

Faithful Citizenship

Principles and Strategies to Serve the Common Good

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Advancing the Culture of Life through Faithful Citizenship

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Introduction

[1] One of the fundamental questions that Catholics confront is how to describe our condition. Are we Catholic citizens of the United States of America or are we Americans who are members of the Catholic Church? While this may seem to be mere semantics, the ordering of the question contains a subtle, but important, revelation of priorities. Both formulations presume the compatibility of religious and national identity. The first assumes that our essential identity arises from our relationship with Christ through the Church, and the second assumes our foremost loyalty lies with our nation. The effect of this ordering on the political positions of an individual is unclear and the legitimacy of public assumptions based upon this ordering is deeply contested. Nonetheless, the prioritizing of religious and political identity can influence a person's process of decision making and, ultimately, his or her decisions.

[2] This article provides a summary of principles that guide Catholics in political decision-making and illustrates the application of those principles toward a culture of life within a civilization of love. The first section discusses human nature and the obligation to do good and avoid evil. The concepts of freedom, truth, good and evil are defined and their

relationship briefly discussed. The second section introduces Catholic political theory regarding the citizen's right and duty to participate in democracy and the limited role of the state in advancing the good of the human person and the human community. The third section provides a sketch of American constitutional law regarding abortion. The relevance of national elections on the ability of citizens to legally protect the lives of the unborn is discussed in the fourth section and the role of state elections is discussed in fifth. The article concludes with a call to faithful citizens to prioritize abortion in making decisions regarding candidates for national and state offices.

Human Nature and the Obligation to Do Good and Avoid Evil

[3] Scripture teaches that the human person is created in the image of God and for communion with God and other persons (Genesis 1:26-27). Because this is human nature, the primary relationship in every person's life is his or her relationship with God (John Paul II 1988: no. 39). This is true whether the person acknowledges God and willingly participates in relationship with God or denies God and rejects God's friendship. The eternal drama of human history is defined by individual and collective decisions either to accept God's offer of eternal friendship and, thus, fulfill our human nature, or to withdraw from God, often in an attempt to define our own destiny. By choosing to draw near to God we follow the basic moral precept, "Do good and avoid evil" (Psalm 34:13).

[4] This precept, however, is contested by contemporary society's unwillingness to acknowledge that objective standards of good and evil exist (see Rorty). Few embrace the idea that a person should do evil and avoid good, but many argue that only the individual can determine what is good and what is evil. This ancient error is evidenced by the conversation between Eve and the serpent in the Garden of Eden. "[Y]ou will be like gods who know what is good and what is bad" (Genesis 3:5). Some secularist philosophies go beyond this to argue, "you will be like gods who *decide* what is good and what is bad." Absent objective standards for good and evil, decisions have value only to the degree that they represent authentic expressions of the person's will (Benedict XVI).

[5] Good and evil are not subjective constructs, which merely reflect the desires or appetites of the individual (John Paul II 1993: no. 35). Good is that which leads to human flourishing and evil is that which diminishes human flourishing. In coming to know God through Jesus Christ, the Holy Spirit, the Scriptures, and the traditions of the faith, the Christian comes to know good from evil (Grisez and Shaw: 49-51). Good reflects our embrace of God and the fullness of life (John 10:10).

[6] Authentic freedom is the ability of the person to make good choices; to fully appropriate the value of goodness and to participate in the creation of future possibilities of goodness. "The more one does what is good, the freer one becomes. There is no true freedom except in the service of what is good and just. The choice to disobey and do evil is an abuse of freedom and leads to 'the slavery of sin'" (*Catechism*: sec.1733). Freedom must be directed to the good or it degenerates into license that harms both the person and the community (see USCCB 2002: IV.7).

Political Structures and Pursuit of the Good

[7] Participation in the political process is a duty of faithful Catholics (Catechism: sec. 1913-1917). It is one of the means by which Catholics pursue both the individual good and the common good. The “common good embraces the sum of those conditions of the social life whereby men, families and associations more adequately and readily may attain their own perfection” (Second Vatican Council 1965: no. 74). The common good is not the aggregation of individual goods, but rather the right ordering of society.

[8] As citizens living in a democratic republic, Americans have both the right and the duty to promote the common good by directing the government’s policies (USCCB 2007: no. 13). This is done primarily by voting and communicating with public officials.

Indeed, all can contribute, by voting in elections for lawmakers and government officials, and in other ways as well, to the development of political solutions and legislative choices, which, in their opinion, will benefit the common good. The life of a democracy could not be productive without the active, responsible and generous involvement of everyone, albeit in a diversity and complementarity of forms, levels, tasks, and responsibilities (CDF: sec II. 2. 2).

As observed by the United States Conference of Catholic Bishops, “. . . responsible citizenship is a virtue, and participation in political life is a moral obligation” (USCCB 2007: no. 13).

[9] In making political judgments citizens properly adhere to their understanding of human nature, of what constitutes good and evil, and the role of government in realizing various goods and combating assorted evils. “[P]olitics are concerned with very concrete realizations of the true human and social good in given historical, geographical, economic, technological and cultural contexts” (CDF: sec. II. 3. 1).

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

It is widely held that the inner logic of such an affirmation [of a substantive concept of the human good derived from our understanding of God and his plan for humanity] tends inexorably toward policy authoritarianism, and thus that such an affirmation necessarily constitutes some kind of incipient fascism. . . . Yet, although widely asserted, the truth of this claim is by no means self-evident. From the premise that we can know the human good it does not automatically follow that it is the right – much less the duty – of government to compel all to embrace it. If some substantive conceptions of the good life may foster an authoritarian politics, others may foster a commitment to government that is sharply limited in its scope and responsible to those it governs (Grasso 1995: 53-54).

[11] There are many human goods that are beyond the capacity of government to provide – friendship and love are clear examples – and it would be useless, if not dangerous, for government to attempt to provide such goods. But while government can not provide friendship or love, it can encourage or discourage the attainment of these goods. Laws requiring strict segregation of the races clearly impede the ability of persons of different races to enter into friendships, and contemporary divorce laws allowing unilateral dissolution of marriage diminish the ability of married couples to persevere in their vows of lifelong love and fidelity. Establishing this is empirically difficult due to the large number of confounding factors in each divorce. Experts agree, however, that the adoption of unilateral divorce causes a significant upsurge in the number of divorces the first ten years after enactment (see Allen; Ellman and Lohr; Glenn; Rogers; and Wolfers).

[12] It is equally important to note that all evils cannot be eradicated by government. As Thomas Aquinas observed:

Human law is imposed on the multitude, a part of which is composed of men imperfect in virtue. Thus all the vices from which the virtuous abstain are not punished by human law, but only the more grievous ones which most people can avoid, and especially those which can hurt others, without the prohibition of which human society could not be preserved. Thus homicide, theft and the like are prohibited by human law (*Summa Theologiae*, I-II, q. 96, a. 2).

There are some evils, which are clearly harmful to the person engaging in them, but that legal prohibitions are incapable of restraining or that, because of the means necessary to restrain them, will result in even greater evils. Much of American free speech jurisprudence is supported by this reasoning. While it is clear that some speech is hurtful to others or advances foolish or evil ideas, empowering the government to permanently silence citizens poses too great a threat to the processes of collective self-governance to outlaw “bad speech” (see *R.A.V. v. City of St. Paul*).

[13] That said, as Aquinas notes, there are some evils that a just government must combat because failure to do so would imperil the continuance of the government and society. Chief among these is the evil of violence directed at the innocent. A government that failed to enact or generally enforce laws against murder would have failed in one of its most fundamental obligations—stability and security of a just order (*Catechism*: 1909).

[14] Similarly a government is fundamentally flawed if its protections against murder or violence are limited to only a portion of society. Yet this is the state of affairs in America today. This is true, not because it represents the will of the citizens or their elected representatives, but rather because a tiny, yet powerful, group of men declared it must be so.

Judicial Rejection of Legal Protection for the Unborn

[15] In 1973, a majority of the United States Supreme Court declared that the Constitution prohibited extending legal protection to the unborn (*Roe v. Wade*). This was done, not on the basis of a textual command within the Constitution, but by cobbling together an argument that created an amorphous right of decisional privacy by invoking language barring the quartering of troops in citizens’ homes and the illegal search of private papers. Building

upon this flawed opinion, the Court has continued to reject legislative efforts to provide minimal protections to the unborn. This section will describe the actual reasoning of *Roe v. Wade*, its unprincipled expansion, and discuss two examples of the Court's usurpation of citizens' right to protect the unborn, *Casey v. Planned Parenthood of Southeastern Pennsylvania* and *Stenberg v. Carhart*. The section ends by exploring the importance of individual justice's judicial philosophy in explaining the shift in abortion law illustrated by *Gonzales v. Carhart*.

The Fictions of *Roe v. Wade*

[16] The text of the Constitution and its amendments do not explicitly address the question of abortion or any medical procedure. Nor is there a textual "right to privacy," which is the foundation of the judicially-created right to abortion. In spite of the Constitution's silence on abortion, *Roe v. Wade* struck down the laws of 46 states protecting the unborn. Equating interpretations of explicit Constitutional provisions protecting the privacy of the home and of criminal defendants¹ to the judicially-created right to use and sell contraception (see *Griswold v. Conn.* and *Eisenstadt v. Baird*), the *Roe v. Wade* majority ruled, "[t]his 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" (*Roe v. Wade*: 152-53). As one prominent scholar of constitutional law has observed, "Roe v. Wade simply string cites a series of privacy cases involving marriage, procreation, contraception, bedroom reading, education, and other assorted topics, and then abruptly announces with no doctrinal analysis that this privacy right 'is broad enough to encompass' abortion. Ipse dixit" (Amar: 778). The Court's inability to definitively identify the constitutional text or historical interpretation requiring it to overturn the abortion laws of forty-six states evidences the vacuous nature of *Roe v. Wade*'s analysis.

[17] The Court rejected any claim of constitutional status on behalf of the unborn child as unsupported by the text of the Constitution (*Roe v. Wade*: 157). According to Justice Blackmun, the Court's differing treatment of constitutional text is justified because no prior case had held "that a fetus is a person within the meaning of the Fourteenth Amendment" (*Roe v. Wade*: 157). He fails to explain how the absence of this judicial precedent differed from the absence of any Supreme Court precedent holding that abortion was constitutionally protected. The justice further opined that a contrary ruling would be inconsistent with the Texas law, which allowed abortion for the purpose of saving the life of the mother (*Roe v. Wade*: 54).

[18] The absence of any prior holding establishing the constitutional personhood of a fetus is not surprising in light of the state of medical knowledge during the first 150 years of this nation's constitutional existence. Careful examination of the development of Anglo-

¹ In the 1960s, the Supreme Court gave the term "privacy" a central role in the interpretation of the Third and Fourth Amendment. See for example *Katz v. U.S.* ("[t]he Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion"); and *Terry v. Ohio* (stating that the Fourth Amendment protects areas in which one has a reasonable expectation of privacy from unreasonable searches and seizures).

American law prior to *Roe v. Wade* evidences increasing attempts to protect the life of the unborn child due to advancing medical knowledge about the nature of pregnancy and the characteristics of the unborn child (see Keown: 26-48). Unlike their eighteenth-century counterparts, doctors and scientists in the nineteenth and twentieth centuries were in the process of acquiring sufficient scientific knowledge about pregnancy to conclude that the unborn child was a separate human being from conception. This increasing knowledge led members of the medical profession to take a leading role in seeking legal protection for the lives of the unborn (see Dellapenna: 257-261 and 281-284; Witherspoon).²

[19] As for the second point, it is difficult to predict the Court's view had it taken seriously Texas's claim of competing constitutional interests, notwithstanding Justice Blackmun's cavalier dismissal: "[b]ut if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?" (*Roe v. Wade*: 54). The constitutionality of a state's failure to protect the life of the unborn was not before the Court in *Roe v. Wade*, and it is unlikely to have arisen under the Texas statute at issue in the case.

[20] If such a case had been presented to the Court in the early 1970s, most likely it would have come from courts in Alaska, the District of Columbia, Hawaii, New York, or Washington, since these jurisdictions had eliminated virtually all restrictions on abortion during the first half of pregnancy (Linton 1990: 157). It is possible that an unborn child (through his or her father or other next friend) might have sought an injunction to stop the mother from obtaining an abortion, arguing that the state had a constitutional obligation to protect the child's life.³ Such a claim might have been rejected due to the absence of any state action, or by adopting a narrow procedural interpretation of the due process clause of the Fourteenth Amendment. Any claim that the Equal Protection clause was violated by omitting the unborn from laws protecting the life of infants and other born persons might have been answered by denying that unborn children and born children are similarly situated due to the unborn child's physical location within the mother's body.

[21] Maybe the Court would have found that the vulnerability of the unborn and the newborn are sufficiently similar to require equal protection of both, at least in cases when the abortion is not necessary to protect the life of the mother and enjoined the threatened abortion (see Collett 2007).

Expansion of *Roe v. Wade's* Flawed Reasoning

[22] In the nineteen years between the creation of a right to abortion in *Roe v. Wade* and the reaffirmation of its constitutional status in *Planned Parenthood v. Casey*, the Court issued opinions regarding abortion at least twenty-three times. This is largely due to the legislative, as opposed to judicial, nature of the majority's opinion in *Roe v. Wade*, and the public's

²For an analysis of how contemporary medical discoveries regarding pregnancy and abortion may impact abortion jurisprudence, see Adkins.

³ Whether the Court would ever recognize the constitutional personhood of the unborn is the subject of a debate between Professor Nathan Schlueter and Judge Robert Bork available online at http://www.firstthings.com/article.php3?id_article=424.

resistance to the seemingly unlimited nature of the abortion right that seemed to have emerged from the Court's definition of "health" in *Doe v. Bolton*: "We agree with the District Court, 319 F. Supp., at 1058, that the medical judgment may be exercised in the light of all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient. All these factors may relate to health." (192). Some abortion providers have publicly stated their beliefs that this allows the performance of any abortion on the basis that "any pregnancy is a threat to a woman's life and could cause grievous injury to her physical health."⁴

[23] Other commentators have described the remarkable performance of the Court as what Justice White called the "Nation's 'ex officio medical board'" (*Planned Parenthood of Central Mo. v. Danforth*: 99), striking down laws requiring parental consent prior to performance of abortion on a minor, overturning state requirements that a second physician be present during a post-viability abortion to provide immediate medical care for any child surviving the abortion, and invalidating bans on abortion by saline amniocentesis, notwithstanding clear evidence that other methods of abortion were available that were safer for the mother. A detailed review of all of the Court's abortion cases is not required to establish that the Court erected an ambitious regulatory scheme on the faulty foundation of *Roe v. Wade*. Examination of *Planned Parenthood v. Casey* and *Stenberg v. Carhart* will suffice.

The Hubris of *Planned Parenthood v. Casey*

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

[25] Unfortunately, at that time only Chief Justice Rehnquist and Justices White, Scalia, and Thomas, were prepared to overrule *Roe v. Wade*. Justices Stevens and Blackmun were adamant that *Roe v. Wade* be retained, and Justices O'Connor, Kennedy, and Souter were ambivalent about the Court's application of the Constitution to the regulation of abortion but persuaded that the institutional integrity of the Court required continued protection of the practice. With opinions on the Court so divided, the ambivalent justices prevailed and the plurality opinion of Justices O'Connor, Kennedy and Souter became the controlling rule of law. These justices were unwilling to affirm the initial correctness of *Roe v. Wade*, instead

⁴ H.R. Rep. No. 108-58, H.R. Rep. No. 58, 108th Cong., 1st Sess. 2003, 2003 WL 1789189 (Leg. Hist.) at 19.

declaring majestically, “the immediate question is not the soundness of *Roe v. Wade’s* resolution of the issue, but the precedential force that must be accorded to its holding” (871).

[26] Supporters and opponents of abortion rights have criticized the plurality opinion as unprincipled (see Calabesi), and at least one legal scholar has characterized it as the worst Supreme Court decision ever (Paulsen). A passage from *Planned Parenthood v. Casey* receiving the most negative attention is the plurality’s extravagant statement of the judicially-created right of decisional privacy.

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State (851).

What Justice Scalia called the “sweet mystery-of-life passage” (*Planned Parenthood v. Casey*: 588, Scalia, J. dissenting) has been derided by legal commentators (Jacob; Breen and Scaperlanda; Grasso; Brennan) and has been characterized as “popular mythology” (Jacob), the product of “philosopher-kings”(Graglia), “startling”(George, Francis), “radical” (Blakey and Murray), and representing “the view that moral relativism is a constitutional command” (Myers).

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

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

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution (*Planned Parenthood v. Casey*: 867).

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

[29] The plurality then suggests that any hope of the citizenry that abortion would be returned to the political process is diminished in direct proportion to public criticism of the Court’s usurpation of the issue. “[T]o overrule under fire in the absence of the most

compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question" (*Planned Parenthood v. Casey*: 867) As Justice Rehnquist notes in his critique of the plurality, "when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, *unless opposition to the original decision has died away*" (*Planned Parenthood v. Casey*: 833, emphasis in original).

[30] Justice Scalia was even sharper in his criticism.

The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges – leading a Volk who will be “tested by following,” and whose very “belief in themselves” is mystically bound up in their “understanding” of a Court that “speak[s] before all others for their constitutional ideals” – with the somewhat more modest role envisioned for these lawyers by the Founders (*Planned Parenthood v. Casey*: 833).

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

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

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

[32] The abstract reasoning and apparent disregard of the primacy of democratic process of *Planned Parenthood v. Casey* has led some to publicly question whether the American people remain in control of the nation’s collective destiny. Introducing a symposium, Neuhaus states:

This symposium addresses many similarly troubling judicial actions that add up to an entrenched pattern of government by judges that is nothing less than the usurpation of politics. The question here explored, in full awareness of its far-reaching consequences, is whether we have reached or are reaching the point where conscientious citizens can no longer give moral assent to the existing regime.

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

To say that the worst abuses of human rights have come from the least democratic branch – the judiciary – is true, but of increasingly questionable relevance to the crisis of democratic legitimacy brought on by judicial action in the cause of abortion and euthanasia. In practice, the American scheme of constitutional democracy invests the courts with ultimate authority to decide what the Constitution is to mean. Judicial action and appointments can, and sometimes do, become major issues in national elections. The refusal of the courts over more than twenty-three years to reverse *Roe v. Wade* must, then, be accounted a failure of American democracy (61).

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

Indifference to Evidence in Carhart I: *Stenberg v. Carhart*

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

[34] As described by the majority, the issue before the Court in *Stenberg v. Carhart* was “whether Nebraska’s statute, making criminal the performance of a ‘partial birth abortion,’ violates the Federal Constitution, as interpreted in *Planned Parenthood of Southeastern Pa. v. Casey* and *Roe v. Wade*. Ultimately the majority found that the statute was unconstitutional because it contained no exception for procedures performed to protect a woman’s health since “substantial medical authority supports the proposition that banning [this] particular abortion procedure could endanger women’s health” (*Stenberg v. Carhart*: 938). Yet the evidence presented to the trial court reveals that the Nebraska legislature’s conclusion that no health exception was required was well supported by “substantial medical authority” (*Stenberg v. Carhart*: 938).

[35] The plaintiff, Dr. Carhart, the only witness who had ever performed partial-birth abortions (also known as “D & X” or “intact D & E” abortions), testified that he only chose to perform a D & X when the fetus presented in breech or where repositioning the fetus from a side presentation resulted in a breech presentation (*Stenberg v. Carhart*: 972 F. Supp. at 522 n. 20). If the partial-birth abortion procedure was medically superior to dismemberment

abortion,⁵ it would seem that Dr. Carhart would have repositioned the fetus to allow use of the superior method, yet he did not do so. This fact suggests that his use of the procedure was more a matter of convenience than of medical necessity.

[36] None of the experts called to testify on the plaintiff's behalf had experience with the procedure. Dr. Stubblefield, the expert relied upon extensively by the trial court "has not performed this procedure himself, nor has he viewed anyone else perform it" *Stenberg v. Carhart*: 1112). Similarly, Dr. Carhart's other expert, Dr. Hodgson, "performed or supervised at least 30,000 abortions," and yet had never intentionally performed an intact D & X (*Stenberg v. Carhart*: 1105). Notwithstanding these experts' lack of experience with or use of the procedure, both Drs. Stubblefield and Hodgson were confident that some circumstances existed in which the protection of a woman's health would require its use.

[37] The American College of Obstetricians and Gynecologists ("ACOG") expressed similar unsubstantiated confidence. "A select panel convened by the ACOG could identify no circumstances under which this procedure [intact D & X] . . . would be the only option to save the life or preserve the health of the woman. An intact D & X, however, may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman, and only the doctor, in consultation with the patient, based upon the woman's particular circumstances can make this decision" (American College of Obstetricians and Gynecologists, Statement (Jan. 1997) quoted in *Carhart v. Stenberg*, 11 F. Supp. 2d at 1105 n.10. Emphasis added).

[38] A more objective opinion was expressed by the American Medical Association (AMA) when it stated that "there does not appear to be any identified situation in which intact D & X is the only appropriate procedure to induce abortion" (AMA Policy H-5.982) Based on this conclusion, the AMA issued statements supporting the federally proposed Partial-Birth Abortion Ban of 1997 and described partial-birth abortion as "broadly disfavored—both by experts and the public . . . It is a procedure which is never the only appropriate procedure and has no history in peer reviewed medical literature or in accepted medical practice development" (AMA Fact Sheet).

[39] The conclusion of the AMA is supported by Colorado physician Warren Hern, M.D., the author of *Abortion Practice*, a widely used textbook on abortion standards and procedures public statements of recognized abortion experts. "I have very serious reservations about this procedure . . . [y]ou really can't defend it" (Gainelli: 1).

[40] The medical authority relied upon by the majority in overturning the partial-birth abortion bans passed by thirty-one states was the testimony of a single physician plaintiff and unsubstantiated speculation by his experts and a professional association. Similar to *Planned Parenthood v. Casey's* command that the people submit to the Court's judgment regarding the legality of abortion, *Stenberg v. Carhart* commanded Americans to accept physicians' initiating childbirth for the purpose of killing the child immediately before he or she emerged from the womb. Such was the state of abortion law prior to the appointment of the two newest

⁵ Dismemberment abortion is a descriptive name for the "dilation and evacuation" procedure used in post-first trimester abortions (Haskell: 123).

justices of the United States Supreme Court, Chief Justice John Roberts and Justice Samuel Alito.

Carhart II: *Gonzales v. Carhart*

[41] Six years after ruling in *Stenberg v. Carhart*, the Court again took up the question of whether the Constitution prohibited bans on the partial-birth abortion procedure. Consolidating appeals from the Courts of Appeals for the Eighth and Ninth Circuits, the Court considered “whether, notwithstanding Congress’s determination that a health exception was unnecessary to preserve the health of the mother, the Partial-Birth Abortion Ban Act of 2003 is invalid because it lacks a health exception or is otherwise unconstitutional on its face” (*Gonzales v. Carhart*: 1169). Similar to the evidentiary record in *Stenberg v. Carhart*, none of the physicians testifying at the trials could identify a single instance in which they had intentionally performed a D & X abortion because it was the medically superior method of abortion in protecting the health of the mother.

[42] In contrast to *Stenberg v. Carhart*, a peer-review study of partial-birth abortion existed, but was inconclusive as to whether D & X was superior to D & E. Dr. Chasen, an early advocate of D & X and the author of the study, testified that there was no difference between the partial-birth and dismemberment abortions in the mother’s blood loss, procedure time, or short-term complication rates (*National Abortion Federation v. Gonzales*).

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

After hearing all of the evidence, as well as considering the record before Congress, the Court does not believe that many of Plaintiffs’ purported reasons for why D & X is medically necessary are credible; rather they are theoretical or false. In addition, Dr. Chasen’s study was initiated with the knowledge that Congress was considering a partial-birth abortion ban. Not only did the study fail to prove the alleged safety advantages of D & X over D & E, it raised serious questions about the potential health risks to women that D & X poses, namely, the risk of future preterm births due to increased cervical dilation during a D & X (*National Abortion Federation v. Ashcroft*: 480).

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

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

The Court of Appeals for the Second Circuit affirmed. Thus Justices Thomas and Kennedy were prophetic when they said that the standard adopted in *Stenberg v. Carhart* would render abortion law subject to the veto of a single physician or allow a single abortion provider to set “abortion policy for the State . . . , not the legislature or the people” (*Stenberg v. Carhart*: 965).

[44] The Supreme Court granted review. By the time oral arguments were presented to the Court, the Courts of Appeals for the Second, Eighth and Ninth Circuits had declared the Act unconstitutional. In a bitterly divided five to four vote, the Supreme Court reversed the lower courts, holding that the Act was sufficiently clear to give physicians adequate warning of the conduct that was prohibited, that Congress was within its constitutional authority to proscribe this particular abortion technique, and that the prohibition did not unduly burden women’s right to obtain abortions (*Gonzales v. Carhart*: 127 S.Ct. at 1628-37). The majority made clear that the state’s power to regulate abortion is not limited to cases where medical opinion is undivided. This recognition of legislative authority is significant in determining the constitutionality of other abortion-related regulations in the absence of unanimous medical opinion.

[45] Justice Ginsburg’s dissent attacks the majority for its disregard of precedent, its use of evocative language, and willingness to defer to Congressional findings of fact. She accuses the majority of holding an outdated and misogynistic view of women, “[t]his way of thinking reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited” (*Gonzales v. Carhart*: 127 S.Ct. at 1649). The fact that three justices joined her in asserting this last point evidences an attempt to relocate the constitutional grounding of abortion rights. What *Roe v. Wade* characterized as a right grounded in the privacy of the patient-physician relationship has now become a woman’s liberty interest encompassed in the due process clause.

The Importance of Judicial Appointments

[46] The differing treatment of partial-birth abortion bans by the Rehnquist and Roberts courts evidences the importance of the justices’ interpretative approach to the Constitution. A court dominated by justices who embrace the idea of a living constitution too often will find constitutional barriers to the political outcomes they dislike (see *Lawrence v. Texas*) while ignoring constitutional text in affirming government actions of which they approve (see *Kelo v. City of New London*). Justices embracing the textualist approach to constitutional interpretation (see Scalia 1997) may refuse constitutional protection to long-enduring practices because of the absence of a controlling text (see *Troxell v. Granville*) or a sharply limited reading of the text. (See *Employment Division, Dept. of Human Resources v. Smith*; Religious Freedom Restoration Act of 1993; and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.)

[47] On the pre-eminent issue of abortion, however, only justices adopting the textualist view have evidenced a willingness to return the question to the democratic process. There are currently no prominent federal judges who embrace the idea that the unborn are persons who can not be deprived of “life, liberty, or property, without due process of law,” nor denied “the equal protection of the laws,” notwithstanding such a position would be

consistent with the idea of the “living constitution.” This suggests that Catholics should support the appointment of Supreme Court Justices who recognize the absence of any textual basis for *Roe v. Wade* and its progeny, as well as the importance of democratic processes in resolving the contested question of whether the unborn are entitled to the status of constitutional persons. Mary Ann Glendon reminds us, “tyranny of the majority does sound alarming. It conjures up visions of peasants with their pitchforks storming the scientist’s castle. Small wonder that it is a favorite slogan of those who would prefer to forget that one of the most basic American rights is the freedom to govern ourselves and our communities by bargaining, education, persuasion, and, yes, majority vote” (Scalia 1997: 113).

The Role of National Politics in Protecting Unborn Children

[48] Supporting reversal of *Roe v. Wade* and the eventual protection of unborn children require Catholics to consider presidential and senatorial candidates’ stances on abortion, since it is the President who has the power to nominate and, with the advice and consent of the Senate, appoint justices of the Supreme Court. The positions of presidential candidates on abortion are also relevant to the appointment of many cabinet members, who as members of the executive branch, exercise substantial influence on federal policy regarding abortion. The Attorney General of the United States is charged with defending federal laws against constitutional challenges. A lukewarm defense of laws seeking to restrict or regulate abortion can be deadly both to the laws and to those the laws are designed to protect. The Secretary of Health and Human Services directs the Centers for Disease Control and Prevention, which accumulates information regarding the incidence and effects of abortion. The Secretary of State advises the President and represents the United States in matters related to foreign affairs, including the impact of proposed treaties and actions within the United Nations regarding the international law of abortion. These are just a sampling of the decisions that the President and members of the executive branch make, which impact the prevalence of abortion in our country and the world.

[49] Presidential support and veto of legislation is equally important to think about when considering the importance of a presidential candidate’s position on abortion. President Clinton repeatedly vetoed federal partial-birth abortion bans, notwithstanding clear majorities in both legislative chambers supporting the legislation. President George W. Bush proudly signed the ban when presented to him. Both of President Bush’s former opponents, in contrast, would have vetoed the ban, insisting that the law contain a health exception.

[50] Congressional elections are also important in extending legal protections to the unborn. The absence of prolife majorities in both houses has stymied attempts by Congressional leaders to insure interstate enforcement of state requirements of parental involvement in young girls’ decisions to obtain abortions. Similarly there has been no movement on proposed national legislation ensuring that women, prior to obtaining abortions in the second half of their pregnancies, are informed of the growing scientific consensus that fetuses feel pain after twenty weeks of development. Efforts to expand existing protections of health-care professionals’ right to refuse to participate in abortion-related procedures and processes have been rebuffed. Congressional efforts are growing to enact the *Freedom of Choice Act*, federal legislation requiring that abortion remain freely available. Clearly,

significant progress could be made in protecting unborn children and their mothers if electing prolife public officials were a priority in our national politics.

The Impact of State Politics on Extending Legal Protection to the Unborn

[51] The importance of politics in extending legal protections to the unborn also requires faithful citizens to attend to state politics. National initiatives to restrict abortion and educate women regarding the nature of abortion and the unborn are of vital importance, but the majority of abortion restrictions and regulations are passed on the state level. As many as twelve States would have enforceable abortion prohibitions on the books if *Roe v. Wade* were overruled. Arkansas would prohibit all abortions. Arizona, Michigan, Oklahoma, Rhode Island, Texas, West Virginia, and Wisconsin would allow abortions only to preserve the life of the mother. Utah would allow abortions to preserve the mother's life or to avoid grave medical harm, or in cases in which the child was conceived through rape or incest or suffered genetic deformity. Three states, Louisiana, North Dakota, and South Dakota, have "trigger" statutes passed after *Roe v. Wade*, with the stated intention of reinstating broad prohibitions on abortion in the event *Roe v. Wade* is reversed. Illinois, Kentucky, and Missouri have "statements of intent" which, in and of themselves, would not restore a prohibition, but foreshadow legislative efforts in the absence of *Roe v. Wade* (Linton 2007). In 2007, 29 abortion restrictions were enacted in 14 states, capping a rapid rise in the number of new laws since 2000. Between 1985 and 1999, states passed an average of 11 new abortion restrictions each year (Vestal).

[52] These state laws, however, are subject to both state and constitutional requirements. Under current interpretation of the United States Constitution, government need not provide taxpayer funding for abortions (see *Beal v. Doe*). While state legislatures may not prohibit all abortions, they have the authority to require that "a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child'" as well as "the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion" (*Planned Parenthood v. Casey*: 881-84). Laws may require that a woman receive this information at least twenty-four hours before performance of an abortion. Abortion providers may be required to obtain parental consent or provide notice to parents prior to performing abortions on minors. Clinics may be subjected to reasonable health and safety regulations.

[53] Some state supreme courts, however, have exceeded the United States Supreme Court in the promotion and protection of abortion. These courts have interpreted their state constitutions as requiring state taxpayer funding of abortions (see *Doe v. Gomez*; *Planned Parenthood of Middle Tennessee v. Sundquist*; *New Mexico Right to Choose/NARAL v. Johnson*; *Women's Health Center of West Virginia, Inc. v. Panepinto*) and access to private hospital facilities by abortion providers (see *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*). Laws requiring parental involvement in a minor's decision to obtain an abortion (see *State v. Planned Parenthood of Alaska*; *Planned Parenthood of Cent. New Jersey v. Farme*; and *American Academy of Pediatrics v. Lungren*), as well as requirements that abortions be performed by physicians (see *Armstrong v. State*), have been struck down as violating state constitutional provisions. All

told, California and nine other states have controlling judicial opinions that create state constitutional protection of abortion (see Linton 2008).

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

[55] The composition of state legislatures is also determinative of whether the unborn are afforded legal protection. State legislatures having strong prolife majorities can attempt to challenge current judicial limits on abortion regulation by passing legislation prohibiting all abortions based upon the unborn child's immutable characteristics such as race and sex, requiring notification of husbands prior to performance of abortions on wives, or creating civil liability for any individual who performs an abortion, absent the informed consent of both genetic parents of the fetus. Following the lead of Louisiana, states can confer juridical personhood on embryos outside of the mother's body (see Louisiana State Statute). With sufficient political support, states can even begin to attempt to reinstate broad prohibitions of abortion.

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

Conclusion

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

[58] This struggle will not be easy. We must persuade our family, friends and neighbors that being pro-choice when faced with the choice of a grave moral evil is nonsensical. We must make our arguments in the cultural heights of the courts, the universities, and most of the mass media. We must oppose government-funded schools' indoctrination of our children on the pleasures of sexual exploration and the moral neutrality of abortion. Citizens in some

states are required to fund abortion by judicial edict in the guise of state constitutional interpretation.

[59] The simple fact remains that those who support abortion are wrong, both morally and politically. A government that refuses to listen to its citizens' demands that the law protect all human beings from violence is anti-democratic, and in refusing to extend such protection it becomes fundamentally unjust (see the Old Testament book of Esther 3:7 – 7:10, which tells the story of the Persian king's removal of Jews from the protection of the law). As faithful citizens, we must persevere in our efforts to ensure that all human life is protected by law. We must persuade our families and neighbors to join us in building a culture of life. We must educate ourselves about the issues and the candidates, and then prayerfully decide whom to support. We must communicate our views to elected officials and hold them accountable for what they do in our name. On those days when it seems to require too much or when change seems impossible, we must remember St. Paul's admonition, "let us not be weary in well-doing: *for in due season we shall reap, if we faint not*" (Galatians 6:9).

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