“The 2004 Law defining all unborn babies as human beings is NOT a tool for ending legal infanticide”, says AUL; a trumpet player insists AUL is missing a golden opportunity!

By Dave Leach

Leach: the 2004 federal law defining all unborn babies as human beings satisfies the conditions of Roe’s “collapse” clause, ending infanticide’s fragile “legality”, and requiring states to defend babies’ 14th Amendment Right to Life.

Forsythe, head of AUL (Americans United for Life): Roe’s “collapse” no longer matters, since Roe’s reasoning has been replaced by the theory introduced in PP v. Casey, and confirmed in Gonzales v. Carhart (2007) that the reason we need to keep infanticide legal is because mothers have come to rely so much on it in order to advance in their careers.

Leach: As Rehnquist pointed out, Roe’s reasoning may have been replaced, but the new “reliance interests” theory hangs on Roe’s “outer shell”, which I would characterize as uncertainty whether the unborn are human. Smash that shell with legally recognized certainty that the unborn are human, and let’s see how long that “reliance interests” sophistry can stand, all alone!

> The joint opinion, following its newly minted variation on stare decisis, retains the outer shell of Roe v. Wade, 410 U.S. 113 (1973), but beats a wholesale retreat from the substance of that case. (Rehnquist, joined by White, Scalia, and Thomas, in Planned Parenthood v. Casey, 505 U.S. 833 (1992)

My college degree is not in law. It is in playing trumpet.

Americans United for Life (AUL) headed by Clark Forsythe has probably been more active in courts on behalf of the unborn than any other legal organization.

Nothing hangs on my wall certifying that I am qualified to insist that AUL is overlooking a golden God-given opportunity to end legal infanticide in a few months! I have no credentials to even *think* such a thought!

But it is true. This article contains much of my evidence. It is my responses to Clark Forsythe’s arguments.

It has not been easy to interact with Forsythe. Neither he nor AUL have responded to my personal emails to them. But in response to my friend Mark Remsburg’s badgering they sent a year-old article by Forsythe, and in response to my friend Chuck Hurley, who heads the Iowa Leader, James Dobson’s Iowa arm, Forsythe sent a personal note with a little more information. In addition, a magazine interview with Forsythe was sent to me, and I have gotten a little more detail from the AUL website.

I do not say any of these things for any want of appreciation for AUL’s God-blessed work for the unborn all these years, which they have well summarized on their website under http://www.aul.org/courts/:

> For nearly 40 years, AUL has protected and defended the sanctity of life in American courts and before international tribunals. AUL has been actively involved in every abortion-related case decided by the U.S. Supreme Court including and since *Roe v. Wade* — most notably, successfully defending the Hyde Amendment in 1980’s *Harris v. McRae* and ensuring that federal and state governments do not have to fund abortion. AUL has also played a key role

in preventing judicial recognition of rights to euthanasia and assisted suicide and in protecting the freedom of conscience of health care professionals.

Over the past five years, AUL has filed more *amicus curiae* ("friend-of-the-court") briefs in federal and state courts than any other pro-life organization, continuing to build on our distinguished and enviable record of courtroom successes. Among the cases in which we recently filed briefs are:

- *Gonzales v. Carhart*, the U.S. Supreme Court case upholding the federal Partial-Birth Abortion Ban Act
- *Morr-Fitz v. Blagojevich*, an Illinois Supreme Court case reinstating a constitutional challenge to former Governor Rod Blagojevich's Executive Order requiring individual pharmacists and pharmacies in Illinois to dispense abortifacient drugs in without regard to individual conscience objections.
- *Acción de inconstitucionalidad expediente 146/2007-00 (In re: Mexico City's "Law of Legal Interruption of Pregnancy")*, a 2007 challenge to Mexico City's legalization of first-trimester abortions.
- *John and June Roe v. Planned Parenthood Southeast Ohio Region*, a case involving Planned Parenthood's failure to comply with Ohio's parental involvement law and to report suspected child sexual abuse.
- *Richmond Medical Center for Women v. Herring*, a Fourth Circuit case upholding Virginia's ban on partial-birth abortion.
- *Rogers v. Planned Parenthood Cincinnati Region*, cases before both the Sixth Circuit and the Ohio Supreme Court concerning a 2004 Ohio law requiring abortion providers to comply with the FDA-approved protocol for dispensing RU-486.
- *Baxter v. Montana*, an attempt to legalize physician-assisted suicide heard by the Montana Supreme Court.

I relate to Elihu, who hesitated to raise his uncredentialed voice to correct his hero Job and Job's credentialed friends, and took a whole chapter of the Bible apologizing for speaking up before getting to his subject. (Job 32.)

> Job 32:4 Now Elihu had waited till Job had spoken, because they *were* elder than he. 5 When Elihu saw that *there was* no answer in the mouth of *these* three men, then his wrath was kindled. 6 And Elihu the son of Barachel the Buzite answered and said, I *am* young, and ye *are* very old; wherefore I was afraid, and durst not shew you mine opinion. 7 I said, Days should speak, and multitude of years should teach wisdom. 8 But *there is* a spirit in man: and the inspiration of the Almighty giveth them understanding. 9 Great men are not *always* wise: neither do the aged understand judgment. ...11 Behold, I waited for your words; I gave ear to your reasons, whilst ye searched out what to say. 12 Yea, I attended unto you, ...18 For I am full of matter, the spirit within me constraineth me. 19 Behold, my belly *is* as wine *which* hath no vent; it is ready to burst like new bottles. 20 I will speak, that I may be refreshed: I will open my lips and answer. 21 Let me not, I pray you, accept any man's person, *[or, hide my light under a bushel because those with more credentials than I are speaking; or, to follow other men not because they are right but because of their credentials]* neither let me give flattering titles unto man. *[Literally, to address someone by another name – a title. See Matthew 23:2-12]* 22 For I know not to give flattering titles; *in so doing* my maker would soon take me away.

Although I truly appreciate every step taken by every prolife organization, even when those steps include criticizing steps I have taken, (because I understand that there is good intent mixed with bad), **progress in ending infanticide in a few months requires that prolife authorities who advise against it, without making a clear, persuasive, irrefutable case why not, must be neutralized, so that the necessary popular consensus behind a strategy that works can form.**

I of course am glad to subject my own theories to the same standard. Let anyone refute them who can, and I will be glad to be steered away from any dead end, because my desire is not to be proved right but

to save lives.

I am a trumpet player. I own the Family Music Center in Des Moines. I have not been trained in law school to know anything about abortion law.

But I am a Christian. I have been given a Light which is not my own, and commanded not to hide it under a bushel, not even before I know everything. What if this light will actually save millions of lives, and because I feared the superior expertise of the AUL, I hid it under a bushel? I will not stand before the AUL on judgment day but before God.

I ask all whose hearts are still soft enough to hear the wails of over 50 million of America's most innocent: think for yourselves. Lives depend on it. Demand that any reason given you, why you should not join an effort to end infanticide within a few months, be persuasive, without requiring you to trust someone else's college degree. When it is not, then please withdraw your contributions from those who stand in the way of ending infanticide quickly, without giving a reason, and give it where it will help most.

This is a record of my attempts to communicate with Americans United for Life, whom Chuck Hurley, a lawyer and head of The Iowa Leader, regards as the premiere American prolife legal team. I have tried through Chuck Hurley, through calling them directly, through writing them, and with the help of Mark Remsburg of Des Moines, to get them to respond to our information about the "collapse" of Roe v. Wade caused legally by a 2004 federal law defining all unborn babies as human beings.

This record begins with their position statement on how abortion ought to be attacked legally. It was sent to Mark Rembsburg in January, 2011. Interleaved with the article are my response to its points, which include the history of my other attempts to communicate with them.

- Dave Leach

AUL Statement on Protecting Human Life

Protecting Human Life January 22, 2010

What is the best strategy to combat abortion, both in the states and ultimately in the Supreme Court?

What is the most aggressive strategy that is also prudent?

Based on our decades of experience, AUL believes the best strategy is state–based, focused on accumulating victories and gaining legislative and judicial momentum. One size – or one solution – does not fit all. The peculiarities of state laws and judicial decisions make some strategies possible in some states and impossible in others. Thus we have examined the political landscape in each state and its legal hurdles and have designed a state-specific strategy to advance the pro-life cause in that state, using one or more of the model laws, including state constitutional amendments, that we have developed on more than 30 issues. Any and all of these laws would, we believe, be upheld by courts. These decisions, in turn, would provide the judicial predicate to overturning of Roe v. Wade, our ultimate goal.

> *[Leach: This article doesn't say, so we will have to surmise it is talking about half-measures that will trim a few edges of abortion, while we are urged not to be so impatient or optimistic as to demand a complete end of infanticide.]*

However, other pro-life Americans favor a "personhood amendment" to state constitutions, that is, an amendment that defines "personhood" as beginning from the moment of conception. Many hope a legal challenge to such an amendment, once passed, will result in the overturning of Roe v. Wade by the Supreme Court. We believe this strategy, though well-intentioned, is both ineffectual and potentially

counterproductive.

[Leach: I agree that personhood amendments in state laws or constitutions are weaker than the personhood language already in federal law; with all states having conflicting positions on the fact question of whether the unborn babies of humans are humans, how can any one state's view be the basis for national policy? But I heard the president of Personhood USA say he doesn't even expect a state initiative to have a legal effect!]

Personhood strategies rest upon the belief that the Supreme Court will overturn Roe given evidence of development and humanity of the unborn child. However, since Roe, evidence of fetal development has been offered to the Court on at least ten occasions without affecting the Court's recognition of a right to abortion. For example, in Stenberg v. Carhart, the Court discussed in graphic detail what an abortion does to an unborn, developing child. The Court still ruled 5 to 4 that partial-birth abortion was a constitutional right. These amendments present evidence to the Court that has been reviewed and rejected repeatedly.

[Leach: So? Stenberg didn't ask the Court to reconsider Roe! And while the discussion was certainly graphic enough, the humanity of the subjects of these gruesome "procedures" was never brought up; or if it was mentioned and I have forgotten, it certainly was not acknowledged as even a consideration by the majority! Courts don't address issues not brought before them. Stenberg didn't allege that the unborn are human at any stage of development. No medical, philosophical, and certainly no Scriptural basis was presented the court to generally challenge its dehumanization of unborn babies. The argument for the partial birth ban boiled down to (1) the yuk factor, and (2) the nearness of the baby to full delivery, and to the "slippery slope" if we officially add born babies to the list of human beings who may be lawfully killed. Either I am really missing something, or these AUL lawyers should know better than to take from Stenberg, which never challenged the Court to review Roe, any despair that no case will ever persuade the justices to review Roe.]

Personhood amendments do not directly challenge the Court's more recent rationale for Roe: the reliance interest of women. In Planned Parenthood v. Casey, the Court declared that the "right to abortion" was now based, in part, on the fact that "women have come to rely on abortion" in order to achieve and maintain equality in society.

[Leach: pardon my snickering, but surely this argument would be laughed out of Kiddie Court. Surely our 14th Amendment has not become so weak that one group of people may rob, enslave, or kill any other group, provided they "have come to rely on" such oppression "in order to achieve...equality"? This "reliance" reasoning is only plausible in the absence of certainty that the unborn are human. Since 2004, it is ripe for a challenge.]

There is no reason to think we have 5 votes to overturn Roe. There are at least 5 votes on the Court in favor of Roe – Kagan, Breyer, Ginsburg, Kennedy and Sotomayor. Kagan, Breyer, and Ginsburg are avowed supporters of Roe. Sotomayor's previous work with the Puerto Rican Legal Defense and Education Fund argued for the most radical expansion of abortion rights possible – an elimination of every pro-life abortion-related law nationwide.

While Kennedy supports some restrictions on abortion, he has supported broad abortion rights in most every circumstance. Kennedy has made clear his support for Roe in at least three opinions over 15 years.

Justice Ginsburg wants to go farther than Roe. Ginsburg has publicly stated that she believes Roe was wrongly decided and would make the right to abortion equal to freedom of speech. Direct challenges to Roe while a pro-Roe majority sits on the Court, could enable Justice Ginsburg to impose her legal justification for abortion and its constitutionality.

[Leach: Just as "reliance" reasoning is only plausible in the absence of certainty that the unborn are human, Ginsburg's equation of the right to murder innocent human beings with the right to free speech is similarly laughable. And yet she will get away with it as long as prolife lawyers treat such folly with respect! Prolife lawyers need to be preparing the hearts of prolifers to stop being intimidated by foolishness. I would think the way to do that would be, through articles like this, to articulate the foolishness. People already know it is the reasoning of Hell. People need to also know it is foolish. It is

not lawful. It has no support in legal reasoning. It is not the Rule of Law.

AUL seems to have no political vision; that is, a vision of how to create public pressure on the court to squarely address issues, through widespread public consensus on those issues. Without a vision or strategy of national consensus among Christians and prolifers about the absurdity of a particular move the Court is considering, I agree; the justices will feel little restraint from sweeping whatever issue they please under the rug. However, with sufficient public education and consensus, the one thing justices fear is looking stupid. Partisan, they are used to, since half our nation will often call them partisan; which half, will depend on the ruling. But very much consensus that they are stupid will stop them because

> Matthew 23:5 ...all their works they do for to be seen of men: they make broad their phylacteries, and enlarge the borders of their garments, 6 And love the uppermost rooms at feasts, and the chief seats in the synagogues, 7 And greetings in the markets, and to be called of men, Rabbi, Rabbi.

[Not only will very much "stupid" make life miserable for them in country clubs and their honored speeches, but it will attack the base of their power. In the hearts of most prolifers, along with the conviction that they violate God's laws, is the fear that they are probably right about American law. After all, they are America's top legal experts! I relate to this fear, because for years I felt this same hesitation within myself, thinking "who am I, with my college degree in teaching music, to tell America's top prolife legal experts they are wrong about the law?" Especially when prolife organizations weren't articulating, or at least widely distributing, clear, simple analysis showing where abortion rulings went beyond partisan all the way to dumb? Or just plain wrong? I began developing such arguments. I published them, I talked to lawyers about them, I filed 3 Supreme Court briefs in the '90's based on them. One of them frightened Janet Reno's justice department so badly that they got TWO 60-day extensions of time to respond to my brief, during which time the Court received a prolife case that did not fundamentally challenge Roe (the justice department knew the Court would not hear more than one prolife case a year). But all that time I kept looking over my shoulder, wondering "could I be missing something? Is it me who is dumb?"

[The only thing that encouraged me was that although hardly anyone would move forward with the opportunity I identified, so that I found myself alone in the arguments I was raising, hardly anyone would find any flaw in my reasoning. And when lawyers occasionally did, it was something I easily answered, usually because I had already addressed it, and after answering I heard no more from them. I know that is a brash thing for a trumpet player to say without positive evidence, able only to argue from absence of negative evidence, and I would love to give you a book full of my correspondence to show you what I presented and the responses I got, but I will give just this one example:

AUL gave Hurley an 11 word answer. Hurley sent it to me by text message. Here is my record:

> Chuck Hurley, xxx-xxxxcell, Hurley text message "AUL responded: 'unlikely court will admit they were wrong or should now change." They promised a more complete answer eventually.... Oct 14, 6:05pm

[I wrote back to Hurley, asking him to respond to AUL for me; I have heard neither from AUL nor from Hurley since. (Update: on February 14 I saw Hurley again and asked him about the AUL response. They had sent it last October! But Hurley had forgotten to send it to me. He subsequently did; my response to what they sent is below.)

> Dave Leach to Chuck Hurley 10/21/10:
>
> Hi! Will you kindly respond to AUL:
>
> Thank you for your preliminary response, to be followed by more detail, to the legal argument I sent that Laci's Law, 18 U.S.C. § 1841(d), creates a legal green light for legislatures to criminalize abortion as if Roe had never existed. You wrote that judges are unlikely to change their minds, or admit they were wrong.
>
> As you prepare the further details to that preliminary opinion, Senate candidate Dave Leach asks you to please consider that:

1. Our argument regards an untested argument. No judge has been asked to rule whether 18 U.S.C. § 1841(d) satisfies the conditions of Roe's "collapse" clause. Therefore there is no need for any judge to change his mind or admit the courts have previously been wrong about whether that is true. Whenever a new federal law impacts a previous federal ruling, federal courts, whose rulings must conform to federal law until such time as courts find them unconstitutional, review de novo whether the previous ruling is still valid, after the new law is added to the mix upon which the ruling was based. Roe's "collapse" clause explicitly acknowledges this process, as it acknowledges that just such a law as 18 U.S.C. § 1841(d) has the authority to "collapse" the Roe ruling.

Not only has there never been a challenge to Roe, based on 18 U.S.C. § 1841(d), but I do not know of a challenge to 18 U.S.C. § 1841(d). However, there have been challenges to similar laws at the state level, based on Roe. Criminal defendants have argued that since Roe questions fetal personhood, therefore 18 U.S.C. § 1841(d) cannot establish fetal personhood, so therefore the defendants should not be charged with murdering them. Courts have rejected that argument, effectively if not explicitly allowing the legal status of fetal personhood to be amended by 18 U.S.C. § 1841(d). This issue, therefore, far from being so settled that we are only asking courts to change their mind or admit they were wrong, is ripe for review.

2. We had asked you to review the soundness of the legal argument, but your answer, that it will fail, not for any want of soundness but because it would change federal law, implies a fatalism that no new law, nor any new legal argument, can ever succeed because it will change federal law. But if our cause is that hopeless, why do fundraising letters continually go out asking help to put new personhood language in federal law next session? And that new language only replicates what we already have in 18 U.S.C. § 1841(d)! Do you believe all contemplated new human life amendments are doomed to failure, too, since they would ask judges to change their minds?

The only thing in the proposed Life at Conception Act that isn't already in the federal code is the statement that the 14th Amendment protects the right of humans to Life. But Roe already conceded that, in its "collapse" clause! The Life at Conception Act specifies from the moment of conception, but Laci's Law already applies its definition of the unborn to "all stages of development". We're not against reinforcing, in federal law, principles that can end abortion, but if we wait until we have erected a second green light a couple of years down the road, before we are willing to proceed on the first green light, aren't we participating in the slaughter?

3. The question whether a legal argument is sound is separate from the question of what kind of case will force unwilling judges to address the argument. The first question is legal and rational; the second question is political and strategic. We asked you the first question, and you answered the second, with only our sketchy strategy or political dynamic for your basis.

The cleanest case we envision is a state legislature criminalizing abortion as if Roe had never existed, following a joint resolution which lays out the basic argument, whose bold conclusion should attract media attention, educating the public to prepare for the case. Hopefully this will soon follow the unseating of three Iowa Supreme Court justices for stuffing sodomite marriage down Iowans' throats in a case that was watched about as much as a challenge to Roe will be, so that judges will be a little slower to trample the Constitution, legal reality, and common sense.

When the law against abortion goes to court, it would be defended, hopefully, by Brenna Findley, our exciting Attorney General candidate who was home schooled, is very prolife, and who has already seen this 18 U.S.C. § 1841(d) argument, studied it, shown it to other legal scholars, and who has not yet publicly endorsed it but neither has she stated any concerns about it.

We think these dynamics will take care of the political problem, as effectively forcing judges to address this argument, as any circumstances we can imagine.

There is already another case in progress that is raising these same arguments, but it is "messier". Dave Leach has gotten these arguments into the record of the Scott Roeder trial. His thanks is that news articles about him continually begin with his "support" of a murderer. But his support is of a fair trial in which legitimate classical defenses are not inappropriately and irrationally railroaded. His support is of the babies who now live because George Tiller can no longer murder them. That case is also weak because instead of an on-fire Attorney General defending the unborn with her political future riding on the outcome and fully funded by taxpayers, it is a half-hearted public defender with nothing to lose by losing, a limited budget, who doesn't even believe the unborn are human beings.

[Later in this article, I will give one more example of the weak responses I have received: my dialog with Harold Jannsen about my analysis of an article by Clark Forsyth, head of AUL.

[And today I am sent this AUL statement, and still I find no clear understanding of anything the Court has said about abortion that is just plain wrong. You would think America's premiere prolife legal team would focus on that. But instead AUL acts as if being legally right is not merely useless, but ABSOLUTELY useless. Too useless to even discuss what "legally right" even is. Which raises the question: if being legally correct has ABSOLUTELY nothing to do with success in court, why do people still go to law school? Or, why do AUL's lawyers think they have any advantage in court over, for example, me?

[The more likely explanation for AUL's attitude is, I believe, no grasp of the clear, simple, argument that Roe has "collapsed" which God has given us through Laci and Conner's Law in 2004. They have all the reasons for rejecting that as a legal green light which I address in my article www.Saltshaker.US/SLIC/NoGreenerLight.pdf. And they have not responded to these arguments, presented to them by Chuck Hurley and myself, because they suffer the same mental inertia most humans do, compounded by their conviction that they are America's premiere prolife legal team and cannot have very much to learn from lawyers who have not specialized in prolife litigation, much less from trumpet players who aren't even lawyers!!! To make matters worse, in 2004, not equipped with these arguments, they went on public record assuring Democrats and abortionists that if the 2004 law passes, it will not undermine abortion even slightly.

[But it is my firm conviction, that without clear understanding and consensus about our legal goal *just among Bible-believing prolifers,* pagan judges cannot be expected to grasp a concept that we can't even agree upon ourselves.

Proverbs 29:18 Where *there is* no vision [national consensus], the people perish: but he that keepeth the law, happy *is* he.

[Conversely I have a strong conviction that to the extent God's people are willing to grasp, together, some truth, and proclaim it without apology, that truth will break down dams which no unregenerate judge can plug.

2Ch 7:14 If my people, which are called by my name, shall humble themselves, and pray [literally, "judge; intercede"], and seek my face, and turn from their wicked ways; then will I hear from heaven, and will forgive their sin, and will heal their land.

[God promises help to His people when they "judge" and "intercede" for their land. Judgment cannot develop in people who do not discuss issues with each other. Nor can God answer His people's prayers if they can't agree what God should do, leaving their prayers to contradict one another.

[When God's people grasp the Truth about the legality of abortion according to American law, and are united in their understanding that a particular move of the Supreme Court is just plain flat out legally ignorant, that will embolden Congress to finally restrain the justices, if the guffaws at their speeches and golf meets don't succeed first.]

(AUL's Forsythe continues:) Every time we lose in court, we make the fight harder. When we lose an abortion-related case in federal court, we create an additional precedent against the pro-life position, further entrenching Roe.

[Leach: True, partly. The other side of this coin is that whenever we succeed in stating the Truth with precision, then in whatever forum God has given us to proclaim it, we plant seeds which grow in the minds of hearers which will absolutely bear fruit. Conversely, when we hide our light under a bushel, darkness flourishes.

> Matthew 13:3 And he spake many things unto them in parables, saying, Behold, a sower went forth to sow; 4 And when he sowed, some *seeds* fell by the way side, and the fowls came and devoured them up: 5 Some fell upon stony places, where they had not much earth: and forthwith they sprung up, because they had no deepness of earth: 6 And when the sun was up, they were scorched; and because they had no root, they withered away. 7 And some fell among thorns; and the thorns sprung up, and choked them: 8 But other fell into good ground, and brought forth fruit, some an hundredfold, some sixtyfold, some thirtyfold. 9 Who hath ears to hear, let him hear. ....18 Hear ye therefore the parable of the sower. 19 When any one heareth the word of the kingdom, and understandeth *it* not, then cometh the wicked *one,* and catcheth away that which was sown in his heart. This is he which received seed by the way side. 20 But he that received the seed into stony places, the same is he that heareth the word, and anon with joy receiveth it; 21 Yet hath he not root in himself, but dureth for a while: for when tribulation or persecution ariseth because of the word, by and by he is offended. 22 He also that received seed among the thorns is he that heareth the word; and the care of this world, and the deceitfulness of riches, choke the word, and he becometh unfruitful. 23 But he that received seed into the good ground is he that heareth the word, and understandeth *it;* which also beareth fruit, and bringeth forth, some an hundredfold, some sixty, some thirty.

Every time we lose in federal court, we fund the other side. Due to a 1976 federal law called "Civil Rights Attorneys Fee Award Act", the winners in a constitutional case on religious liberty or abortion have their attorney fees paid for by taxpayer dollars. For example, in 2000, taxpayers in 30 states paid $6 million to the ACLU and Planned Parenthood when the court struck down bans on partial-birth abortion in Nebraska and 29 other states. When we go into court, we should do so in those circumstances where we have the best chance of winning.

[Leach: I certainly have no desire to go to court against infanticide and lose!

On the other hand I have no patience for fundraising to save a couple of lives by organizations who want our money to create a legal green light to save all of the babies several years in the future – a light which is no different than the legal green light we already have, which the fundraisers declare has no power to undermine abortion!]

(AUL:) Proposed personhood amendments could prohibit abortion bans with any exceptions. If the legislature passes an abortion (law) ban with exceptions (such as rape, incest, or life of the mother), an enacted personhood amendment which requires "equal protection" of the unborn may well nullify it and abortion would remain legal despite the amendment. [Leach translation: laws restricting abortion that have any exceptions at all could be prohibited if certain personhood constitutional amendments are enacted. Laws against most but not all abortions would be found unconstitutional, leaving a state with no restrictions at all against abortion!]

[Leach: At least AUL doesn't say that would *definitely* be the outcome! It is hard to imagine a court could overturn an abortion restriction because it doesn't ban every last abortion as demanded by the state's pure personhood law, and conclude the personhood law requires that there be no restriction on abortions whatsoever! Although it is a common approach courts take towards laws, only part of which they don't like: to throw out the baby with the bathwater. But don't courts exercise authority to overrule only part of a law without the whole? Couldn't the court overrule the exceptions only?

In fact, Gonzales v. Carhart (2007) ridicules the very possibility that a court could ban a law because it doesn't criminalize enough:

> It is objected that the standard D&E is in some respects as brutal, if not more, than the intact D&E, so that the legislation accomplishes little.... There would be a flaw in this Court's logic, and an irony in its jurisprudence, were we first to conclude a ban on both D&E and intact D&E was overbroad [as did the Stenberg ruling, 7 years earlier] and then to say it is irrational to ban only intact D&E because that does not proscribe both procedures. [as the abortionists hoped the

Gonzales court would do in 2007].

But I acknowledge there is a contradiction in law, when a state's personhood law declares every last unborn baby is a human being, but then allows human beings to be murdered if their fathers committed rape or incest.

And I know that even Roe v. Wade imagined there was a huge contradiction because Texas declared the personhood of the unborn, but made an exception to save the life of the mother.

> Roe v. Wade said "When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. [There is at least an exception] for the purpose of saving the life of the mother.... But 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 determinant, does not the ... exception appear to be out of line with the Amendment's command?"

The "life of the mother" so-called contradiction is just foolish, and yet this alleged contradiction was one of the philosophical pillars of Roe. We have Necessity Defense laws which justify heroes who save lives even if they have to bend the letter of the law a little. But we don't have laws which *require* anyone to save lives. If there is ever actually a time when allowing a baby to live means the mother must give her life, society can certainly honor the mother who sacrifices herself. But law cannot require anyone to sacrifice herself. That is far from a contradiction of the personhood of every unborn baby.

As for the rape and incest exceptions contradicting personhood, yes of course they do. Would we feel free to murder a judge who was conceived in rape or incest? No? But we could have, before he was born? Because he didn't become fully human until he became a judge, or at least a lawyer?

The 14th Amendment requires all states to protect the right to life of all human beings equally. Once the fact that any group of people are "humans" and "persons" is established, then any failure of laws to protect them equally cannot justify dehumanizing them even more as not being "persons in the whole sense" so therefore we may murder them! Or enslave them! No, if there is to be any killing, it must be of those laws!

(AUL:) Proposed personhood amendments do not ban any conduct and cannot restrict the actions of anyone but the government. State constitutional amendments that apply the state constitution's due process and equal protection clauses to the developing human, including the unborn, only limit what the three branches of government do. They cannot limit actions of Planned Parenthood or individual abortion providers.

[Leach: True. Constitutional amendments, like Laci's Law, do not criminalize abortion directly. They only "collapse" Roe, freeing states to criminalize abortion as if Roe never existed. A state personhood declaration, not coupled with criminal laws which specify actions and affix penalties to them, is a reason for doing something without doing anything. Criminal laws need to be connected to the personhood declarations. That was the problem in Webster: Missouri had a wonderful personhood declaration, although it was emasculated by saying it was subject to decisions of the Supreme Court! But the Court noted that without specific laws restricting abortion, or even case law connecting the principle with abortion, it was premature to even assume Missouri intended to apply the principle to abortion. The Court said maybe Missouri only intended to apply it to the inheritance rights of a baby born after his father died, an application of which even Roe approved! Here is how the court said it:

> (This is taken from the syllabus, not the ruling itself) This Court need not pass on the constitutionality of the Missouri statute's preamble. In invalidating the preamble, the Court of Appeals misconceived the meaning of the dictum in *Akron v. Akron Center for Reproductive Health, Inc.,* **462 U.S. 416**, 444, that "a State may not adopt one theory of when life begins to justify its regulation of abortions." **[p491]** That statement means only that a State could not "justify" any abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodied the State's view about when life begins. The preamble does not, by its terms, regulate abortions or any other aspect of appellees' medical practice, and § 1.205.2 can be interpreted to do

no more than offer protections to unborn children in tort and probate law, [For example, the rights of a child to inherit property left by a father who died before the child was born] which is permissible under *Roe v. Wade, supra,* at 161-162. This Court has emphasized that *Roe* implies no limitation on a State's authority to make a value judgment favoring childbirth over abortion, *Maher v. Roe,* **432 U.S. 464**, 474, and the preamble can be read simply to express that sort of value judgment. The extent to which the preamble's language might be used to interpret other state statutes or regulations is something that only the state courts can definitively decide, and, until those courts have applied the preamble to restrict appellees' activities in some concrete way, it is inappropriate for federal courts to address its meaning. *Alabama State Federation of Labor v. McAdory,* **325 U.S. 450**, 460. Pp. 504-507.

My vision is of publishing the arguments in a Joint Resolution, or in the findings of fact in a law thoroughly criminalizing abortion as if Roe never existed. That will generate the national public discussion necessary to unite prolifers behind a clear understanding of what American law requires, which will put the necessary political pressure on the justices to squarely address Roe's "collapse" under the 2004 law.

(AUL:) Losing at the ballot box and in court demoralizes pro-life activists and biases the public against pro-life laws.

Well, now, that depends on how well prolife lawyers educate their followers. If prolifers understand that their side is absolutely, legally, and rationally correct, and that the Court's next decision is irrational, ignorant, with no legal reasoning, people will not be demoralized: they will be energized.

I think that is what makes Christianity grow under persecution. The contrast between the crystal clear righteousness of God and the Gospel, and the irrational, immature, juvenile, ignorant intolerance for truth acted out by the government, or by fanatical mobs, just becomes so overwhelming that people are ready to be tortured and die for the truth, and for love, and for God.

Think of Roe v. Wade's "collapse" clause as a doe in estrus.

Think of Laci and Conner's Law (2004) as a 32 point buck.

Think of legal abortion, whom no one believes can ever sink, as the Titanic.

Think of the truth legally "established/recognized" in Laci and Conner's Law as the iceberg.

(AUL:) Therefore the way to overturn Roe is through a series of carefully calibrated cases involving state legal restrictions that are within the rationale of Justice Kennedy's majority opinion in Gonzales v. Carhart (upholding the federal ban on partial birth abortion). For more information on Americans United for Life, visit www.AUL.org

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[Leach: In view of the utter unpredictability of the Court on the subject of abortion, willy nilly overturning state restrictions patiently crafted to satisfy the Court's limits given in the last decision, I would think the miniscule success of Gonzales v. Carhart must be as much due the enormous political pressure on the Court to criminalize this gruesome "procedure", as to how carefully the law complied

with the last ruling.

[Since Forsythe's vision is limited to what he can "carefully calibrate" to the "rationale of...Gonzales", I read the majority opinion again, looking for opportunities. Excerpts are below. To summarize, the Court is pledged to respect the legitimate interests of states to regulate abortions so long as they do not place a "substantial burden" on access to abortion before viability.

In order to allow any restriction of any abortion procedure, there has to be consensus in the medical community that the "procedure" is almost never necessary to protect the health of the mother.

Personhood amendments, laws, and statements are OK so long as no law applies them to any "substantial" restriction of abortion. ""[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.,* at 877. *Casey*, in short, struck a balance. The balance was central to its holding."

OK, let's look at that statement. Is this a ruling that definitions of all unborn babies as human beings are in fact meaningless? The majority might wish it had such power, to order this fact to mean nothing. But the meaning of this idea in Webster was that as long as the state which passed the law treats it as meaningless, and does not ask the Court to weigh its significance, there is no pressure on the Court to address the issue. However, should the day come when someone takes the language seriously and manages to get it before the Court, then as O'Conner said in Webster, "When the constitutional invalidity of a State's abortion statute actually turns upon the constitutional validity of *Roe,* there will be time enough to reexamine *Roe,* and to do so carefully."
]

Excerpts from Gonzales v. Carhart, majority opinion

The court began its analysis with what it saw as the appropriate question--"whether 'substantial medical authority' supports the medical necessity of the banned procedure." *Id.,* at 796 (quoting *Stenberg*, 530 U. S., at 938). This was the proper framework, according to the Court of Appeals, because "when a lack of consensus exists in the medical community, the Constitution requires legislatures to err on the side of protecting women's health by including a health exception." 413 F. 3d, at 796.

The District Court in *Planned Parenthood* concluded the Act was unconstitutional "because it (1) pose[d] an undue burden on a woman's ability to choose a second trimester abortion; (2) [was] unconstitutionally vague; and (3) require[d] a health exception as set forth by ... *Stenberg*." 320 F. Supp. 2d, at 1034-1035....

The court [of appeals] interpreted *Stenberg* to require a health exception unless "there is *consensus in the medical community* that the banned procedure is never medically necessary to preserve the health of women." 435 F. 3d, at 1173.

Finally, the Court of Appeals found the Act void for vagueness. *Id.,* at 1181. Abortion doctors testified they were uncertain which procedures the Act made criminal. The court thus concluded the Act did not offer physicians clear warning of its regulatory reach. ...

The principles set forth in the joint opinion in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), did not find support from all those who join the instant opinion. See *id.,* at 979-1002 (*Scalia*, J., joined by *Thomas,* J., *inter alios,* concurring in judgment in part and dissenting in part). Whatever one's views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion--that the government has a legitimate and substantial interest in preserving and promoting fetal life--would be repudiated were the Court now to affirm the judgments of the Courts of Appeals....

Casey involved a challenge to *Roe* v. *Wade*, 410 U. S. 113 (1973). The opinion contains this summary: "It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each." 505 U. S., at 846 (opinion of the Court)....

Though all three holdings are implicated in the instant cases, it is the third that requires the most extended discussion; for we must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child....

To implement its holding, *Casey* rejected both *Roe*'s rigid trimester framework and the interpretation of *Roe* that considered all previability regulations of abortion unwarranted. 505 U. S., at 875-876, 878 (plurality opinion). On this point *Casey* overruled the holdings in two cases because they undervalued the State's interest in potential life. See *id.,* at 881-883 (joint opinion) (overruling *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986) and *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983))....

We assume the following principles for the purposes of this opinion. Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." 505 U. S., at 879 (plurality opinion). It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the

fetus attains viability." *Id.,* at 878. On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.,* at 877. *Casey*, in short, struck a balance. The balance was central to its holding. We now apply its standard to the cases at bar....

We conclude that the Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face....

Unlike the statutory language in *Stenberg* that prohibited the delivery of a " 'substantial portion' " of the fetus--where a doctor might question how much of the fetus is a substantial portion--the Act defines the line between potentially criminal conduct on the one hand and lawful abortion on the other....

Respondents likewise have failed to show that the Act should be invalidated on its face because it encourages arbitrary or discriminatory enforcement. *Kolender, supra*, at 357. Just as the Act's anatomical landmarks provide doctors with objective standards, they also "establish minimal guidelines to govern law enforcement." *Smith* v. *Goguen*, 415 U. S. 566, 574 (1974). The scienter requirements narrow the scope of the Act's prohibition and limit prosecutorial discretion. ...

We next determine whether the Act imposes an undue burden, as a facial matter, because its restrictions on second-trimester abortions are too broad. A review of the statutory text discloses the limits of its reach. The Act prohibits intact D&E; and, notwithstanding respondents' arguments, it does not prohibit the D&E procedure in which the fetus is removed in parts....

Congress, it is apparent, responded to these concerns because the Act departs in material ways from the statute in *Stenberg*. It adopts the phrase "delivers a living fetus," §1531(b)(1)(A) (2000 ed., Supp. IV), instead of " 'delivering. . . a living unborn child, or a substantial portion thereof,' " 530 U. S., at 938 (quoting Neb. Rev. Stat. Ann. §28-326(9) (Supp. 1999)). The Act's language, unlike the statute in *Stenberg*, expresses the usual meaning of "deliver" when used in connection with "fetus," namely, extraction of an entire fetus rather than removal of fetal pieces....

By adding an overt-act requirement Congress sought further to meet the Court's objections to the state statute considered in *Stenberg*. Compare 18 U. S. C. §1531(b)(1) (2000 ed., Supp. IV) with Neb. Rev. Stat. Ann. §28-326(9) (Supp. 1999). The Act makes the distinction the Nebraska statute failed to draw (but the Nebraska Attorney General advanced) by differentiating between the overall partial-birth abortion and the distinct overt act that kills the fetus. See *Stenberg*, 530 U. S., at 943-944. The fatal overt act must occur after delivery to an anatomical landmark, and it must be something "other than [the] completion of delivery." §1531(b)(1)(B). This distinction matters because, unlike intact D&E, standard D&E does not involve a delivery followed by a fatal act....

The canon of constitutional avoidance, finally, extinguishes any lingering doubt as to whether the Act covers the prototypical D&E procedure. " '[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' " *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988) (quoting *Hooper* v. *California*, 155 U. S. 648, 657 (1895)). It is true this longstanding maxim of statutory interpretation has, in the past, fallen by the wayside when the Court confronted a statute regulating abortion. The Court at times employed an antagonistic " 'canon of construction under which in cases involving abortion, a permissible reading of a statute [was] to be avoided at all costs.' " *Stenberg, supra*, at 977 (*Kennedy*, J., dissenting) (quoting *Thornburgh*, 476 U. S., at 829 (O'Connor, J., dissenting)). *Casey* put this novel statutory approach to rest....

Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U. S., at 878 (plurality opinion). The abortions affected by the Act's regulations take place both previability and postviability; so the quoted language and the undue burden analysis it relies upon are applicable. The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions. The Act does not on its face impose a substantial obstacle, and we reject this further facial challenge to its validity....

There can be no doubt the government "has an interest in protecting the integrity and ethics of the medical profession." *Washington* v. *Glucksberg*, 521 U. S. 702, 731 (1997); see also *Barsky* v. *Board of Regents of Univ. of N. Y.*, 347 U. S. 442, 451 (1954) (indicating the State has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine). Under our precedents it is clear the State has a significant role to play in regulating the medical profession. *Casey* reaffirmed these governmental objectives. The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of the opinion was that the Court's precedents after *Roe* had "undervalue[d] the State's interest in potential life." 505 U. S., at 873 (plurality opinion); see also *id.,* at 871. The plurality opinion indicated "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.,* at 874. This was not an idle assertion. The three premises of *Casey* must coexist. See *id.,* at 846 (opinion of the Court). The third premise, that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting *Casey*'s requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn....

No one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life. Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition. Congress determined that the abortion methods it proscribed had a "disturbing similarity to the killing of a newborn infant," Congressional Findings (14)(L), in notes following 18 U. S. C. §1531 (2000 ed., Supp. IV), p. 769, and thus it was concerned with "draw[ing] a bright line that clearly distinguishes abortion and infanticide." Congressional Findings (14)(G), *ibid.* The Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned....

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue. See, *e.g., Nat. Abortion Federation*, 330 F. Supp. 2d, at 466, n. 22 ("Most of [the plaintiffs'] experts acknowledged that they do not describe to their patients what [the D&E and intact D&E] procedures entail in clear and precise terms"); see also *id.,* at 479. It is, however, precisely this lack of information concerning the way in which

the fetus will be killed that is of legitimate concern to the State. *Casey, supra*, at 873 (plurality opinion) ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning"). The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form. It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions....

The prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it "subject[ed] [women] to significant health risks." Ayotte, supra, at 328; see also Casey, supra, at 880 (opinion of the Court). ...

("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad").

+++++Here is a magazine interview with Clark Forsythe, head of Americans United for Life.

- Justin Taylor - http://thegospelcoalition.org/blogs/justintaylor -

Overturning and Undermining *Roe v. Wade*: An Interview with Clarke Forsythe

Posted By Justin Taylor On January 22, 2010

Today is the 37th anniversary of the Supreme Court's infamous decision, *Roe v. Wade*. Mr. Forsythe's chapter on *Roe* in *Politics for the Greatest Good* is called "Overturning *Roe v. Wade* Successfully," and it's the best thing I've seen on the topic.

Mr. Forsythe was kind enough to answer some questions about *Roe* and what we can do to undermine it and overturn it. For more details, I highly recommend his book.

You are a strong advocate for the overturning of *Roe v. Wade*. Yet you argue that unless we adopt "the virtue of open-mindedness" we won't be able to understand the decision, its power, and its significance today. Can you explain in what sense we should be open-minded about this terrible decision?

Successful advocates have to know their opponent's case (and its weaknesses) better than the opponent does. Those who advocate against *Roe* need to be "open-minded" enough to thoroughly understand the decision—including its impact and the reasons why it still stands 37 years later—better the supporters of *Roe*. We can't successfully overcome political obstacles unless we thoroughly understand them. After William Wilberforce committed his parliamentary career to the goal of overturning the slave trade in 1787, he spent at least a year —maybe more—studying and understanding the slave trade. Open-mindedness is necessary for discernment.

Polling suggests that, by and large, the American public prefers the status quo with regard to *Roe*. Why do you think that's the case?

Because the majority of the public does not understand what the *Roe* decision did or stands for. This is thoroughly laid out in James Davison Hunter's book *Before the Shooting Begins* [6], which exhaustively explores the 1990 Gallup Poll on "Abortion and Moral Beliefs." Abortion advocates and politicians who support *Roe* have a vested interest in perpetuating public ignorance of the scope and implications of the *Roe* decision. It dictated one of the most extreme abortion policies for any nation in the world. There is a serious conflict between the fact that *Roe* enforces a right to abortion on demand from conception to birth and the fact that polls show that the majority of Americans support abortion only for "the hard cases" early in pregnancy. Some in the media still describe *Roe* as authorizing a right to abortion "in the first three months of pregnancy."

I'm guessing that many readers would be surprised to read this line from your book: "Some Americans likely believe that overruling *Roe* means that the Supreme Court would make abortion illegal. This is seriously wrong. . . . If the Court overruled *Roe* today, abortion would be legal in at least forty-three states tomorrow" (p. 186). Why is this?

The simple answer is that pre-*Roe* state abortion prohibitions have been repealed in those states since 1973—no criminal prohibitions exist in those states. The legislatures would have to pass new prohibitions. The

practical effect of "overturning Roe" means that the national right to abortion created by the Supreme Court in Roe would be reversed, and that would effectively return the issue to the legislative processes at the federal or state level. The states (or, in the opinion of some, Congress) would be allowed to pass new laws; but unless they passed prohibitions on abortion, there would be no prohibitions (in those states) to enforce. I was asked in an interview in Manhattan this week whether the overturning of *Roe* means that the Supreme Court would "make abortion illegal" or whether some federal law would make abortion illegal or whether state prohibitions in the 50 states would immediately go back into effect. None of those three scenarios is true, but it's a persistent misunderstanding. The overturning of *Roe* would mean minimal immediate change until the states acted. Regulations now on the books in the states—like parental notice and consent laws, and clinic regulations—would continue to be enforceable.

Leach: It is not entirely true that repealing Roe will have no immediate effect on criminalizing abortion. If Roe's "collapse" clause is satisfied by establishing the humanity of babies of humans, the babies would instantly have a 14th Amendment right to life, as that same "collapse" clause acknowledges. Thus states would be obligated to criminalize abortion to provide the unborn "equal protection of the laws". During the interim between legal recognition of Roe's "collapse" and a reasonable opportunity for legislatures to act, lawsuits would be possible.

Why should *Roe v. Wade* be overruled?

It authorizes the homicide of the unborn child as national policy, a national "right." It means abortion on demand nationwide as a practical matter, and it is an unjust, unconstitutional usurpation of the people's right of self-government to decide the abortion issue, as the people decide other controversial issues, through the normal processes of representative government. By contrast, there is no "Roe" on other controversial bioethical issues—like human cloning, stem cell research, or assisted suicide. The Court has not taken them away from the American people; we decide these issues through the public officials we elect. In addition to the questions of moral principle and constitutional authority, there is the question of governmental competence: the Court has demonstrated through its incompetence over the past 37 years that the American people can better decide the abortion issue than the Court. And for women's health, the Court created a public health vacuum—meaning that women are not informed of the medical risks, among other things, and abortion clinics are little regulated. At the very least, that vacuum should be filled by regulations enforced by local public health officials.

You explain that as a practical matter, there are only two ways to overturn a Supreme Court decision: (1) a constitutional amendment, or (2) a Supreme Court decision that overrules a prior decision. Let's start with the first. You say that a constitutional amendment has virtually no chance of success in the foreseeable future. Why not?

A culture that produces 1.2 million abortions a year is not a culture that will pass a federal constitutional (national) human life amendment. Before any such amendment is possible, the *Roe* decision will first have to be overturned, and the abortion issue returned to the normal democratic and legislative processes, and the states and public opinion will have to show progress toward a legal and political culture that will support a human life amendment. Parliament didn't pass a prohibition on the slave trade in 1807 until Wilberforce and his allies first considerably reduced the slave trade; that was the result of numerous prudential limits between 1787-1805, including (but not limited to) the "neutral flags" tactic that was dramatized in the movie *Amazing Grace*.

Leach: AUL assumes the political opportunity must wait until abortion is considerably reduced. That is logical, but there is another way: the power of the simple truth. On blogs, the bottom line of pro-death folk is that "abortion is LEGAL". Take that away, and indignation against prolifers becomes very quiet. So, let prolife groups publicly explain the simple truth that it is not. It "collapsed" 10 years ago, and now the entire abortion industry violates the 14th Amendment.

Explain that the only reason this hasn't been legally recognized yet is that prolifers have not yet brought a case that forces courts to squarely address the issue. Courts don't automatically resolve inconsistencies in law as soon as they appear; a case has to be brought before them. There are many reasons that delay bringing the right case, some understandable and some embarrassing. But it is obvious that the conditions of Roe's "collapse" clause were fully satisfied in 2004; therefore it is simply not true, and is simplistic at best, to say abortion is still "legal". Its violation of the 14th Amendment is not lessened one bit by the fact that courts have not yet ruled upon it.

The Fourteenth Amendment says that no state may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." ***Roe*** **declared that an unborn child is not a "person" protected under the Fourteenth Amendment. Some pro-life advocates would like to see the Court revisit this holding. Why, in your view, is that improbable?**

It is not simply "improbable" but almost certainly impossible in our lifetime. That's because every single justice since Roe has rejected it (the proposition that the unborn child is a "person" within the meaning of the Fourteenth Amendment), including the most anti-Roe justices, Justice Scalia and Justice Thomas. And Scalia and Thomas have rejected it for at least two or three reasons. First, the words "abortion" and "unborn child" are not in the Constitution; they weren't specifically considered by the framers of the 14th Amendment. Second, Justice Scalia and Thomas believe that the abortion issue was and is an issue for the states to decide, as a constitutional matter. The third is perhaps the most powerful and the one most often ignored by pro-lifers: Scalia and Thomas want the Court out of the "abortion-umpiring business," which they think has undermined the integrity of the Court as a constitutional and political institution. The declaration that the unborn child is a "person" within the meaning of the 14th Amendment would not extract the Court but thrust it more deeply into the "abortion-umpiring business." So, for both constitutional and institutional reasons, Scalia and Thomas have at least implicitly rejected 14th Amendment "personhood," and it's almost certain that any justice nominated by even a pro-life president and confirmed by the Senate in the next 20 years will be heavily influenced by the reasoning of Scalia and Thomas. We don't have to agree with that, but we do need to understand it.

Leach: I would agree with Scalia and Thomas that the Court should get out of the "abortion umping" business, or any other business where they are shooting state legislatures with "penumbras". But the Court doesn't have to *decide* personhood to recognize that federal law has decided it, so courts need to conform their rulings to federal law, in this case meaning to get Roe out of the way of state legislatures. In so doing, the court can certainly rule so "without prejudice", meaning the court takes no position on the issue, itself. In fact Roe treated personhood as a fact issue which courts aren't qualified to *decide*. It talked as if doctors and preachers are better qualified to decide this *fact issue.*

I respond to this argument further when it comes up again in the following personal letter from Clark Forsythe. I give quotes from Scalia and Thomas indicating that once the life of unborn babies is established as a "protected liberty", they accept the role of the Court to overrule a state which fails to protect it.

As a practical matter, then, some President would have to nominate, and the Senate confirm, at least six justices who are willing to adopt what Justices Scalia and Thomas have rejected. That might happen in 2050, if, between now and then, *Roe* is overturned and a majority of states enact and enforce prohibitions on abortion, thereby exhibiting a national political culture that opposes all abortion. But that's not political reality in 2010.

Last but not least, federal constitutional "personhood" was argued to the Supreme Court by Texas and Georgia in the oral arguments in 1971 and 1972 leading up to the *Roe* decision in 1973, and has been argued

to the Supreme Court, in legal briefs, at least 25 times since *Roe*. So, it's not a new argument that the Court hasn't heard before.

Leach: You say personhood has been argued at least 25 times since Roe. Make it 27, counting two of mine. But it has not been argued since 2004, when federal law first defined all unborn babies as "members of the species homo sapiens".

Given that both a constitutional amendment and a personhood decision are extremely unlikely, what are incremental some steps that we can take to hallow out *Roe*?

By "incremental," I assume you mean legislative means that affirmatively protect the unborn and women and that reduce abortion (in contrast to outright abortion bans that would be clearly rejected by the current Supreme Court). On the legal side, the states can enact (1) fetal homicide laws (the strongest possible legal protection of the unborn child today), (2) legislation to limit and fence in and reduce abortion, and (3) legislation to protect women's health and ensure that women get full information about the six major medical risks to women from abortion. Political science professor Michael New's series of statistical analyses attribute the 25% drop in abortions (from 1.6 million annually in 1992 to 1.2 million annually in 2006) to legislation of this kind. The current majority of the Court will likely uphold any regulation of abortion that makes medical sense, and there's a lot that the states can and should do to protect women from the medical risks.

Leach: One problem with the "incremental laws" you propose is that they do not escape Roe's judgment upon the whole history of laws which do not treat unborn babies of humans as "persons in the whole sense" since killing them is penalized with less severity than killing adults. A state law which criminalizes abortion at its heart, as if abortion never existed, would overcome that legal argument. A court challenge of such a law, defended by a state attorney general on the basis of the 2004 federal law defining the unborn as humans, would put the strongest possible pressure on the Court to address Roe's "collapse".

Yet I appreciate every restriction anyone can achieve. I only oppose such contentment with tiny restrictions that prolifers have no attention span to study proposals that would Stop Legal Infanticide by Christmas (SLIC).

Can you give us a brief overview of your case for prudence and incrementalism in public policy as opposed to an "all-or-nothing" approach?

The key political virtue for citizens in a democratic republic is *prudence*. Prudence is very simply "practical wisdom," though I like Thomas Aquinas's definition best: "right reason about what is to be done." His definition captures the reasoning that is at the heart of the intellectual virtue of prudence. Revered by Aristotle and Thomas Aquinas as the preeminent of the four cardinal virtues, prudence has, in our time, either been buried in clichés ("settling for half a loaf," "getting what you can get") or confused with other terms (moderation, caution, gradualism, incrementalism). As an intellectual virtue, political prudence challenges political leaders and voters with four questions:

1. Are they pursuing good goals?
2. Do they exercise wise judgment as to what's possible?
3. Do they successfully connect means to ends?
4. Do they preserve the possibility of future progress when the ideal cannot be immediately achieved?

Because prudence is practical wisdom, I include two chapters on William Wilberforce and Abraham Lincoln, in which I examine their political prudence.

Zeal is important but never sufficient to make a difference in politics. Prudence is absolutely essential because it makes zeal effective in making progress and making a difference. One common reason for imprudence is ignoring or overlooking obstacles to our goals and aspirations; and zeal is often the reason

why we ignore or overlook obstacles.

Let's not put the cart before the horse. When it comes to politics, prudence judges in any particular circumstance whether an incremental strategy is the right one. Roughly speaking, I think of prudence as "strategic," and incrementalism as "tactical." Incremental means simply step-by-step, or, for example, limiting a social evil when complete prohibition is beyond our control. (The term is pervasive throughout politics, finance, sports, and the military.)

When it is not possible to completely prohibit a social evil, it is both moral and effective to limit it as much as possible. When the ideal is beyond our power, it is moral and effective to seek the greatest good possible. Prudence instructs us that an "all-or-something" approach is better than an "all-or-nothing" approach in politics. One of the reasons is that progress is almost always a result of momentum, and momentum—in the face of countervailing obstacles—is often produced by small victories.

In the business world, by comparison, Jim Collins' book *Good to Great* [7] captures this reality by his use of the metaphor of the fly-wheel, and the need to get the fly-wheel going by concentrated, effective, consistent action to produce the right change.

An all-or-nothing approach, by contrast, is rarely prudent (I can't think of an example) and rarely produces change, and when nothing is the result, it doesn't create the needed momentum to produce change. This reality is reflected in the simple truth that it's always good (a good goal) to limit an evil.

Leach: You mention Wilberforce as an example of "prudence". All I know about Wilberforce is a number of articles I have read about him, and watching the movie "Amazing Grace". My impression is that although the results he achieved were incremental, he was never unclear about his goal. He never pretended that the small concessions he argued for along the way would satisfy him or buy his endorsement of the legal legitimacy of the remainder of slavery. When I hear arguments for corresponding incremental restraints against abortion in today's legislatures and courts, the arguments seem obsessed with issues I care relatively little about, like the health of women who are trying to murder their babies, and only incidental reminders that the real purpose of these almost symbolic restraints is that they will at least slightly diminish unthinkable bloody infanticide with zero legal legitimacy, supported by anarchy of legal reasoning, of which judges and news reporters ought to be first thoroughly ashamed, and second relieved of their forums from which they are able to confuse and intimidate. Likewise Christians should be ashamed of listening to them, following their wicked rulings, and buying their filthy newspapers, instead of creating their own news sources and their own courts as commanded by 1 Corinthians 6. (Lest you think God was stupid to write 1 Corinthians 6, somewhere I still have a full page article with the speech of a Nebraska chief justice honoring some kind of centennial in Iowa, in which he said that until a century ago, courts had little business compared with now because Christians and communities handled their own problems.)

Indeed, Christians should be ashamed of letting their God be shamed by pagan news reporters, judges, lawmakers, and Democrats in whose world murdering your own baby is normal while calling that "murder", and sodomy "abomination", is "extremist" and on the margins of civilized society! Christians should be ashamed of their weak or non response to God's enemies who call it stupid to obey and proclaim God, and "credible" to refrain from quoting Him! God's word for those who regard His Word as foolish is "foolishness". 1 Corinthians 3:19. It is an accurate word! Christians need to believe it, and use it, to marginalize it! We don't need it to build our self esteem! We have God!

Forsythe is not specific about what strategies he regards as "all or nothing". I agree with him if he means things like third party candidates who can't even manage enough consensus to get on ballots, yet "purists" will support them and no others less "pure", that is until imperfections are

discovered in their heroes causing their few supporters to dissolve into factions. Politics is unfortunately dominated by imperfect human beings, not angels. Even God puts humans in charge, Romans 13:1. Even God, who could have put angels in charge, or even Himself, Matthew 4:8-10, does not always choose the best leaders for people, but only the best that the people will tolerate, 1 Samuel 8.

I can only guess who Forsythe thinks wants “all or nothing” within prolife work. If he is disappointed by the fragmentation, each prolifer thinking only his approach is effective and critical of others for diverting resources from the effective approach, I certainly share his frustration.

Forsythe’s discussion of "all or nothing", "all or something", "prudence", "incrementalism", "strategic", and "wise judgment as to what's possible" may be logical outside the context of the problem before us. But there is no "all or nothing" about a state law criminalizing abortion as if Roe never existed, setting up a court challenge which looks winnable and which does NOT ask any court to affirm "with prejudice" anything about personhood other than to acknowledge the fact that federal law has established it, so therefore by the terms of Roe itself, Roe must "collapse". Since the argument is no less true however the Court reacts to it, raising it as powerfully and persistently as we can is the best way to prepare the public, whose need we agree upon, for the end of abortion.

Incrementalism, as a goal which we present as what will satisfy us, is the wrong strategy for two reasons: the reason I mentioned, that "incremental" laws do not treat the unborn as "persons in the whole sense", and secondly, politically and strategically, in this age of Compromise, deliberately holding our best punches puts us almost out of the ring before the process of "compromise" even begins. We need to slug our way as far as we can into our opponent's corner before the compromise begins.

To put it in Biblical terms, Jesus promises that if we push mountains, with faith in God, eventually (he didn't say instantly; sometimes it may be incrementally) they will tumble. Now if we decide even before we try that that is impossible, and push an anthill instead, the one thing guaranteed to us is that we will never topple a mountain. But if we don't give up pushing a mountain, who knows but that God will turn out not to be a liar? But even if you think He is, then even without Him we are more likely to at least topple several anthills, and maybe a foothill.

There are many things we can and should to as advocates for life, including prayer, giving, volunteering, etc. For readers who want to make a difference in public policy with regard to abortion, what are some things they can do?

1. Become active voters. Vote in upcoming primaries, and vote in the upcoming state and federal general elections, including the Congressional mid-term elections in November 2010.
2. Stay informed through reading and information that’s on the Web. See e.g., www.aul.org [2].
3. Get involved with a pro-life organization in your state that is actively involved in lobbying on the life issues in your state capitol this Spring.
4. Support AUL’s work in the courts and legislatures.

Chuck,

Below is our Senior Counsel Clarke Forsythe’s response to your query. Let me know how we can help further.

Dan McConchie, Vice President of Government Affairs, Americans United for Life

10/27/2010 Response from AUL to Chuck Hurley:

Unfortunately, there is no "collapse clause" in Roe v. Wade that will be automatically "triggered" by some future event. The Court doesn't work that way.

Leach: I understand that the process is not automatic. I never indicated it was. Fact and law changes all the time, creating contradictions which remain unresolved until some legislature or court addresses them. Courts can't address contradictions until some case presents them. And even then the court, being composed of humans with the normal array of human prejudices, will not acknowledge facts they don't like, unless the political pressures will not allow what is swept under the rug to remain under the rug. Our job, therefore, is to assemble the very strongest reasoning possible, and then create those political pressures to get them squarely addressed.

As Iowa Congressman Steve King said on the Jan Mickelson show February 15, 2011, you get in the strongest position you can possibly get in, and then you strike as hard as you can. We are at the time to strike hard. The legal landscape simply can't get significantly better than federal recognition of the fact that all unborn babies are fully human. (See www.Saltshaker.US/SLIC/NoGreenerLight.pdf)

The collapse of Roe v. Wade will only come by changing the justices and addressing the rationale that currently binds some justices to Roe---the reliance interests rationale of Casey, which is also shared by the public right now.

Leach:

This is from the majority opinion in Casey, about "reliance interests":

> The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application. *[Leach translation: mothers who have come to rely on the legal right to murder their own babies would pay too heavy a cost of we stopped their bloodletting.]* Since the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, see Payne v. Tennessee, [505 U.S. 833, 856] supra, at 828, where advance planning of great precision is most obviously a necessity, it is no cause for surprise that some would find no reliance worthy of consideration in support of Roe. *[Leach translation: some folks are surprised that we apply this "reliance" principle to abortion, since in the past it was only applied to business contracts where changing laws that alter business contracts would make it impossible for businessmen to plan business ventures.]*
>
> While neither respondents nor their amici in so many words deny that the abortion right invites some reliance prior to its actual exercise, one can readily imagine an argument stressing the dissimilarity of this case to one involving property or contract. Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for Roe's holding, such behavior may appear to justify no reliance claim. Even if reliance could be claimed on that unrealistic assumption, the argument might run, any reliance interest would be de minimis. This argument would be premised on the hypothesis that reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.
>
> To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that, **for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.** The ability of women to participate equally in the economic and social life of the

Nation has been facilitated by their ability to control their reproductive lives. See, e.g., R. Petchesky, Abortion and Woman's Choice 109, 133, n. 7 (rev. ed. 1990). The Constitution serves human values, and while the effect of reliance on Roe cannot be exactly measured, neither can the certain cost of overruling Roe for people who have ordered their thinking and living around that case be dismissed. [505 U.S. 833, 857]

By "reliance interests", Forsythe means the Supreme Court thinks abortion should be allowed, no longer because we are unsure whether babies of humans are humans, but because women have come to "rely" on the right to murder these millions of human beings by surgical abortion, in case murdering them by chemicals doesn't work. Forsythe explains this "reliance interests" theory in his article at http://www.trolp.org/main_pgs/issues/v10n1/Forsythe.pdf.

> The *Casey* plurality ultimately justified its adherence to *Roe* and *Doe* on the foundation of the "reliance on the availability of abortion in the event that contraception should fail."...The bottom-line rationale of *Casey* is that "reliance interests" in abortion—as a backup to failed contraception—justified retaining the rule of *Roe*. This sociological—or perhaps social psychological conclusion—is the only analysis that now unifies a majority of the Supreme Court in favor of continual assertion of power over the abortion question. The assertions of the plurality opinion in *Casey*, its reliance interests justification, and its "undue burden" standard were adopted by the majority in *Stenberg v. Carhart* in 2000.[120] Today, constitutional law is no longer the basis for what the Court has done. Social policymaking—supported only by the Court's sociological, social psychological, or philosophical premises—stands as the justification for the power exercised in *Roe*, *Casey*, and *Carhart*.

This is all true. But that was only possible before federal law legally established the fact that all unborn babies are human beings. The "reliance interests" of mothers to kill can't stand against federal establishment of the fact that those whom mothers "rely" on killing are human beings with full 14th Amendment Rights to Life. The Court has not said such a thing, and the Court dares not say such a thing.

Were that indeed to become the Court's formal position, let them say so! Let us present them with a case that forces them to say so! The people of the United States may have gotten into the habit of murdering their own babies, but they are not ready to return to slavery! But slavery will be the least of the legal anarchy we will return to, if we can stomach the doctrine that getting into the habit of depriving others of fundamental rights creates a Constitutional Right to legal protection while you do so!

The reason we cannot let this reasoning stop us is that there must come a point where everyone realizes how naked Emperor Abortion stands, with not a stitch remaining of legal clothes. That point is reached if indeed the justices really will dare to put in writing that it matters not whether the unborn are human beings – mothers have developed such a habit of murdering them that the blood letting must go on. The Court has not explicitly said that even the establishment of the unborn as fully human beings cannot move it from its support for abortion – Forsythe only assumes the Court will be this dull witted because that seems the logical result of its declarations in Stenberg.

Forsythe continues: Besides, it is often overlooked that Blackmun's point on personhood was not about moral personhood or ontological personhood. It instead was based in the question of whether the framers of the 14th Amendment intended to protect the unborn child when they wrote it. All of the justices have rejected the proposition that the 14th Amendment was intended when it was drafted to protect the unborn child, even the most anti-abortion or anti-Roe justices.

Leach: I would take it as obvious that the unborn were not on the minds of the framers of the 14th Amendment. Nor were a hundred other groups of human beings whose oppression was not foreseen in 1868, yet whose cause is defended today because of their work. For example, the undocumented school children

whose 14th Amendment rights were protected by Plyler v. Doe, 1982. Their intent was to, as the Amendment says, give all human beings "equal protection of the laws".

Forsythe: Justices Scalia and Thomas have repeatedly said they will not support it, and it is virtually certain that Chief Justice Roberts and Justice Alito share the views of Justices Scalia and Thomas.

Leach: The four justices are pretty adamant that Roe must go, though. They would indeed hesitate to force the nation to adopt their personal view that the unborn have a 14th Amendment Right to Life, preferring to allow states to struggle with the issue. But presented with the uncontroverted establishment of that right in federal law, they would surely at the least agree that any uncertainty about "when life begins" at the time of Roe no longer exists, so the rights of the mother to kill must now compete not only with "legitimate state interests", but also with the at least apparent fundamental right to life of the unborn. The mother's rights to kill, or reliance upon killing, would be thus weakened to the extent that there is too little of it left to merit Court protection.

One reason states ought to handle the balancing of rights:

> Rehnquist, White, Scalia, Thomas: Here the dissent talks about why jurisdiction is for states:
> The joint opinion is forthright in admitting that it draws this distinction based on a policy judgment that parents will have the best interests of their children at heart, while the same is not necessarily true of husbands as to their wives. Ante, at 895. This may or may not be a correct judgment, but it is quintessentially a legislative one.

But there are indications the conservative justices would go farther if possible, than to merely pass it back to the states.

The following quote from Casey says the "liberty" to kill babies is not "protected" so courts should allow states to "adopt one position or the other", but of course the Court should overrule state laws that do "intrude on a protected liberty". This should not be taken as a statement that the minority rejects "life" as a constitutionally "protected" liberty, or that the minority is committed to rejecting the unborn as "life". This statement was made years before federal law established legal recognition of the unborn as human beings.

> Second dissent, by Scalia, White, Thomas: My views on this matter are unchanged from those I set forth in my separate opinions in Webster v. Reproductive Health Services, 492 U.S. 490, 532 (1989) (opinion concurring in part and concurring in judgment), and Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 520 (1990) (Akron II) (concurring opinion). **The States may, if they wish, permit abortion on demand,** but the Constitution does not require them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. As the Court acknowledges, "where reasonable people disagree, the government can adopt one position or the other." Ante, at 851. **The Court is correct in adding the qualification that this "assumes a state of affairs in which the choice does not intrude upon a protected liberty,"** ibid., - but the crucial part of that qualification [505 U.S. 833, 980] is the penultimate [next to last] word. A State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a "liberty" in the absolute sense. Laws against bigamy, for example - with which entire societies of reasonable people disagree - intrude upon men and women's liberty to marry and live with one another. But bigamy happens not to be a liberty specially "protected" by the Constitution.

Next the minority acknowledges the human personhood argument and says its very existence, without any ability of the Court to disprove it, is reason to topple Roe. Unfortunately the minority also says "there is no way to determine [whether the unborn are human or merely "potentially human"] as a legal matter; it is, in fact, a value judgment." Assuming the minority is not omnipotent, we should not assume they foresaw U.S. 18-1841(d) and included that in their unarticulated list of "ways" that fail to determine

personhood “as a legal matter”. I would like to see this 2004 law presented to them, giving them the opportunity to respond to it, and hear their answer for myself, before I accept Forsythe’s assumption how they would answer.

> ..."reasoned judgment" does not begin by begging the question, as Roe and subsequent cases unquestionably did by assuming that what the State is protecting is the mere "potentiality of human life." See, e.g., Roe, supra, at 162; Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 61 (1976); Colautti v. Franklin, 439 U.S. 379, 386 (1979); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 428 (1983) (Akron I); Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 482 (1983). The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child is a human life. Thus, whatever answer Roe came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. **There is, of course, no way to determine that as a legal matter; it is, in fact, a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so.**

The above argument may be characterized as saying the Court has no business overruling state efforts to comply with the 14th Amendment.

Now that federal law has legally recognized the fact that the unborn are just as human as blacks, a northern state that permits, protects, and even funds abortion can no more be tolerated than a southern state whose laws protect slave owners. Surely the minority will agree.

Actually I must dismiss as absurd and surely not the position they would affirm upon reflection, that it is impossible to know whether the unborn or the elderly are human beings! That excuse for such critical ignorance would just as easily stretch to include Blacks, Jews, Christians, or “illegals”, and return us to the days of enslaving us all, so long as the majority within a state vote for it!

Here is an example of the minority’s practical reasons for leaving states alone to struggle with abortion:

> ...by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.
> We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.

These of course are practical, not legal reasons. The quote above indicates they still recognize the legitimacy of Court involvement when the “liberty” (in our case, the “liberty” to live) trampled by states is constitutionally “protected”.

But let’s not get confused and imagine that the choice is all one or the other; either the states set their own laws or the Supreme Court does it. Indeed, the Supreme Court has done a lot of micromanaging of state laws regarding abortion; as the minority points out so ruthlessly, abortion case law is far from “settled” or predictable; states continually try to regulate abortion in conformity with the latest Supreme Court limits, only to be overturned by the Court making up new limits. Pornography is another area where it has become impossible to predict how the Court will rule, making it impossible to enact laws with any confidence what will happen to them. But in most areas courts leave legislatures alone unless some violation of “fundamental rights” is egregious.

But even in the case of abortion and pornography, the details of future criminal laws are left to states, since it is state police who must enforce them, just as the details of other crimes against harming human beings is left to states. There have been a few cases where Courts tried to create state laws, not only dictating what legislatures ought to enact but themselves giving orders as if they had authority to create laws, but those cases were scandals and fortunately the rare exception. When the Iowa Supreme Court did that with

sodomite marriage, ordering county recorders to process sodomite marriage applications in 2009, voters in 2010 removed the three justices from the bench whose retention votes came up.

I see no reason to fear that the minority sees any less role for the Court regarding abortion than this normal, historical role. I also support that role.

Let me clarify a bit more, the respective roles of states and courts regarding issues like abortion, if they were handled the way most issues are, and the way abortion was before 1973, to which I think the minority wants to return.

The Courts step in where a specific state law egregiously violates some constitutionally protected right, but the Courts correct it not by replacing it with a law that conforms to the Constitution, but by stating the *general principle* which the law violates, hoping the legislature will understand the principle and enact the law's replacement.

Even when the day comes that the Supreme Court acknowledges the establishment of all unborn babies as human beings and "persons in the whole sense", states will still have the responsibility to flesh out many details. In that day, a state which does not criminalize abortion at all would be in violation of the 14th Amendment, and a lawsuit against the state might be reviewed by the Supreme Court. But as long as reasonable steps are taken to criminalize abortion, many details will be, and must be, left to states, with no concern for Court interference.

For example, culpability has always been a factor in American law. Mothers are less culpable than abortionists; they are less likely to know what they are doing. Even the Bible acknowledges the legitimacy of punishing people less for the same offense, who are less culpable, by establishing "cities of refuge" instead of execution for accidental manslaughter. Numbers 35:11, for example.

By establishing "cities of refuge", God was not saying that the victims of accidental killings were less human than the victims of deliberate murders!

The current Scott Roeder case has brought the national spotlight on Kansas' unique law defining "voluntary manslaughter". It is an example of a creative approach to factoring in culpability.

Another legitimate factor for juries and laws to weigh is the clarity of evidence. Exodus 21:22, the only Bible verse quoted in Roe where it was so tragically misunderstood, recognizes a factor that perhaps should be more clear in our "unborn victims of violence" laws: that sometimes women are injured because they interject themselves between two fighting men, in which case a jury should sort out the evidence to discern whether the injury was intended; and not only whether the injury to the woman was intended, but also whether the injury to the baby was intended. For example, were punches aimed deliberately at the womb?

The lack of evidence for a conviction of a killer does not mean a state regards his victim as less human than a victim whose murderer was executed!

State Representative Beth Wessel-kroeschell on Valentine's Day, at a hearing of Iowa HF 153 which establishes protection of the unborn, gave a wonderful list of situations where different states might handle the details of abortion criminalization differently. For example, even after a state recognizes the personhood of the unborn from conception, then contraception that prevents the sperm meeting the egg would still be legal, and contraception that prevents implantation of the fertilized egg would not, but how about contraception where the science is not clear which happens?

Forsythe: What is not well understood why Scalia and Thomas have stated they will not adopt "constitutional personhood." There are two reasons. First, fidelity to the Constitution means leaving the abortion issue where the framers of the 14th Amendment left the issue----with the states. Abortion has been a state (not a federal) issue since colonial times. Abortion has consistently been a state criminal issue, and the framers of the 14th Amendment never gave a thought to taking the issue (or the enforcement of homicide laws) away from the states. Second, they have said that the Court should get out of the "abortion umpiring" business. To them, judges have no business parsing abortion laws--one way or another—but are for the people to decide as a matter of self-government. They believe that judges have no greater wisdom or intelligence to devise a better abortion policy than the people.

Leach: Forsythe puts "constitutional personhood" in quotation marks as if it is found in the two cases

he cites – Stenberg and Casey – but the phrase is not found there. I have listed a few quotes that come close to what Forsythe alleges, but I show that they are not retreating from the Court's historical role. It would be helpful if Forsythe would say where Scalia and Thomas have "stated they will not adopt 'constitutional personhood'." Because the argument which Forsythe says is their reason, is not a reason.

Yes, states have always handled criminal laws. The purpose of criminal laws is to protect human beings from criminals. The requirement that criminal laws must protect unborn human beings and black human beings just as they protect all other human beings is not taking jurisdiction away from states to determine the details of the laws. "Fundamental rights" must be protected by all states, but "legitimate state interests" are legitimately fleshed out by states.

If I knew where Forsythe gets this impression, or exactly what the justices said, I could have a more intelligent analysis of whether Forsythe represents them accurately. I could at least be more certain what Forsythe thinks the phrase means.

I don't think anyone doubts that the four would overrule Roe! Overruling Roe would return the issue to the states. I would regard that as progress!

Forsythe: The Court did consider evidence of personhood at the time of Roe. The personhood of the unborn child was argued by both Texas and Georgia and by numerous amicus briefs that included fetal pictures. In fact, the Court has considered it repeatedly since then - personhood has been argued in at least 25 amicus briefs in abortion cases since Roe.

Leach: And also in two principal briefs that I wrote. But that means nothing. It is when the Court squarely addresses an issue that its mind is determined. Not when it ignores an issue. That is why this battle is not just about legal reasoning. It is about assembling the political pressures that force the Court to squarely address the issues.

I don't know how thoroughly unborn personhood was "argued" at the time of Roe, but it was certainly alleged. But Blackmun responded with a rationale so clever, and actually somewhat rational, to which prolifers have been slow to respond to this day. He said even Texas' exception for "the life of the mother" illustrates that the unborn are not as protected as the born, and in fact never have been by the laws of the states, which indicates that their framers have never considered the unborn "persons in the whole sense".

Even the future proposed Life at Conception Act, introduced this year in the U.S. Senate by Senator Roger Wicker of Mississippi, falls prey to this argument by not "authorizing prosecution" of mothers!

My response is that federal law now recognizes all unborn babies as human beings. Once a group of people are so recognized, the denial of their rights by unconstitutional laws does not become contrary evidence, that they do not turn out to be humans after all! We can't deny fundamental rights to people, and then take that mistreatment as proof that they are not people after all so we are free to enslave or kill them!

As for the "life of the mother" exception, that is historically explained as recognition that we can recognize the heroism of someone who volunteers his life for the sake of another, but we cannot criminalize someone who does not choose such heroism.

Forsythe: The focus on "constitutional personhood" also overlooks the question of whether "constitutional personhood" is necessary or effective to protect the unborn child, either now or after Roe is overturned. Homicide law or fetal homicide laws protect the unborn child by prohibiting the killing itself, while a constitutional amendment that only affects state action (not private or personal action) only limits what the branches of government can do.

Leach: By "constitutional personhood" I presume Forsythe means legal recognition that the 14th Amendment "equal protection" of all "persons" applies to the unborn. Interesting point, that the 14th Amendment only has jurisdiction over states, not over individuals.

But this argument is an introduction to the imaginary wonders of LawyerLand, because the 14th Amendment compels states to give the "equal protection of the laws" to all humans within their jurisdiction. Well, that means states are required to enact sufficient criminal laws to protect all equally. Criminal laws restrain individuals, right?

For example, the purpose of the 14th Amendment was to forever end slavery. The relevant clause begins "No State shall ...deny to any person within its jurisdiction the equal protection of the laws." Thus,

Forsythe says, it doesn't say anything to individuals about what they can do, right? But so far as I know, not one slave was ever owned by any state! Slaves were owned by individuals! The 14th Amendment ordered states to criminalize the ownership of slaves by individuals! Likewise today, the 14th Amendment orders states to criminalize the murder of unborn babies by individuals.

Maybe Forsythe means a federal Constitutional Amendment defining unborn personhood is binding only on government murders, because federal Constitutional Amendments have no direct jurisdiction over individuals. Although the income tax amendment illustrates how a federal Constitutional Amendment can certainly *affect* individuals!

But even a personhood amendment that does not directly restrain individuals, does restrain government. It restrains the Supreme Court. At the federal level, it would invalidate Roe, and FACE, and permit individuals to stop abortion without government interference. During the Operation Rescue days, prolifers nearly ended abortion even with nearly 100,000 arrests. Were there no arrests, we would easily stop abortion. Peacefully.

And of course without Roe, states are free to once again criminalize abortion. Whether the recognition that the unborn are among those "persons" protected by the 14th Amendment is accomplished in a constitution, or in a statute, or in a case ruling, it obligates states to restrain individuals from murdering each other.

Forsythe: Also, there is no relation between fetal statutory personhood or state statutory personhood and the 14th Amendment. A federal or state statute written 130 years after the 14th Amendment was enacted cannot change what the amendment says or its original purpose.

Leach: Straw dog argument. No one is proposing altering the 14th Amendment! We are proposing *obeying* it! Controversial, I know. I agree that state personhood laws are a weak vehicle for establishing the facts which Roe's "collapse" clause invites, because contradictory state laws are a chaotic foundation for a federal policy. But federal law's legal recognition of these facts is perfect for the job. The 14th Amendment states the law - I have no illusions that a federal law adds anything to it. The federal law establishes legal recognition of the facts which apply the 14th Amendment to the unborn: that they are human beings.

Forsythe: The "collapse clause" fallacy also completely overlooks the fact that the rationale of Roe was substantially changed in Planned Parenthood v. Casey in 1992. The Court shifted from an historical rationale for Roe to a sociological rationale---the idea that women need abortion as a back-up to failed contraception. Blackmun's rationale for Roe became irrelevant with the Court's adoption of this "reliance interest" rationale in Casey.

Leach: The longer Forsythe presses this point the more violently I gag. Not even so much at the possibility that the Court might be fully as degenerate as Forsythe says, but at the fear which Forsythe not only has, but insists we have, that there is something sufficiently rational in the Court's alleged position that we should fear challenging it, lest the court figure out how to back it up.

I think the inability of the majority to form an intelligent response to the eloquent sarcasm of the minority makes it pretty clear that it is the majority which is in fear. Fear that the public will figure out the scam. As the minority puts it:

> (Second dissent in Casey): As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here - reading text and discerning our society's traditional understanding of that text - the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality, our process of constitutional adjudication consists primarily of making value judgments; if we can ignore a long and clear tradition clarifying an ambiguous text, as we did, for example, five days ago in declaring unconstitutional invocations and benedictions at public high school graduation ceremonies, Lee v. Weisman, 505 U.S. 577 (1992); if, as I say, our pronouncement of constitutional law rests primarily on value [505 U.S. 833, 1001] judgments, then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school - maybe better.

The Court may not know much about the Constitution, but they are watching that little clause that gives Congress authority to limit their jurisdiction. They know that if the public demands it, Congress will do it. The Court also fears the other bottom line: a humiliating constitutional amendment. Most constitutional amendments are not humiliating to courts since they were not responses to court overreaches. But the 14th Amendment was humiliating. It was a response to Dred Scott. *Scott v. Sandford 60 U.S. (19 How.) 393 (1856)*

Another bottom line feared by the majority is catcalls on the lecture circuit. Averted eyes at the country club.

Mat 23:2 Saying, The scribes and the Pharisees sit in Moses' seat:

Mat 23:3 All therefore whatsoever they bid you observe, *that* observe and do; but do not ye after their works: for they say, and do not.

Mat 23:4 For they bind heavy burdens and grievous to be borne, and lay *them* on men's shoulders; but they *themselves* will not move them with one of their fingers.

Mat 23:5 But all their works they do for to be : they make broad their phylacteries, and enlarge the borders of their garments,

Mat 23:6 And love the uppermost rooms at feasts, and the chief seats in the synagogues,

Mat 23:7 And greetings in the markets, and to be called of men, Rabbi, Rabbi.

The nine justices who have held the rest of America hostage for 38 years have much more to fear than the rest of America!

But none of these restraints will occur before the people understand they are merited. That is why it is critical that U.S. 18-1841(d) and similar attacks on the reasoning of infanticide become the subjects of massive public education. That is why it is critical that prolife voices trapped in a pre-2004 time warp of fatalism, unable to grasp or unwilling to acknowledge new opportunities, or to interact with those presenting them, must be neutralized, so that the population may see clearly the folly of the Courts, and stop it.

Forsythe would have counseled John the Baptist to hold off informing Herod of God's view of incest until Herod had died and been replaced by another king. No doubt all John's friends were there in Forsythe's stead, giving him the same advice. But stubborn John wouldn't listen.

Did he accomplish anything, other than losing his head?

It turns out even Herod had a hunger, although on a tight leash, for truth. Although Herod publicly classified John as a criminal, privately he sought his advice often, knowing he was honest. No doubt the people benefited, because surely this took some of the sharp edges off Herod's rule. Of course, the people didn't know that. They continued to think John the fool. The fanatic. The extremist who only stood in the way of the credibility of people trying to restrain Herod respectably.

Shall we be like John, and bring an honest case before SCOTUS, fully aware of their low interest in ending infanticide except under the most extraordinary political pressure? And what if we have no hope of mounting the necessary political pressure, for example because prolife lawyers say such cases hold no hope because they are predicated on SCOTUS following the law and SCOTUS has not been doing much of that? Shall we bring a case anyway, or wait until the Court is all dead and replaced?

What if our hope of bringing the Truth to American law seems as hopeless as the hope of Iranian Christians bringing the Gospel to Iran? Shall we wait for our Ayatollah to die? Or shall we present God's Truth anyway, as if we were as foolish as Iranian Christians who vainly believe the Truth has power?

If Forsythe's argument is that the justices are irrational and inconsistent, then what strategy can Forsythe have for building a careful line of cases like stacking playing cards into a castle? No matter how careful the line, won't SCOTUS simply knock it all over with some new invented rationale?

But if Forsythe's argument is that the latest "reliance interest" is actually rational and consistent, and we can work with that, then I must question Forsythe's reasoning. It is not rational and consistent, as the Casey dissent eloquently lays out. The sarcasm in that dissent is like listening to the Rush Limbaugh show. It is as rational as a justification of slavery. For even the most cautious, the most respectable among us, there has to be a line in the sand whose crossing by outrageous folly will move us to shout the Truth. If there is not, our tolerance of Hell must be infinite.

Forsythe: Five of the current justices support the "reliance interests" rationale. The "collapse clause"

or personhood argument does not take into account the current rationale that upholds the constitutional right to abortion in America. It is irrelevant to where the current debate in the Court is.

Leach: What takes into account “the current rationale that upholds the constitutional right to abortion in America” is the recognition that political pressures and public education must be assembled to make clear what the Court is being pressured to address. The Court simply cannot get away with replacing Roe’s at least superficial regard for the rights of human beings with a doctrine that murdering human beings must proceed with legal protection once people have come to “rely” on it.

Forsythe: While "constitutional personhood" will not overturn Roe, that does not mean that there are not methods to overturn Roe or to protect women and children from abortion. There are numerous alternatives that will yield better results and make more progress.

Leach: Forsythe never says there is any other strategy in his arsenal to actually end abortion before the current justices are replaced. This paragraph presumably refers to less than substantial restrictions which the Court may still allow. I am all for every prolifer doing whatever he can to restrict even one abortion if he can. I support Forsythe and his Americans United for Life in whatever he can accomplish in legislatures and courts.

But there is a way to end all abortions in a few months. I have talked to dozens of attorneys about it, and this response by Forsythe, gotten through Chuck Hurley of The Iowa Leader, is the closest I have received to a clear argument against it. I have explained why this response fails to show that the opportunity is an illusion.

However, I am grateful for this response. They will be very useful in preparing appeal arguments in the Scott Roeder case. (He has the opportunity to present a pro-se “supplementary brief” in addition to the brief of his court appointed attorney, which I have the opportunity to help with.) After arguments why Roe has “collapsed”, I will be equipped to then deal with these “reliance interests” which were invented after Roe.

Although I truly appreciate every step taken by every prolife organization, even when those steps include criticizing steps I have taken, (because I understand that there is good intent mixed with bad), progress in ending infanticide in a few months requires that prolife authorities who advise against it, without making a clear, persuasive, irrefutable case why not, must be neutralized, so that the necessary popular consensus behind a strategy that works can form.

I of course am glad to subject my own theories to the same standard. Let anyone refute them who can, and I will be glad to be steered away from any dead end, because my desire is not to be proved right but to save lives.

I am a trumpet player. I own the Family Music Center in Des Moines. I have not been trained in law school to know anything about abortion law.

But I am a Christian. I have been given a Light which is not my own, and commanded not to hide it under a bushel, not even before I know everything. What if this light will actually save millions of lives, and because I feared the superior expertise of the AUL, I hid it under a bushel? I will not stand before the AUL on judgment day but before God.

I ask all whose hearts are still soft enough to hear the wails of over 50 million of America’s most innocent: think for yourselves. Lives depend on it. Demand that any reason given you, why you should not join an effort to end infanticide within a few months, be persuasive, without requiring you to trust someone else’s college degree. When it is not, then please withdraw your contributions from those who stand in the way of ending infanticide quickly, without giving a reason, and give it where it will help most.

More quotes from Casey:

But while a State has "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child," ante, at 846, legitimate interests are not enough. To overcome the burden of strict scrutiny, the interests must be compelling. The question then is

how best to accommodate the State's interest in potential human life with the constitutional liberties of pregnant women.

Casey, quoting from Webster: The viability line reflects the biological facts and truths of fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the [505 U.S. 833, 933] woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman. At the same time, the viability standard takes account of the undeniable fact that, as the fetus evolves into its postnatal form, and as it loses its dependence on the uterine environment, the State's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling.

Casey, Stevens, concurring and dissenting, showing that the balancing of women's and "fetus" rights is predicated on the assumption that the fetus is NOT legally recognized as a person, a predication which surely must falter when it is established that the fetus IS:
Identifying the State's interests - which the States rarely articulate with any precision - makes clear that the interest in protecting potential life is not grounded in the Constitution. It is, instead, an indirect interest supported by both humanitarian and pragmatic concerns. Many of our citizens believe that any abortion reflects an unacceptable disrespect for potential human life, and that the performance of more [505 U.S. 833, 915] than a million abortions each year is intolerable; many find third-trimester abortions performed when the fetus is approaching personhood particularly offensive. The State has a legitimate interest in minimizing such offense. The State may also have a broader interest in expanding the population, 3 believing society would benefit from the services of additional productive citizens - or that the potential human lives might include the occasional Mozart or Curie. These are the kinds of concerns that comprise the State's interest in potential human life.

In counterpoise is the woman's constitutional interest in liberty. One aspect of this liberty is a right to bodily integrity, a right to control one's person. See, e.g., Rochin v. California, 342 U.S. 165 (1952); Skinner v. Oklahoma ex rel Williamson, 316 U.S. 535 (1942). This right is neutral on the question of abortion: the Constitution would be equally offended by an absolute requirement that all women undergo abortions as by an absolute prohibition on abortions. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Stanley v. Georgia, 394 U.S. 557, 565 (1969). The same holds true for the power to control women's bodies.

The woman's constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature.

Blackmun, concurring and dissenting:
[Footnote 12] JUSTICE SCALIA urges the Court to "get out of this area," post, at 1002, and leave questions regarding abortion entirely to the States, post, at 999-1002. Putting aside the fact that what he advocates is nothing short of an abdication by the Court of its constitutional responsibilities, JUSTICE SCALIA is uncharacteristically naive if he thinks that overruling Roe and holding that restrictions on a woman's right to an abortion are subject only to rational basis review will enable the Court henceforth to avoid reviewing abortion-related issues. State efforts to regulate and prohibit abortion in a post-Roe world undoubtedly would raise a host of distinct and important constitutional questions meriting review by this Court. For example, does the Eighth Amendment impose any limits on the degree or kind of punishment a State can inflict upon physicians who perform, or women who undergo, abortions? What effect would differences among States in their approaches to abortion have on a woman's right to engage in interstate travel? Does the First Amendment permit States that choose not to criminalize abortion to ban all advertising providing information about where and how to obtain abortions?

1st Dissent: Rehnquist, White, Scalia, Thomas:

Although they reject the trimester framework that formed the underpinning of Roe, Justices O'CONNOR, KENNEDY, and SOUTER adopt a revised undue burden standard to analyze the challenged regulations.

Could this be what Forsythe alludes to, as rejecting Roe's reasoning about personhood? But this doesn't address personhood; it says the only thing rejected is the "trimester framework".

Dissent, no predictability: (Fosythe's argument is predicated on the expectation that the Court is consistent.

...we initially held that a State could require a minor to notify her parents before proceeding with an abortion. H. L. v. Matheson, 450 U.S. 398, 407 -410 (1981). Recently, however, we indicated that a State's ability to impose a notice requirement actually depends on whether it requires notice of one or both parents. We concluded that, although the Constitution might allow a State to demand that notice be given to one parent prior to an abortion, it may not require that similar notice be given to two parents, unless the State incorporates a judicial bypass procedure in that two-parent requirement. Hodgson v. Minnesota, supra.

In Roe, the Court observed that certain States recognized the right of the father to participate in the abortion decision in certain circumstances.... But three years later, in Danforth, the Court ...held that a State could not require that a woman obtain the consent of her spouse before proceeding with an abortion.

….Although Roe allowed state regulation after the point of viability to protect the potential life of the fetus, the Court subsequently rejected attempts to regulate in this manner....

(the majority makes a mockery of Stare Decisis:) This discussion of the principle of stare decisis appears to be almost entirely dicta, because the joint opinion does not apply that principle in dealing with Roe. Roe decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. Roe decided that abortion regulations were to be subjected to "strict scrutiny," and could be justified only in the light of "compelling state interests." The joint opinion rejects that view. Ante, at 872-873; see Roe v. Wade, supra, 410 U.S., at 162 -164. Roe analyzed abortion regulation under a rigid trimester framework, a framework which has guided this Court's decisionmaking for 19 years. The joint opinion rejects that framework. Ante, at 873.

Stare decisis is defined in Black's Law Dictionary as meaning "to abide by, or adhere to, decided cases." Black's Law Dictionary 1406 (6th ed. 1990). Whatever the "central holding" of Roe that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. Roe continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality.

The joint opinion thus turns to what can only be described as an unconventional - and unconvincing - notion of reliance, a view based on the surmise that the availability of abortion since Roe has led to "two decades of economic and social developments" that would be undercut if the error of Roe were recognized. Ante, at 856. The joint opinion's assertion of this fact is undeveloped, and totally conclusory. In fact, one cannot be sure to what economic and social developments the opinion is referring. Surely it is dubious to suggest that women have reached their "places in society" in [505 U.S. 833, 957] reliance upon Roe, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for

men.

The end result of the joint opinion's paeans of praise for legitimacy is the enunciation of a brand new standard for evaluating state regulation of a woman's right to abortion - the "undue burden" standard.

In evaluating abortion regulations under that standard, judges will have to decide whether they place a "substantial obstacle" in the path of a woman seeking an abortion. Ante at 877. In that this standard is based even more on a judge's subjective determinations than was the trimester framework, the standard will do nothing to prevent "judges from roaming at large in the constitutional field," guided only by their personal views. Griswold v. Connecticut, 381 U.S., at 502 (Harlan, J., concurring in judgment).

Here, "abortion is a form of liberty protected by the Due Process clause" may be quoted from the dissent, but consider the ambiguity of the context. "We" sometimes means courts of the past. The first "we" below means the majority. The second "we" below means the minority dissent. Yet the quote, a conclusion logically drawn from the minority reasoning, is not the minority view but is a hypothetical: if the minority reasoning ruled, then states could "regulate abortion procedures in ways rationally related to a legitimate state interest." Yet even that should not be taken as the farthest the minority would like to go, since the minority several times, in several ways, with delicious sarcasm, states that the entirety of Roe ought to be reviewed.

We have stated above our belief that the Constitution does not subject state abortion regulations to heightened scrutiny. Accordingly, we think that the correct analysis is that set forth by the plurality opinion in Webster. A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest. Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 491 (1955); cf. Stanley v. Illinois, 405 U.S. 645, 651 -65 (1972). With this rule in mind, we examine each of the challenged provisions

2nd dissent: Scalia, White, Thomas

> The emptiness of the "reasoned judgment" that produced Roe is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of amicus briefs submitted in this and other cases, the best the Court can do to explain how it is that the word "liberty" must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice. The right to abort, we are told, inheres in "liberty" because it is among "a person's most basic decisions," ante, at 849; it involves a "most intimate and personal choic[e]," ante, at 851; it is "central to personal dignity and autonomy," ibid.; it "originate[s] within the zone of conscience and belief," ante, at 852 it is "too intimate and personal" for state interference, ibid.;, it reflects "intimate views" of a "deep, personal character," ante, at 853; it involves "intimate relationships" and notions of "personal autonomy and bodily integrity," ante, at 857; and it concerns a particularly "`important decisio[n],'" ante, at 859 (citation omitted). 2 But it is [505 U.S. 833, 984] obvious to anyone applying "reasoned judgment" that the same adjectives can be applied to many forms of conduct that this Court (including one of the Justices in today's majority, see Bowers v. Hardwick, 478 U.S. 186 (1986)) has held are not entitled to constitutional protection - because, like abortion, they are forms of conduct that have long been criminalized in American society. Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally "intimate" and

"deep[ly] personal" decisions involving "personal autonomy and bodily integrity," and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable. It is not reasoned judgment that supports the Court's decision; only personal predilection. Justice Curtis' warning is as timely today as it was 135 years ago:

> "[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." Dred Scott v. Sandford, 19 How. 393, 621 (1857) (dissenting opinion).

As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here - reading text and discerning our society's traditional understanding of that text - the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality, our process of constitutional adjudication consists primarily of making value judgments; if we can ignore a long and clear tradition clarifying an ambiguous text, as we did, for example, five days ago in declaring unconstitutional invocations and benedictions at public high school graduation ceremonies, Lee v. Weisman, 505 U.S. 577 (1992); if, as I say, our pronouncement of constitutional law rests primarily on value [505 U.S. 833, 1001] judgments, then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school - maybe better. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people should demonstrate, to protest that we do not implement their values instead of ours. Not only that, but the confirmation hearings for new Justices should deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated;