman’s right to decide to terminate her pregnancy”); Pro-Choice Miss. v. Fordice, 716 So.2d 645, 650-54 (Miss. 1998) (creating state constitutional right to abortion); Armstrong v. State of Mont., 989 P.2d 364, 384 (Mont. 1999) (we hold that Article II, Section 10, protects a woman’s right of procreative autonomy-here, the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice”); Right to Choose v. Byrne, 450 A.2d 925, 934 (N.J. 1982) (“The right to choose whether to have an abortion ... is a fundamental right of all pregnant women”); Planned Parenthood of Middle Tennessee v. Sundquist, 38 S.W.3d 1, 15 (Tenn. 2000) (“[t]he concept of ordered liberty embodied in our constitution requires our finding that a woman’s right to legally terminate her pregnancy is fundamental”); and Beacham v. Leahy, 287 A.2d 836 (Vt. 1972) (finding state constitution protected abortion until “quickening”). For an extensive analysis of state constitutional law related to abortion, see Paul Benjamin Linton, ABORTION UNDER STATE CONSTITUTIONS: A STATE-BY-STATE ANALYSIS (Carolina Academic Press forthcoming).

185. The ability of citizens to knowledgably participate in judicial elections was enhanced by a recent Supreme Court ruling, which recognized candidate’s free speech rights to discuss contested political issues during judicial campaigns. Republican Party of Minn. v. White, 536 U.S. 765 (2002).
abortion regulation by passing legislation prohibiting all abortions based upon the unborn child's immutable characteristics such as race and sex,186 requiring notification of husbands prior to performance of abortions on wives,187 or creating civil liability for any individual who performs an abortion, absent the informed consent of both genetic parents of the fetus. Following the lead of Louisiana, states can confer juridical personhood on embryos outside of the mother's body.188 With sufficient political support, states can even begin to attempt to reinstate broad prohibitions of abortion.189

Some of these initiatives are unlikely to survive judicial review at this time, but the fact that citizens and their elected representatives keep making the case to the courts and the American people that government should protect the lives of the unborn is important. Such laws provide the opportunity for the Supreme Court to revisit its opinion in Roe, and evidence citizens’ rejection of the Court's resolution of these issues by judicial fiat. Most importantly, the laws affirm citizens’ conviction that unborn children are worthy of legal protection. For this reason, faithful citizens have a grave obligation to consider abortion in selecting state officials, just as they do in selecting the President and members of Congress.

VI. CONCLUSION

This is not the first time in American history that the Supreme Court has misinterpreted the Constitution and then stubbornly refused to correct its mistake. It took a civil war to reverse Dred Scott v. Sandford,190 and fifty-eight years to repudiate the Court’s ruling that “separate, but equal”191 met the constitutional command of governmental non-discrimination.192 Thousands of faithful citizens shed their blood to free this nation from the sin of slavery,193 and their modern counterparts have sacrificed comfort,
reputation, and personal wealth to end the evil of racial segregation. Similarly, Catholics are called to engage in the arduous struggle to end constitutional protection of abortion and to extend legal protection to the unborn.

This struggle will not be easy. Our opponents are well organized and well funded. They have won the linguistics war. They are often referred to as “pro-choice,” and we are “anti-abortion,” or even worse “anti-choice.” They command the cultural heights of the courts, the universities, and most of the mass media. They use government-funded schools to indoctrinate our children on the pleasures of sexual exploration and the moral neutrality of abortion. Some citizens are required to fund abortion by judicial edict in the guise of state constitutional interpretation.

Yet the simple fact remains that those who support abortion are wrong, and we are right. A government that refuses to listen to its citizens’ demands that the law protect all human beings from violence is antidemocratic, and in refusing to extend such protection it becomes fundamentally unjust. As faithful citizens, we must persevere in our efforts to insure that all human life is protected by law. We must persuade our families and neighbors to join us in building a culture of life. We must educate ourselves about the issues and the candidates, and then prayerfully


Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said “the judgments of the Lord are true and righteous altogether.”

Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865).


196. See Mccorvey v. Hill, 385 F.3d 846, 853 (5th Cir.2004) (Jones, J. concurring) (“That the Court’s constitutional decisionmaking leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer not only about the abortion decisions, but about a number of other areas in which the Court unhesitatingly steps into the realm of social policy under the guise of constitutional adjudication.”); Neil Gross and Solon Simmons, The Social and Political Views of American Professors at 74 (2007), available at http://www.wjh.harvard.edu/~ngross/ounsbery_9-25.pdf (74.7 percent of American professors believe it should be possible for a pregnant woman to obtain an abortion for any reason); and Stanley Rothman and Amy Black, Media and Business Elites: Still in Conflict?, THE PUBLIC INTEREST 72 at 83 (Spr. 2001)(97% of media believe “[i]t is a woman’s right to decide whether or not to have an abortion).


decide who to support. We must communicate our views to elected officials and hold them accountable for what they do in our name. And, on those days when it seems to require too much or when change seems impossible, we must remember St. Paul's admonition, "let us not be weary in well-doing: for in due season we shall reap, if we faint not." 200