Re-Reading *Roe v. Wade*

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Abstract: It has been forty years since the Supreme Court decided *Roe v. Wade*. The Court's decision has been criticized for years. But, as one commentator recently noted, almost no one ever reads the Court's decision anymore. That is lamentable. Re-reading *Roe v. Wade* from a perspective of forty years is a valuable experience. Re-reading *Roe* reveals again how weak the opinion is at so many levels. That is one reason why I am optimistic that the decision will ultimately be overturned. The Supreme Court and the American system do have the capacity for self-correction and the deep flaws in *Roe v. Wade*, some of which I explore in this essay, suggest that the ultimate reversal of *Roe v. Wade* is likely.

Introduction[1]

In January 2013, Linda Greenhouse published a comment[2] in the *New York Times* marking the fortieth anniversary of *Roe v. Wade*.[3] In the course of the comment, Greenhouse made the point that almost no one ever reads the Court's decision in *Roe v. Wade*.[4] I think there is a lot of truth to that observation. *Roe* has become a symbol – it was a great

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[1] This article is an expanded version of a talk I presented on November 7, 2013 at the "*Roe* at 40 – The Controversy Continues" Symposium at Washington & Lee University School of Law. An earlier version of the paper was presented on May 31, 2013 at the annual conference of University Faculty for Life. I am grateful to the organizers of the Symposium for the invitation to participate and for their gracious hospitality. This article originally appeared in the *Washington & Lee Law Review* 71 (2014): 1025-46 and is reprinted here by permission.

[2] See Linda Greenhouse, "Misconceptions," *The New York Times*, Opinionator (Jan. 23, 2013, 9:00 PM), http://opinionator.blogs.nytimes.com/2013/01/23/misconceptions/?_r=0 (last visited Jan. 14, 2014), discussing how perception of the *Roe v. Wade* decision has morphed over time (on file with the *Washington and Lee Law Review*).

[3] 410 U.S. 113 (1973).

[4] See Greenhouse, supra note 2: "To read the actual opinion, as almost no one ever does...."

victory for women's rights, it was an important part of a cultural transformation, it is perhaps the leading example of judicial excess, it is a manifestation of the culture of death. But I think it is true that people do not read the actual decision very often anymore.

After reading Greenhouse's comment, I did re-read *Roe v. Wade* carefully. That re-reading of *Roe v. Wade* was a valuable experience. Scholars, and not just pro-life scholars, know that the opinion is deeply flawed.[5] Re-reading the opinion, from a perspective of forty years, makes that even more apparent. Yet, I came away from that re-reading with a renewed confidence that the Court's decision in *Roe v. Wade* will ultimately be overturned. In this article I will explain my reaction to this re-reading of *Roe v. Wade*.

1. The Opinion in *Roe v. Wade*

Weaknesses

I will begin with a few observations about the opinion. Most of the defects in *Roe v. Wade* were apparent from the very beginning and were explored in critical articles by John Hart Ely,[6] Richard A. Epstein,[7] and many others[8] in the immediate aftermath of the decision. Some of these well-known errors are still notable on a fresh read. First, it is still striking how poor the opinion is, on so many levels. I will briefly discuss some of the most obvious examples.

Substantive Due Process

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[5] *See* Michael Stokes Paulsen, "The Worst Constitutional Decision of All Time," *Notre Dame Law Review* 78 (2003) 995, 1011: "*Roe*'s reasoning is utterly laughable, a running joke in constitutional law circles."

[6] See generally John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," *Yale Law Journal* 82 (1973): 920, criticizing the mixed messages and unexplained reasoning of *Roe v. Wade*.

[7] See generally Richard A. Epstein, "Substantive Due Process by Any Other Name: The Abortion Cases," *1973 Supreme Court Review* (1973): 159, discussing the Court's broad and innovative use of substantive due process.

[8] See generally Robert M. Byrn, "An American Tragedy: The Supreme Court on Abortion," *Fordham Law Review* 41 (1973): 807, addressing a number of "fundamental errors" in *Roe v. Wade*.

The Court's treatment of substantive due process is startlingly shoddy. The Due Process Clause of the Fourteenth Amendment provides that "[n]o state shall...deprive any person of life, liberty, or property, without due process of law."[9] Although this clause sounds "procedural," the Court has long used the doctrine of substantive due process to "hold[] unconstitutional state statutes that violate a 'liberty' interest the Court believes is protected by the clause, regardless of the manner in which the deprivation occurs."[10] This doctrine, "which affords constitutional protection to individual rights claims without a clear textual warrant,"[11] has long been controversial.[12]

The Court had rejected all substantive review under the Due Process Clause as recently as 1963. In *Ferguson v. Skrupa*,[13] eight Justices of the Supreme Court rejected any substantive review of legislation under the Due Process Clause.[14] In *Ferguson*, Justice Black stated:

> The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns*, and like cases – that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely – has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.... It is now settled that States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some

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[9] U.S. Constitution, Amendment XIV, § 1.

[10] Richard S. Myers, "The End of Substantive Due Process?," *Washington & Lee Law Review* 45 (1988): 557 n1 [hereinafter Myers, "Due Process"].

[11] Ibid. at p. 557.

[12] See generally Nathan S. Chapman & Michael W. McConnell, "Due Process as Separation of Powers," *Yale Law Journal* 121 (2012): 1672, criticizing contemporary attempts to use originalism to support modern substantive due process doctrine; Richard S. Myers, "Pope John Paul II, Freedom, and Constitutional Law," *Ave Maria Law Review* 6 (2007): 61-77 [hereinafter Myers, "Pope John Paul II"], discussing this controversy.

[13] 372 U.S. 726 (1963).

[14] See ibid. at p. 730, noting that use of the Due Process Clause to hold legislative acts unconstitutional when the Court believes "the legislature has acted unwisely" had been discarded.

specific federal constitutional prohibition, or some valid federal law.[15]

Despite that 1963 ruling, the modern era of substantive due process began just two years later in 1965 with the Court's decision in *Griswold v. Connecticut*,[16] although the Court could not bring itself to actually endorse the doctrine.[17] In his concurring opinion in *Roe v. Wade*, Justice Stewart stated: "[i]n view of what had been so recently stated in *Skrupa*, the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision."[18] But in 1973, in *Roe v. Wade*, the Court did forthrightly accept the doctrine of substantive due process.[19]

The Court's acceptance of the doctrine of substantive due process in *Roe*, though, was almost casual. The Court did not even bother to explain why the Due Process Clause had a substantive component.[20] Even if one accepted the doctrine of substantive due process, the Court's explanation for why the choice of an abortion is protected by that doctrine as a fundamental liberty is shockingly weak.[21] The Court, without a hint of irony, even invoked Justice Holmes's dissent in *Lochner* in which Holmes noted the need for judicial restraint.[22] The Court concluded that a "right of privacy" does exist

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[15] Ibid. at pp. 730-31, quoting *Lincoln Federal Labor Union v. Northwest Iron & Metal Co.*, 335 U.S. 525, 536 (1949); see also Myers, "Due Process," supra note 10, at pp. 560-61, discussing *Ferguson v. Skrupa*.

[16] 381 U.S. 479 (1965).

[17] See id. at p. 482, declining to analyze the right of privacy under the Due Process Clause of the Fourteenth Amendment.

[18] *Roe v. Wade*, 410 U.S. 113, 167 (1973) (Stewart, J., concurring).

[19] See ibid. at p. 153: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

[20] See *Griswold*, 381 U.S. at 482, declining to analyze the right of privacy under the Due Process Clause of the Fourteenth Amendment.

[21] See Myers, "Pope John Paul II," supra note 12, at p. 63, noting that deciding whether the right involved is "fundamental" is usually the most important inquiry in substantive due process cases.

[22] *Roe*, 410 U.S. at 116. Justice Blackmun expressed the need for the Court

under the Constitution.[23] The Court rejected the claim "that one has an unlimited right to do with one's body as one pleases, ..."[24] but "the Court provide[d] neither an alternative definition [of the general constitutional right involved] nor an account of why it [thought] privacy [was] involved."[25] The *Roe* Court did mention that the right of personal privacy "has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education...."[26] As John Ely noted, in the end, the Court "simply announces that the right to privacy 'is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.'"[27]

History

The Court's treatment of the history of abortion is an embarrassment. That treatment seemed designed to show that there had been some sort of a historical recognition of a right to an abortion. For example, Justice Blackmun stated:

> It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to

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"to resolve the issue by constitutional measurement, free of emotion and predilection" (ibid.). Justice Blackmun later noted: "We bear in mind, too, Justice Holmes' admonition in his now- vindicated dissent in *Lochner v. New York*, 198 U.S. 45, 76 (1905): "[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States" (ibid. at 117). Professor Epstein's comment hit the nail on the head: "Anyone can quote Holmes in *Lochner v. New York*. But not everyone can apply the Holmes doctrine when his views are not embodied in the legislation under review." Epstein, supra note 7, at p. 168 (footnote omitted).

[23] See *Roe*, 410 U.S. at 153: "This right of privacy...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

[24] Ibid. at p. 154.

[25] Ely, supra note 6, at p. 931.

[26] *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (citations omitted).

[27] Ely, supra note 6, at p. 932 (quoting *Roe*, 410 U.S. at 153).

terminate a pregnancy than she does in most States today.[28]

Many scholars have refuted the historical analysis in *Roe v. Wade*.[29] As John Keown stated: "*Roe* was a radical break with the law's historical protection of the unborn child and thereby with its adherence to the principle of the inviolability of human life."[30] In sum, despite the efforts of Justice Blackmun to argue to the contrary, "*Roe*'s invention of a constitutional right to abortion represented a radical rejection of America's long-standing history and traditions."[31]

The Treatment of the Unborn in Other Areas of the Law

The Court's treatment of how the unborn are regarded in other areas of the law was fundamentally flawed. An accurate account would have undermined the Court's conclusions. Robert Byrn noted: "It is evident that the Court's errors in [*Roe v.*] Wade are cumulative. From a distorted interpretation of the common law on abortion to a general misunderstanding of the status of the unborn in American law, the Court erected a flimsy house of cards, piling one error upon another."[32] Moreover, the Court ignored the fact that, as Richard Epstein noted, "recent judicial trends have expanded, not limited,"[33] the rights of the unborn.

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[28] *Roe*, 410 U.S. at 140.

[29] See generally Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* (2006), discussing the legal history of abortion in England and America and addressing Justice Blackmun's conclusions; Byrn, supra note 8, at pp. 813–14, addressing a number of "fundamental errors" in *Roe v. Wade*; John Keown, "Back to the Future of Abortion Law: *Roe*'s Rejection of America's History and Traditions," *Issues in Law & Medicine* 22 (2006): 4, questioning Justice Blackmun's conclusion and the historical claims in *Roe v. Wade*; James S. Witherspoon, "Re-examining *Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment," *St. Mary's Law Journal* 17 (1985): 28-47, discussing the historical and medical foundations of *Roe v. Wade*.

[30] Keown, supra note 29, at p. 5 (footnote omitted).

[31] Ibid. at p. 37.

[32] Byrn, supra note 8, at p. 849.

[33] Epstein, supra note 7, at p. 175; see also Ely, supra note 6, at p. 925, noting that the Court's reliance on certain doctrines regarding the protection of fetuses undercuts, rather than supports, its conclusion.

Personhood

The Court's treatment of the personhood issue was also incredibly weak. The Court held "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[34] The easiest way to understand the weakness of the Court's treatment of the personhood issue is to compare the *Roe* opinion with the recent seventy-page article by Michael Paulsen entitled "The Plausibility of Personhood."[35] Paulsen concludes that "the clear plausibility of personhood suggests at the very least that *Roe* – on this point as on so many others – is indefensible."[36]

The Origins and Value of Human Life

The Court's treatment of the origins and value of human life is also incredibly weak.[37] The Court explained that it did not really need to decide the issue of when life begins.[38] Yet, the Court did decide the question[39] because, as Joe Grano noted, "the Court necessarily rejected the legislative judgment that fetal life deserves protection."[40] In the Court's judgment, the unborn did not have any interest that the mother

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[34] *Roe v. Wade*, 410 U.S. 113, 158 (1973) (footnote omitted).

[35] See Michael Stokes Paulsen, "The Plausibility of Personhood," *Ohio State Law Journal* 74 (2012): 14, considering the legal personhood status of a living human fetus *in utero*.

[36] Ibid. at p. 72.

[37] For an excellent academic critique of the Court's efforts in this regard, see Randy Beck, "State Interests and the Duration of Abortion Rights," *McGeorge Law Review* 44 (2013): 31, discussing the viability rule; Randy Beck, "*Gonzales, Casey*, and the Viability Rule," *Northwestern University Law Review* 103 (2009): 249, discussing the development of the viability rule from *Roe* to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); Randy Beck, "The Essential Holding of *Casey*: Rethinking Viability," *University of Missouri Kansas City Law Review* 75 (2007): 713, discussing the "rethinking" of viability in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

[38] See *Roe*, 410 U.S. at p. 59: "We need not resolve the difficult question of when life begins."

[39] See Myers, "Due Process," supra note 10, at p. 610: "According to Justice White's approach, for example, it is a serious mistake to regard *Roe v. Wade* as advancing a neutral position on the issue of abortion."

[40] Joseph D. Grano, "Judicial Review and a Written Constitution in a Democratic Society," *Wayne Law Review* 28 (1981): 24.

or the state was bound to respect. And here my allusion to *Dred Scott* is intentional.[41]

De-emphasis on Women's Rights

Second, the Court's de-emphasis of abortion as a matter of a woman's right is striking. That point was made in the Greenhouse comment I noted above. Greenhouse stated: "To read the actual opinion, as almost no one ever does, is to understand that the seven middle-aged to elderly men in the majority certainly didn't think they were making a statement about women's rights: women and their voices are nearly absent from the opinion."[42] That aspect of the decision has long been noted[43] but it is still rather remarkable. The Court's summary of its holding ignores the woman's interest almost entirely. The Court noted in the first trimester that "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."[44] After viability, the abortion decision is again assigned to "appropriate medical judgment."[45] Further,

> Here is the Court's conclusion of the portion of the opinion summarizing the holding: The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.[46]

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[41] See Myers, "Due Process," supra note 10, at p. 563 n38, noting the connection to the philosophy underlying the *Dred Scott* case; Paulsen, supra note 5, at p. 1018, noting the close affinity of the pro-choice philosophical argument with the moral stance of *Dred Scott*.

[42] Greenhouse, supra note 2.

[43] See generally Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," *North Carolina Law Review* 63 (1985): 375, discussing the role of women in the *Roe* decision; Sylvia A. Law, "Rethinking Sex and the Constitution," *University of Pennsylvania Law Review* 132 (1984): 955, attempting to articulate a constitutional concept of sex-based equality.

[44] *Roe v. Wade*, 410 U.S. 113, 164 (1973).

[45] Ibid. at p. 165.

[46] Ibid. at pp. 165–66.

The errors in this thinking are obvious. As Richard Epstein stated long ago:

> [The Court's] result does not seem to be a fair implication of the right of privacy, the only suggested basis for the decision. The privacy to be protected must be that of the pregnant woman and not that of some attending physician.... [Moreover,] [i]t is either pretense or folly to assume that the decision to have an abortion will be made for the most part by physicians on the basis of 'their best medical judgment.' ... [In nearly every instance,] there is no medical question, and hence no place for medical judgment.[47]

This is not to say that *Roe* would have been a sound decision if it had forthrightly addressed whether women (as opposed to their physicians) had a constitutional right to an abortion; the focus on physicians in Justice Blackmun's opinion is, though, further evidence of the disingenuousness of the opinion.

Eugenics

Third, the eugenic statements in Justice Blackmun's opinion are noteworthy. In one of the earliest sentences in the opinion, Justice Blackmun noted that "population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem."[48] His conclusion emphasized that the Court's holding was consistent "with the demands of the profound problems of the present day."[49] While Justice Blackmun did not explicitly endorse the ugly, eugenic history of the demand for abortion rights,[50] re- reading those statements is instructive. The issue surfaced in 2009 in comments made by Justice Ginsburg who stated: "Frankly I had thought that at the time *Roe* was decided, there was concern about population growth and particularly growth in

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[47] Epstein, supra note 7, at p. 181 (footnotes omitted).

[48] *Roe*, 410 U.S. at p. 116.

[49] Ibid. at p. 165.

[50] See, e.g., Mary Meehan, "How Eugenics and Population Control Led to Abortion," *Meehan Reports* (last updated Jan. 2, 2014), http://www.meehan reports.com/how-led.html (last visited Jan. 14, 2014), detailing the role of eugenics in the development of legal abortions (on file with the *Washington and Lee Law Review*).

populations that we do not want to have too many of."[51] Justice Ginsburg's comments created a firestorm,[52] and three years later she made some clarifying comments[53] that did very little to allay the concerns that many had about her comments.[54]

The eugenics aspects of this issue are complex,[55] but revealing.[56]

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[51] See Emily Bazelon, "The Place of Women on the Court," *The New York Times Magazine* (July 7, 2009), http://www.nytimes.com/2009/07/12/magazine/12gins burg-t.html?pagewanted=all&_r=0 (last visited Jan. 14, 2014), interviewing Justice Ruth Bader Ginsburg (on file with the *Washington and Lee Law Review*).

[52] See Dan Gilgoff, "Does Ruth Bader Ginsburg Support Eugenics?", *U.S. News* (July 14, 2009), http://www.usnews.com/news/blogs/god-and-country/2009/07/14/does-ruth-bader-ginsburg-support-eugenics (last visited Jan. 14, 2014), discussing Justice Ginsburg's comment in the *New York Times Magazine* (on file with the *Washington and Lee Law Review*); Jonah Goldberg, "Ruth Bader Ginsburg and a Question of Eugenics," *National Review Online* (July 15, 2009, 12:00 AM), http://www.nationalreview.com/articles/227883/ruth-bader-ginsburg-and- question-eugenics/jonah-goldberg (last visited Jan. 14, 2014), discussing Justice Ginsburg's comment in the *New York Times Magazine* and the historical eugenics movement in the United States (on file with the Washington and Lee Law Review).

[53] See Emily Bazelon, "Talking to Justice Ruth Bader Ginsburg," *Slate* (Oct. 19, 2012, 1:03 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/10/ ruth_bader_ginsburg_clears_up_her_views_on_abortion_population_control_and.html (last visited Jan. 14, 2014), clarifying Justice Ginsburg's comments on abortion and eugenics (on file with the *Washington and Lee Law Review*).

[54] See Ben Johnson, "Justice Ginsburg Backpedals After Advocating Abortion to Reduce Unwanted Populations: Report," *Lifesite News* (Oct. 22, 2012), http://www.lifesitenews.com/news/justice-ginsburg-reportedly-backpedals-from-controversial-population-contro/ (last visited Jan. 14, 2014), criticizing Justice Ginsburg's clarifying statements in the *Slate* article (on file with the *Washington and Lee Law Review*).

[55] See Mary Ziegler, "*Roe*'s Race: The Supreme Court, Population Control and Reproductive Justice" (Sept. 17, 2012) (unpublished St. Louis University Legal Studies Research Paper No. 2012-26), http://ssrn.com/abstract=2148055, discussing the historical context of race and abortion (on file with the *Washington and Lee Law Review*). Professor Ziegler recognizes the linkages between population control efforts and the push for abortion rights but cautions against simply equating the views of population control advocates and more modern advocates of abortion rights who emphasize women's rights. I agree with her that it is not appropriate to argue that every person who favored the

Eugenics typically involves efforts to improve the human species, and often involves efforts to eliminate the unfit.[57] (It is worth recalling Justice Holmes's statement from *Buck v. Bell*[58] that "three generations of imbeciles are enough."[59]) These efforts carry with them a rejection of the idea that human beings have equal dignity.[60] They reject the traditional Western sanctity of life ethic and focus rather on quality of life.[61] That is why some have expressed concerns about some phrases in Justice Blackmun's opinion in *Roe*.[62] Justice Blackmun's opinion contained the following infamous passage: "In short, the unborn have never been regarded in the law as persons in the whole sense."[63] The Court's subsequent statement just a few paragraphs later in support of its viability line of reasoning – that viability was the point at which "the

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legalization of abortion (or who now is in favor of the right to abortion) is in favor of population control or eugenics. My broader point, though, is a theoretical point: as explained in the text, there is a linkage between eugenics and those who favor abortion rights: both deny the idea of basic human equality.

[56] It is clear that population control efforts played an important role in the push for abortion rights. See Clarke D. Forsythe, *Abuse of Discretion: The Inside Story of Roe v. Wade* (2013), pp. 578-60, discussing the role of population control in the deregulation of abortion; John Keown, "Eugenics and the Law" in *The New Frontiers of Genetics and the Risk of Eugenics: Proceedings of the 15th Assembly of the Pontifical Academy for Life 2009*, ed. J. Lafitte & I. Carrasco de Paula (2010), pp. 111-15, discussing the linkage between eugenics and the efforts to legalize abortion in England.

[57] See John C. Berry, "Eugenics" in *Encyclopedia of Catholic Social Thought, Social Science, and Social Policy*, vol. 3: *Supplement*, ed. Michael L. Coulter, Richard S. Myers & Joseph A. Varacalli (2012), pp. 103-07, defining the term eugenics and discussing its development.

[58] 274 U.S. 200 (1927).

[59] Ibid. at p. 207.

[60] See Keown, supra note 56, at p. 115, noting that laws protecting against homicide or the killing of human beings recognize the equality in dignity of human beings.

[61] See John Keown, "The Legal Revolution: From 'Sanctity of Life' to 'Quality of Life' and 'Autonomy'" in Issues for a Catholic Bioethic, ed. Luke Gormally (1999), pp. 233-60, discussing the distinction between "sanctity of life" and "quality of life" and its historical development.

[62] See infra notes 65–66, discussing the "quality of life" orientation at p. 63. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

[63] *Roe v. Wade*, 410 U.S. 113, 162 (1973).

fetus then presumably has the capability of meaningful life outside the mother's womb"[64] – further supported the charge that the Court was adopting a "quality of life" orientation.[65] So, the stakes here are quite large.[66]

Caution Is Surprising in Majority Opinion

Fourth, the Court's cautious, diffident approach is surprising. For example, the Court, as I mentioned above,[67] invoked (with approval) Justice Holmes's famous comment in his dissent in *Lochner* in which Holmes stated that "[the Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural or familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[68] Yet, Justice

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[64] Ibid. at p. 163; see also supra notes 37–41 and accompanying text, discussing the analysis of viability in *Roe v. Wade*.

[65] See Richard S. Myers, "An Analysis of the Constitutionality of Laws Banning Suicide from the Perspective of Catholic Moral Teaching," *University of Detroit Mercy Law Review* 72 (1995): 782-83 [hereinafter Myers, "Constitutionality"], discussing this theme and its risks; Byrn, supra note 8, at pp. 857–61, discussing the "dangerous implications" of *Roe v. Wade*.

[66] Then-Cardinal Ratzinger describes these risks clearly: "One understands, then, how a state which arrogates to itself the prerogative of defining which human beings are or are not the subject of rights and which consequently grants to some the power to violate others' fundamental right to life, contradicts the democratic ideal to which it continues to appeal and undermines the very foundations on which it is built. By allowing the rights of the weakest to be violated, the state also allows the law of force to prevail over the force of law. One sees, then, that the idea of an absolute tolerance of freedom of choice for some destroys the very foundation of a just life for men together. The separation of politics from any natural content of right, which is the inalienable patrimony of everyone's moral conscience, deprives social life of its ethical substance and leaves it defenseless before the will of the strongest." Joseph Ratzinger, "The Problem of Threats to Human Life," *Catholic Culture* (Apr. 8, 1991), http://www.catholicculture.org/culture/library/view.cfm?id=187&repos=1&subrepos=&searchid=292732 (last visited Jan. 14, 2014) (on file with the *Washington and Lee Law Review*).

[67] See supra note 22 and accompanying text, discussing Justice Holmes's dissent in *Lochner v. New York*.

[68] *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

Rehnquist noted that "while the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York*, the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case."[69] The Court's false gesture of humility with regard to the origins of human life is similar.[70] These statements were a complete smokescreen but they did seem to reflect a Court that was uneasy about its role. Of course, that feature of Justice Blackmun's opinion-writing was all gone by the time of his subsequent opinions in *Webster v. Reproductive Health Services*[71] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[72]

Dissents Are Weak

Fifth, it is a bit surprising to note the weakness of the dissents. As John Hart Ely noted just after the decisions, "[w]ere the dissents adequate, this comment would be unnecessary. But each is so brief as to signal no particular conviction that *Roe* represents an important, or unusually dangerous, constitutional development."[73] The dissents, by Justices White and Rehnquist, do contain some effective points and some of the stronger passages in those opinions are still quoted today. For example, Justice White noted that "[t]he Court simply fashions and

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[69] *Roe v. Wade*, 410 U.S. 113, 173–74 (1973) (Rehnquist, J., dissenting).

[70] The Court stated: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer" (ibid. at p. 159) (majority opinion). This was, of course, false, for the Court did in fact decide the issue (as a legal matter). See supra notes 37–41 and accompanying text, discussing the Court's default decision regarding when life begins.

[71] 492 U.S. 490, 537–60 (1989) (Blackmun, J., concurring in part and dissenting in part).

[72] 505 U.S. 833, 922–43 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[73] Ely, supra note 6, at p. 920 n3; see also Michael Stokes Paulsen, "Comments from the Contributors" in *What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision*, ed. Jack M. Balkin (2005), p. 239, describing the inadequacies of the dissents to *Roe v. Wade*.

announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes."[74] His critique of the activism of the Court's opinion was also made effectively. In perhaps the most-quoted portion of the dissents, Justice White noted: "As an exercise of raw judicial power, the Court perhaps has the authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court."[75] But on the whole the dissents were weak and did not do justice to the magnitude of the Court's decisions or to the issues involved.[76] It is interesting to imagine the dissent that Justice Scalia might have written had he been on the Court in 1973.[77]

2. Lessons from a Re-reading of *Roe v. Wade*

In this section of the article I will offer some reflections on the principal lessons that can be learned from a re-reading of *Roe*.

First, one of the strongest impressions one gets from re-reading *Roe v. Wade* is of the weakness of Justice Blackmun's opinion. That point – the weakness of Justice Blackmun's opinion – is well understood, but it is even more striking on a fresh reading of the opinion. I think that is an important reason for believing that *Roe* will ultimately be overturned. The judicial rationale for a nearly unlimited right to an abortion was deeply flawed from the outset. That has become clearer with the passage of years. Advocates for the right to an abortion have been re-writing the opinion for years in an effort to place the decision on a firmer foundation.[78] These efforts have floundered over the years and that too

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[74] *Doe v. Bolton*, 410 U.S. 179, 221–22 (1973) (White, J., dissenting).

[75] Ibid. at p. 222.

[76] See Paulsen, supra note 73, at p. 239, describing the inadequacies of the dissents to *Roe v. Wade*.

[77] See Paulsen, supra note 5, at p. 1022, comparing the *Roe* dissents to Justice Scalia's "impassioned dissents" in *Casey*; *cf. Casey*, 505 U.S. at 979–1002 (Scalia, J., concurring in the judgment in part and dissenting in part), explaining thoroughly his disagreement with the *Casey* decision.

[78] See generally *What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision*, ed. Jack M.

(the realization that no one alternative explanation has really taken hold) suggests that *Roe v. Wade* will eventually be overturned.

Second, the continuing controversy about *Roe* (this Symposium is just one of many examples), which is driven in part by the easy target that the opinion presents, indicates that *Roe* is still in play.[79] I do not think we reflect often enough about how unusual that is.[80] In other areas of constitutional law, we do not often encounter this sort of ongoing critique of decisions that are, in theory, settled law. So, for example, the sex discrimination decisions of the Burger Court in the early- and mid-1970s (precisely the time of *Roe v. Wade*) were enormously controversial.[81] These decisions made significant changes in equal protection law. The Court elevated the level of scrutiny it used in sex discrimination cases from the lowest level of scrutiny to a form of heightened scrutiny that resulted in the invalidation of many laws that contained classifications based on sex.[82] These decisions were criticized

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Balkin (2005), collecting comments and re-written opinions of how *Roe* should have been decided.

[79] Although *Roe* was modified in some respects by *Casey*, the right to abortion was not drastically cut back, as is sometimes claimed. See infra note 88 and accompanying text, discussing how *Casey* modified *Roe*. The main import of *Roe* – that there is a right to abortion at any point during pregnancy for any reason – is still the law. See infra note 88 and accompanying text, discussing how *Casey* modified *Roe*; Paulsen, supra note 5, at p. 996 n4, discussing the larger differences between *Casey* and *Roe* in detail.

[80] This next paragraph is drawn from an earlier article of mine. See Richard S. Myers, "A Comment on 'The Constitutional Law and Politics of Reproductive Rights'" in *Life and Learning XXII: The Proceedings of the Twenty-Second University Faculty for Life Conference*, ed. Joseph W. Koterski, S.J. (forthcoming) (manuscript at p. 6), http://ssrn.com/abstract=2150236 (on file with the *Washington and Lee Law Review*).

[81] See Reva B. Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De facto ERA," *California Law Review* 94 (2006): 1323, exploring how equal protection doctrine relating to sex discrimination was forged through social movement conflicts during the time of the defeat of the Equal Rights Amendment.

[82] See Deborah L. Brake, "Sex as a Suspect Class: An Argument for Applying Strict Scrutiny to Gender Discrimination," *Seton Hall Constitutional Law Journal* 6 (1996): 953-56, providing a brief history of the Supreme Court's development of the standard of review for analyzing sex discrimination.

as examples of judicial activism. There was little support for the Court's approach in the text, history, or prior judicial interpretation of the Equal Protection Clause. The decisions came at a time of sweeping cultural changes on matters of sexual equality. Yet, today there is almost no controversy at all about these decisions. The Court's decisions are widely accepted.[83] No one holds conferences re-assessing *Craig v. Boren*.[84]

The contrast with *Roe v. Wade* could not be more striking.[85] *Roe* was controversial in 1973 and it is still controversial. In addition to the withering critiques of *Roe* as an exercise of constitutional interpretation, there is the profoundly significant matter that *Roe* has not been accepted in the broader culture.[86] Moreover, *Planned Parenthood of Southeastern Pennsylvania v. Casey*[87] is not really accepted either.[88] There is constant

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[83] See Siegel, supra note 81, at p. 1335: "The core precepts of sex discrimination law are now canonical."

[84] 429 U.S. 190 (1976), determining that sex discrimination was subject to intermediate scrutiny.

[85] This next paragraph is drawn from an earlier paper of mine. See Myers, supra note 80, at p. 9, discussing the contrast with *Roe v. Wade*.

[86] See Forsythe, supra note 56, at pp. 289-309, noting broad agreement in American culture about the issue of abortion; Clarke D. Forsythe & Stephen B. Presser, "The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States," *Texas Review of Law and Policy* 10 (2005): 164057, discussing the Court's abortion jurisprudence and public opinion. In his recent book, Forsythe summarized the point in this fashion: "What makes abortion uniquely controversial is that the Justices have sided with a small sect – 7 percent of Americans – who support abortion for any reason at any time. And the Justices have for forty years prevented the 60-70 percent of Americans in the middle from deciding differently. The conflict between public opinion and the Supreme Court's nationwide policy is one key reason why *Roe* is uniquely controversial" (Forsythe, supra note 56, at p. 296).

[87] 505 U.S. 833 (1992).

[88] See Forsythe & Presser, supra note 86, at pp. 164–67, discussing the Court's abortion jurisprudence and public opinion. *Casey* did modify *Roe* in certain respects but the degree of the changes was not as dramatic as some suggest. *Casey* itself stated that it preserved "the central holding of *Roe v. Wade*." *Casey*, 505 U.S. at 879. Under *Casey*, States have more freedom to regulate abortion but still no power to prohibit abortion at any point during pregnancy. See generally Richard S. Myers, "Reflections on the Twentieth Anniversary of *Planned Parenthood v. Casey*" in *Life and Learning XXII: The*

resistance to *Roe v. Wade* among judges,[89] legislators,[90] academics,[91] and in the broader culture.[92] Increasing pro-life sentiment makes it clear that *Roe* and *Casey* are not sufficiently well accepted to remove the issue from broader public debate. *Roe* and *Casey* have not been accepted, or at least not to the degree of the Court's sex discrimination decisions from the same era.[93]

Third, a re-reading of *Roe v. Wade* prompts the realization that the decision is not in reality the landmark that its reputation would seem to suggest. *Roe* was, in certain respects, a momentous decision. It has had an enormous impact in opening the door to a staggering number of abortions over the last forty years. Of course, many of these abortions would have happened without *Roe*, but it is important and tragic that

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Proceedings of the Twenty-Second University Faculty for Life Conference, ed. Joseph W. Koterski, S.J. (forthcoming), http://ssrn.com/abstract= 2150241 (on file with the *Washington and Lee Law Review*).

[89] See *Hamilton v. Scott*, 97 So. 3d 728, 737–47 (Ala. 2012) (Parker, J., concurring specially), noting the deficiencies in *Roe v. Wade*'s emphasis on viability in a case addressing wrongful death.

[90] There continues to be legislative efforts to limit abortion rights in the States. See Dave Andrusko, "A Snapshot of the Status of Pro-Life Legislation in the States," *National Right to Life News* (Mar. 16, 2012), http://www.nationalright tolifenews.org/news/2012/03/a-snapshot-of-the-status-of-pro-life-legislation-in- the-states/#.UtbzGLSPXlU (last visited Jan. 14, 2014), discussing various legislative attempts to restrict abortion (on file with the *Washington and Lee Law Review*).

[91] The proceedings from the annual conferences of University Faculty for Life are good examples. See "UFL Life and Learning Conferences Past Proceedings," University Faculty for Life website: http://www.uffl.org/pastproceedings.html (last visited Jan. 14, 2014), providing links to materials and presentations given at the yearly conference (on file with the *Washington and Lee Law Review*).

[92] See Michael New, "Additional Gallup Data Proves America Trending Strongly Pro-Life," *Lifenews.com* (June 14, 2012, 10:39 AM), http://www.lifenews.com/2012/06/14/additional-gallup-data-proves-america-trending-strongly-pro-life/ (last visited Jan. 14, 2014), discussing a recent survey that showed a significant decrease in pro-choice sentiment (on file with the *Washington and Lee Law Review*).

[93] See supra notes 83–84 and accompanying text, discussing the broad acceptance of the Supreme Court's sex discrimination decisions.

these over fifty million abortions[94] have occurred with the imprimatur of the United States Supreme Court. But *Roe* has always seemed more than that. In reality, however, the opinion is an outlier. That is true in many areas. Although women still have a nearly unlimited right to an abortion, in many other areas of the law, unborn children have increasingly been accorded legal protection. The federal Unborn Victims of Violence Act (and various state counterparts)[95] and the federal Born-Alive Infants Protection Act[96] are two important examples. The Alabama Supreme Court decision in *Ex Parte Ankrom*[97] is another prominent example. In that case, the court held that Alabama's chemical endangerment statute protected unborn children.[98] Justice Parker's special concurrence concluded:

> The decision of this Court today is in keeping with the widespread legal recognition that unborn children are persons with rights that should be protected by law. Today, the only major area in which unborn children are denied legal protection is abortion, and that denial is only because of the dictates of Roe [*v. Wade*]. *Roe* has become increasingly isolated on this point, as on many others.[99]

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[94] See Steven Ertelt, "55,772,015 Abortions in America since *Roe v. Wade* in 1973," *Lifenews.com* (Jan. 18, 2013, 1:13 PM), http://www.lifenews.com/ 2013/ 01/18/55772015-abortions-in-america-since-roe-vs-wade-in-1973/ (last visited Jan. 14, 2014), discussing a study detailing the number of abortions performed since 1973 (on file with the *Washington and Lee Law Review*).

[95] 18 U.S.C. § 1841 (2012); see also "Unborn Victims of Violence (Fetal Homicide)," *National Right to Life News*, http://www.nrlc.org/federal/unborn victims/ (last visited Jan. 14, 2014), providing links to documents on federal and state legislation punishing harm to unborn victims (on file with the *Washington and Lee Law Review*).

[96] 1 U.S.C. § 8; see also "Born-Alive Infants Protection Act," *National Right to Life News*, http://www.nrlc.org/federal/bornaliveinfants/ (last visited Jan. 14, 2014), providing links to documents on the federal Act (on file with the *Washington and Lee Law Review*).

[97] Case Nos. 1110176, 1110219, 2013 Ala. *Lexis* 8 (Jan. 11, 2013).

[98] See ibid. at *60: "[The] Court of Criminal Appeals correctly held that the plain meaning of the word 'child' in the chemical-endangerment statute includes an unborn child...[and we] reject the Court of Criminal Appeals' reasoning insofar as it limits the application of the chemical-endangerment statute to a viable unborn child."

[99] Ibid. at *89 (Parker, J., concurring specially). 100. 381 U.S. 479 (1965).

Roe is thought of, along with *Griswold v. Connecticut*,[100] as representative of the modern approach to substantive due process. Yet, here too *Roe* is somewhat of an outlier. It seemed that *Roe* and *Casey* might support a fundamental right to assisted suicide,[101] but in *Washington v. Glucksberg*[102] the Supreme Court rejected that expansion of substantive due process, in part it seemed because the Court was reticent about constitutionalizing another area of social life.[103] And more importantly the Court in *Glucksberg* set forth an approach to substantive due process that amounted to a rejection of the approach the Court had used in *Roe v. Wade*.[104] As I noted in a prior article, "Chief Justice Rehnquist's opinion [in *Glucksberg*] was all about judicial restraint and deference to history and tradition."[105] The notable exception to this analysis is the Court's decision in *Lawrence v. Texas*,[106] in which the Court held unconstitutional a Texas statute prohibiting homosexual sodomy.[107] *Lawrence* though, despite its expansive language, was modest in the sense that the Court was invalidating a law that existed in only a relative handful of states. *Lawrence*, as scholars such as Cass Sunstein have noted,[108] is similar in this respect to *Griswold v.*

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[100] 381 U.S. 479 (1965).

[101] See Richard S. Myers, "Physician-Assisted Suicide: A Current Legal Perspective," *National Catholic Bioethics Quarterly* 1 (2001): 346-48, discussing the broad language of rights in *Roe* and *Casey*.

[102] 521 U.S. 702 (1997).

[103] See ibid. at pp. 719–23, finding that a protection to commit suicide is not included in the Due Process Clause and that to find such a thing would reverse "centuries of legal doctrine and practice."

[104] See Myers, supra note 101, at p. 349, comparing the Court's analysis in *Glucksberg* to that in *Roe* and *Casey*.

[105] Myers, "Pope John Paul II," supra note 12, at p. 66 (footnote omitted). 106. 539 U.S. 558 (2003).

[106] 539 U.S. 558 (2003).

[107] See ibid. at p. 578: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

[108] See, e.g., Steven G. Calabresi, "Substantive Due Process after *Gonzales v. Carhart*," *Michigan Law Review* 106 (2008): 1524, discussing how "activist" the *Griswold* decision was in comparison to *Roe*; Cass R. Sunstein, "Liberty After *Lawrence*," *Ohio State Law Journal* 65 (2004): 1062-63, discussing the concept of desuetude, of laws lapsing over time, and comparing *Griswold* and

Connecticut in which the Court struck down a law that existed in only one state in the Union.[109] *Roe*, in which the Court effectively invalidated the abortion laws of every state, is exceptional.[110] Moreover, *Lawrence* is in many respects more reflective of the importance of equality than it is a full endorsement of individual autonomy,[111] although there is, of course, language in *Lawrence* to support the autonomy reading.[112] And *Lawrence*, despite the predictions of Justice Scalia's dissent, has not led to a wholesale invalidation of morals legislation.[113]

Fourth, as noted above, from a perspective of forty years, *Roe*'s almost complete neglect of equality themes is striking. As suggested in my discussion of *Lawrence v. Texas*, that is where the action is today. It is intriguing that the discussion about same-sex marriage has primarily been about "marriage equality" and not about a right to marriage.[114] I think that is in part because we seem to lack the moral vocabulary to discuss basic moral issues directly. I think this focus on equality suggests the importance of pro-life efforts to focus on and to prevent the harms to women from abortion,[115] and on efforts to combat the equality

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Lawrence on this ground.

[109] See Calabresi, supra note 108, at p. 1525, noting that *Lawrence*, like *Griswold*, changed very few State laws.

[110] See ibid. at p. 1524: "Whereas *Griswold* struck down the law of one state, a law which was not even being enforced, *Roe* struck down the abortion laws of all fifty states."

[111] See Myers, supra note 88, at p. 13, noting an expansive understanding of liberty in *Lawrence*.

[112] See ibid. at 12, discussing Justice Scalia's prediction regarding the end of all morals legislation; Myers, "Pope John Paul II," supra note 12, at pp. 74–77, discussing the "moral relativism" of *Lawrence*.

[113] See Myers, supra note 88, at p. 12, discussing Justice Scalia's prediction regarding the end of all morals legislation; Myers, "Pope John Paul II," supra note 12, at pp. 74–77 discussing the "moral relativism" of *Lawrence*.

[114] It is noteworthy that the early challenges to the constitutionality of the Defense of Marriage Act – see, e.g., *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) – prominently featured arguments that bans on same-sex marriage violated the right to marry. By the time of the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the arguments were nearly exclusively framed in terms of equal protection.

[115] See Forsythe, supra note 56, at pp. 245–68, discussing the danger that an abortion poses to a woman's health; Richard S. Myers, "The Supreme Court

arguments in favor of abortion rights.[116] The equality arguments in favor of abortion rights (which have surfaced in certain judicial opinions and in the literature) are not securely rooted in the text of the Constitution or in established legal doctrine.[117] In addition, efforts to ban abortion for reasons of sex selection also may be important because they turn this equality argument against the right to an abortion.[118] Moreover, the reaction of abortion rights advocates to efforts to ban abortion for reasons of sex selection indicates that the issue is more about autonomy (about the power to make decisions) and not about equality. When faced with a conflict between equality and autonomy, autonomy wins every time.

Fifth, the Court's relatively cursory treatment of the origins and value of human life is noteworthy and creates an opening.[119] The Court's humility in claiming that it "need not resolve the difficult question of when life begins[,]"[120] was obviously false. But this false gesture of humility may make it easier for people to avoid the reality that abortion takes the life of a human being. As Michael Paulsen has stated:

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and Abortion: The Implications of *Gonzales v. Carhart*" in *Life and Learning XVII: The Proceedings of the Seventeenth University Faculty for Life Conference*, ed. Joseph W. Koterski, S.J. (2008), pp. 123-24, discussing the role of equality in the campaign for abortion rights.

[116] For a general discussion of this theme (from a pro-abortion rights perspective), see Neil S. Siegel & Reva B. Siegel, "Equality Arguments for Abortion Rights," *UCLA Law Review Discourse* 60 (2013): 160.

[117] See Erika Bachiochi, "Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights," *Harvard Journal of Law & Public Policy* 24 (2011): 896-907, discussing the connection between the right to equality and the right to an abortion; Paulsen, supra note 5, at pp. 1009–11 n35, detailing the lack of a connection between equal protection jurisprudence and the language and meaning of the constitutional text; Mary Catherine Wilcox, Note, "Why the Equal Protection Clause Cannot 'Fix' Abortion Law," *Ave Maria Law Review* 7 (2008): 307, discussing whether equal protection arguments will be successful in striking down abortion regulations.

[118] See Paulsen, supra note 5, at p. 1010 n35, discussing instances where the pro-abortion reasoning may be controverted.

[119] For an extensive treatment of the issue, see, for example, Robert P. George & Christopher Tollefsen, *Embryo: A Defense of Human Life*, 2nd ed. (2011), arguing "that embryonic human beings deserve full moral respect."

[120] *Roe v. Wade*, 410 U.S. 113, 159 (1973).

I doubt that more than a small percentage of Americans, if pressed on the point, would dispute the fact that abortion is the killing of a human life in its prenatal state and that, outside of a few truly extreme situations, such killing is morally unjustifiable. But nobody really wants to be pressed on the point.[121]

For those opposed to the *Roe v. Wade* decision, it is important to continue to make the scientific and moral case for the protection of the unborn.[122] This is why efforts such as ultrasound laws are so important.[123] Even efforts that do not purport to save many lives, such as bans on partial birth abortion and bans on abortion for reasons of fetal pain, may help to serve an educational function.[124] Efforts to build a reverence for the value of human life in other areas – such as in debates about assisted suicide or infanticide – are also important.[125]

Conclusion

In sum, the overwhelming sense that comes through a re-reading of *Roe* is that Justice Blackmun authored an incredibly weak opinion. I think that portends the decision's ultimate reversal. The Supreme Court and the American system do have the capacity for self-correction and the deep flaws in the key case establishing a nearly unlimited right to an abortion suggest that the ultimate reversal of *Roe v. Wade* is likely.

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[121] Paulsen, supra note 5, at p. 1041.

[122] See, e.g., George & Tollefsen, supra note 119, at pp. 1–25, detailing the importance of understanding that a human being is a human being from the beginning of development.

[123] See Scott W. Gaylord & Thomas J. Molony, "*Casey* and a Woman's Right to Know: Ultrasounds, Informed Consent, and the First Amendment," *Connecticut Law Review* 45 (2012): 595, discussing a split between courts about the constitutionality of various state statutes requiring display and explanation of an ultrasound to a woman prior to an abortion.

[124] See Myers, supra note 115, at p. 122, discussing this aspect of bans on partial birth abortion.

[125] See Richard S. Myers, "Reflections on the Terri-Schindler Schiavo Case" in *Life and Learning XIV: The Proceedings of the Fourteenth University Faculty for Life Conference*, ed. Joseph W. Koterski, S.J. (2005), pp. 40-41, noting the need to focus on this broader point.