FIRST THINGS

How Not To Overturn *Roe v. Wade*

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An aside in Justice Antonin Scalia's recent article, "God's Justice and Ours" (FT, May), provides a useful and timely reminder that efforts to overrule *Roe v. Wade* through "personhood" litigation are doomed to failure. In the course of his article (which focuses on the morality of the death penalty), Justice Scalia writes: "My difference with *Roe v. Wade* is a legal rather than a moral one: I do not believe . . . that the Constitution contains a right to abortion. And if a state were to permit abortion on demand, I would—and could in good conscience—vote against an attempt to invalidate that law for the same reason that I vote against the invalidation of laws that forbid abortion on demand: because the Constitution gives the federal government (and hence me) no power over the matter."

Several organizations, including the National Foundation for Life and the Texas Justice Foundation, have undertaken litigation that is intended to overturn *Roe v. Wade* and establish the legal personhood of the unborn child. The National Foundation for Life (NFFL) modestly describes its litigation strategy as the "Global Project." This strategy suffers from many analytical and methodological errors, not the least of which is the notion, central to the ongoing federal litigation in New Jersey (the *Donna Santa Marie* case now on appeal in the Third Circuit), that a woman who has been coerced into having an abortion has no legal remedy under the state's wrongful death statute when, in fact, such a remedy clearly exists under current law—either a common law action for battery or, if state actors are involved, a federal civil rights action, which the Supreme Court itself approved of in *Planned Parenthood v. Casey* (1992). And for those women who have *not* been coerced into having an abortion (which is to say virtually *all* women who undergo abortions), how can it be said that *their* rights (as opposed to their children's rights, discussed below) have been violated? The essential shortcoming of this type of litigation, however, is that it aims at persuading the Justices of the Supreme Court of the existence of a fact—that the unborn child is a developing member of the human family from the moment of conception—with which they already are familiar.

The unstated premise of those who have adopted this strategy is that the Justices do not understand the nature of abortion, and that if they are forced to confront the scientific and

medical facts about the conception and development of the unborn child, they will be compelled to reconsider *Roe v. Wade* and hold that the unborn child is a constitutional person. To speak in spiritual terms, the critics assume that the problem lies in the intellect rather than the will. That premise is mistaken. Every member of the Court understands what an abortion is. If there was any doubt about this before, the Court's decision in *Stenberg v. Carhart* two years ago, striking down Nebraska's partial-birth abortion law, should have laid that doubt to rest.

The majority opinion's cold and clinical description of various abortion methods betrays no ignorance of the nature of abortion. The Court understands that the purpose and effect of an abortion is to kill an unborn (and, in some instances, a partially born) child. Whatever reservations some members of the *Carhart* majority may have about the morality of abortion in general or the partial-birth technique in particular, those reservations have not affected their collective judgment that women need abortion to be legal in order for them to be full and equal members of American society. It is that judgment, and not any misunderstanding of what happens in an abortion, that is the source of our present predicament, as even a casual perusal of the Court's opinion in *Casey* reaffirming *Roe v. Wade* would disclose.

Instead of meeting head-on the Court's rationale for adhering to the abortion liberty, the NFFL veers off in a different direction, arguing for the "personhood" of the unborn child. But by now, it should be clear that no member of the Court—past or present—believes that the unborn child is a "person," as that term is used in Section 1 of the Fourteenth Amendment. Seventeen justices have sat on abortion cases since and including *Roe*, and not one has ever stated that the unborn child is a constitutional person. Neither then-Justice William Rehnquist nor the late Justice Byron White, both of whom dissented in *Roe*, took issue with the Court's holding that the unborn child is not a constitutional person. Both Justices, then and later, recognized the states' authority to legislate in this area. Dissenting in *Roe*, Justice Rehnquist stated that "the drafters did not intend to have the Fourteenth Amendment withdraw from the states the power to legislate with respect to this matter [i.e., abortion]." Dissenting in both *Roe* and *Doe v. Bolton*, the companion case to *Roe*, Justice White stated that "this issue [i.e., abortion], for the most part, should be left with the people and the political processes the people have devised to govern their affairs."

No present or past Justice has ever taken the position that the unborn child is, or should be regarded as, a "person" as understood in the Fourteenth Amendment, including the late Justice White, perhaps the most eloquent critic of *Roe v. Wade*. And in the *Carhart* case, the Court refused even to consider Nebraska's argument that a partially born child is a constitutional person. That question was rejected for review without dissent. So much for the naive notion of "forcing" the Court to take on the personhood issue.

But there is more than silence to indicate the Justices' views. Dissenting in *Casey*, Justice Antonin Scalia stated, "The states may, if they wish, permit abortion-on-demand, but the Constitution does not *require* them to do so." This statement, in an opinion that Chief Justice Rehnquist, Justice White, and Justice Clarence Thomas joined, quite obviously is not compatible with a recognition of personhood. And in dissenting from the Court's decision to strike down the Nebraska partial-birth abortion ban, Chief Justice Rehnquist and Justices Scalia and Thomas once more urged that the issue of abortion be returned to the states.

In his brief dissent in *Carhart*, Justice Scalia stated that "the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, state by state, whether this practice should be allowed." Justice Thomas, writing for himself, Chief Justice Rehnquist, and Justice Scalia, began his lengthy dissent by stating: "Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother."

Entirely apart from the issue of personhood, there is little basis for believing that any of the Justices would accept the argument that the Supreme Court (or any court) is qualified to state when human life begins. Dissenting in *Casey*, Justice Scalia, joined by the Chief Justice and Justices White and Thomas, wrote that the question of when human life begins is not "a legal matter" capable of resolution by a court, but, instead, is "a value judgment" that may be made only by the political branches of government. In his concurring opinion in *Ohio v. Akron Center for Reproductive Health* (1990), Justice Scalia said that the determination of when human life begins is a question not capable of judicial resolution and instead must be left to the political process where compromise and accommodation of divergent views is possible. This theme—that the resolution of the abortion question should be left to the political branches of government—has been a leitmotif of Justice Scalia's abortion opinions.

The immediate objective of the NFFL's strategy is to compel New Jersey and a handful of other states to recognize wrongful death actions for unborn children where such actions are not currently allowed. But this objective, to the extent that it is intended to challenge *Roe*, is also misdirected. Nothing in *Roe*, properly understood, forbids New Jersey or any other state from imposing civil liability and/or criminal sanctions on anyone who causes injury to or the death of an unborn child (outside the context of abortion). Indeed, many more states recognize such civil actions (and punish such crimes) now than before *Roe* was decided. One might go further and argue that the Constitution should forbid one person (the pregnant woman) from being able to

consent to the injury or death of another person (her unborn child), but that assumes a state of affairs in which *both* persons are entitled to the protection of the Constitution. For the reasons set forth above, no federal court is going to hold that New Jersey (or any other state) must extend its wrongful death statute to unborn children on either equal protection or due process grounds, regardless of whether their death occurs as a result of abortion or otherwise.

But if the NFFL strategy is pursued, several federal courts will hold, as *Roe* did and as the Third Circuit already has in an earlier failed attempt of the "Global Project," *Alexander v. Whitman* (1997), that the unborn child is *not* a constitutional person ("the short answer to plaintiffs' argument is that the issue is not whether the unborn are human beings, but whether the unborn are constitutional persons"). These decisions, none of which has been (or is likely to be) reviewed by the Supreme Court, simply reinforce the positivist legal principle that having the attributes of humanity is not enough to entitle one to the protection of the law. That result, in my judgment, would be most regrettable.

Roe may be (and we must hope and pray *will* be) overturned some day, either by a Court decision returning the issue to the states or by a constitutional amendment. But most assuredly it will not come about through an effort like the NFFL's "Global Project," which simply diverts scarce pro-life resources into a quixotic venture destined to fail. Justice Scalia's recent restatement of his view that the Constitution does not speak to the issue of abortion at all should serve as a much needed wake-up call to those who think otherwise.

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