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[Book Review of] *Abortion and the Constitution: Reversing "Roe v. Wade" Through the Courts*, edited by Dennis J. Horan, Edward R. Grant, and Paige C. Cunningham

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## II.

Imagine the following "socratic" exchange in a course in constitutional law at an American law school on Jan. 21, 1973.

PROF. SNIGGLESWORTH: Mr. Piffle, what does the Constitution say about abortion?

PIFFLE: That it is a woman's right, sir.

PROF. SNIGGLESWORTH: Very interesting. And where does it say that?

PIFFLE: In the Due Process clause of the 14th Amendment.

PROF. SNIGGLESWORTH: Mr. Piffle, please read the language of that clause aloud for the class.

PIFFLE: "[No] State [shall] deprive any person of life, liberty, or property, without due process of law."

PROF. SNIGGLESWORTH: I hear no reference to abortion. How is that?

PIFFLE: Well, sir, the 14th Amendment's concept of personal liberty is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

PROF. SNIGGLESWORTH: And what then of the life of the fetus?

PIFFLE: When not even doctors, philosophers, and theologians can arrive at any consensus as to when life begins, that question need not be taken up in resolving the constitutional issue of abortion. Let's just say this: the states may not, by adopting one theory of life, override the rights of the pregnant woman.

PROF. SNIGGLESWORTH: But can the question of the rights of the fetus be gotten rid of so easily? After all, there is no doubt that the fetus is *alive*. Nor is there any doubt that it is biologically human. Could it not, in fact, be argued on these grounds that the fetus is itself a person within the language and meaning of the 14th Amendment?

PIFFLE: Well, sir, if that were the case, then there could not, of course, be a constitutional right to abortion. The fetus's right to life would then be specifically guaranteed by the Amendment. But no case has ever held the fetus to be a person. Nor does the Constitution define the term. And where "person" is used in the Constitution (for example, in listing the qualifications for office of members of the House of Representatives and Senate), it almost always has application only post-natally.

PROF. SNIGGLESWORTH: Has any case ever held that there is a constitutional right to abortion?

PIFFLE: No, sir. In any event, not yet.

PROF. SNIGGLESWORTH: Then I am unimpressed by your argument insofar as it rests on the proposition that no case has ever held the fetus to be a person for purposes of extending to it constitutional protections. Does the Constitution define the term "liberty"?

PIFFLE: No, sir.

PROF. SNIGGLESWORTH: Yet you confidently assert that the scope of the term extends to cover abortion. In your view, then, an undefined term in the constitution can have an expansive scope indeed! But why do you ascribe so narrow a scope to the term "person"? If we look only to its application where it is used elsewhere in the constitution, would we not exclude from its meaning six-year olds? The comatose? Would the constitutional status of these individuals be that of non-persons?

PIFFLE: Well, sir, you may have a point there. But more important than the application of the word elsewhere in the constitution is the historical fact that throughout the major portion of the 19th century, prevailing legal abortion practices were far freer than they are today. We can conclude, therefore, that the framers of the 14th Amendment did not mean by "person" anyone not yet born.

PROF. SNIGGLESWORTH: Hmmm. So you argue from the "intent of the framers". Not a popular theory of constitutional interpretation at the moment, but perhaps it will someday come back into fashion. Now let me see if I understand your reasoning. You suggest that the law on abortion was more permissive at the time of the adoption of the 14th Amendment. This, you suppose, warrants the conclusion that those responsible for that amendment did not intend to protect the unborn. But is it not the case that the restrictive

abortion statutes in force today were by and large enacted at the very time of the framing and ratification of the 14th Amendment?

PIFFLE: That's true. But those statutes were enacted to protect women from what was then a dangerous surgical procedure, not to protect fetuses. They do not reflect an understanding of fetuses as persons.

PROF. SNIGGLESWORTH: What historical evidence have you for this?

PIFFLE: The matter has been researched by Prof. Cyril Means of NYU Law School.

PROF. SNIGGLESWORTH: Counsel to the National Association for the Repeal of Abortion Laws?

PIFFLE: Yes. He has also established that abortion probably was not a crime at common law.

PROF. SNIGGLESWORTH: Well, that seems an utterly implausible claim in view of what was written by Bracton, Coke, and Blackstone. But let's go back to this business about the purpose of the 19th century abortion statutes. You say that they were to protect women from a dangerous surgical procedure. Do you know of statutes of that time banning other dangerous surgical procedures? Were there not procedures still more dangerous than abortion which were, in fact, permitted by law in those jurisdictions forbidding abortion?

PIFFLE: I don't know, sir. I'm not a historian.

PROF. SNIGGLESWORTH: Neither is Professor Means, apparently. (general laughter) Well, let's put aside the intentions of the framers for a moment. You say that the constitutional issue can be decided — striking down restrictions on abortion in the states which have been in existence at least since the time of the adoption of the 14th Amendment and probably (Professor Means's egregious thesis notwithstanding) at common law — without deciding "when life begins"!

PIFFLE: Yes. We can just leave that question open. Perhaps it will be resolved someday, but no one has the answer at the moment.

PROF. SNIGGLESWORTH: And would this constitutional right to abortion exist all the way through pregnancy? Could the life of the fetus never be protected by legislation in the states?

PIFFLE: Sir, I've given this considerable thought, and I think that for purposes of constitutional analysis we can divide pregnancy into trimesters. During the first trimester, when abortion is actually safer for the woman than carrying the pregnancy to term, the constitution forbids restrictions of any kind on a woman's choice to have an abortion. During the second trimester, regulation is permissible, but only for the sake of protecting maternal health. Then, during the third trimester, once the fetus could live outside the womb, I could see permitting the states to enact legislation to protect what is, after all, potential life. Of course, even during this period abortion must be legally available when going through with a pregnancy would endanger the health — including the mental health — of the mother.

PROF. SNIGGLESWORTH: And all of that, you suppose, may be gleaned from the proposition that "no person shall be denied life, liberty, or property, without due process of law"? No, no, Mr. Piffle, you are not interpreting the Constitution, you are proposing a national abortion policy. You simply ignore those constitutional principles of federalism which stand as an impediment to your proposal. But let us join you in ignoring those principles for a moment. If we are to opt for some such scheme as yours, oughtn't we convene a congressional committee, hold hearings, debate the issue in public, and put it to a vote? And, in any event, doesn't your scheme violate your own norm of procedure here? Haven't you, in effect, decided that vexing question of when life begins?

PIFFLE: Not at all, sir. I simply leave that to the individual.

PROF. SNIGGLESWORTH: The individual woman? Or the individual fetus? (laughter) Well, I think I know which you mean. But what you have left to her is to the question of whether she will or will not abort the fetus. You have decided that the fetus will be treated through the first six months of its existence (and quite possibly through the entire nine months) *as if* its life has not begun. No state may protect it. It doesn't count as a person for purposes of constitutional protection. Your method of "not deciding" places the fetus

in precisely the legal position it would be in were you to declare flat out that its life does not begin until viability (or, as the case may be, birth). You *decide*, do you not, that life begins, at the earliest, at the seventh month? So much for "not deciding".

On Jan. 21, 1973, Mr. Piffle's mistakes and confusions would have been nothing more than grist for Prof. Snigglesworth's socratic mill. On Jan. 22, 1973, they became part of the constitutional law of the United States.

On that date, the Supreme Court of the United States announced its decision in the case of *Roe v. Wade*. The majority opinion, written by Justice Harry Blackmun, and joined in by six of his brethren, is nothing short of remarkable for its defective historiography, simplistic constitutional theory, and downright shoddy reasoning. All of Piffle's errors appear in Blackmun's opinion — the undefended assertion that the right to abortion is within the scope of the 14th Amendment's Due Process clause, the uncritical acceptance of Cyril Means's discredited historiography, the ludicrous attempt to draw conclusions from the exclusively post-natal application of the word "person" in connection with such things as the qualifications for public office of members of the House and Senate, the bizarre claim that the Court, in granting the abortion right, prescinds from the question of "when life begins".

For defenders of the notion of a constitutional right to abortion, Blackmun's opinion is an embarrassment. Their preoccupation is with putting that putative right on a firmer legal footing by, for example, proposing ways of "rewriting *Roe*". For pro-life lawyers, *Roe* presents an intellectually easy target. Their concerns are principally tactical; how can the opinion's obvious weaknesses be exploited in the prevailing political circumstances to achieve an early reversal.

The contributors to *Abortion and the Constitution: Reversing Roe v. Wade Through the Courts* fall into the latter camp. They are a diverse group of scholars and lawyers who came together at a 1984 conference sponsored by Americans United for Life Legal Defense Fund, the principal legal arm of the prolife movement, to share information and arguments relevant to the project of effecting a reversal of *Roe* through litigation.

By the time the conferees gathered, hopes for a constitutional amendment reversing *Roe* had faded. So too had the prospects of circumventing the decision by congressional action defining the fetus as a person or stripping the jurisdiction of the federal courts over matters having to do with abortion. The only realistic possibility for undoing *Roe* had become reconsideration of the case by the Supreme Court itself.

Here things had already begun looking less gloomy. The seven-member *Roe* majority had quite likely shrunk to six. Justice Sandra Day O'Connor, whose nomination by President Reagan had been opposed by pro-life groups on the basis of her pro-choice voting record as a member of the Arizona state legislature, turned out to be a powerful critic of *Roe*. While declining to comment on the question of whether *Roe* itself ought to be reversed, O'Connor began consistently voting with the original *Roe* dissenters, Justices White and Rehnquist, in abortion-related cases. Moreover, in a widely publicized dissenting opinion of her own in *Akron v. Akron Center for Reproductive Health*, a 1983 case in which the Court struck down a city ordinance requiring, among other things, the consent of parents for abortions performed on minors under the age of 15, she forcefully attacked key aspects of the *Roe* decision, describing its framework as "on collision course with itself".

The *Roe* majority was to shrink still further two years later when Chief Justice Warren Burger resigned from the Court, enabling Reagan to appoint Antonin Scalia — virtually a sure bet to support a reversal. Then, in 1987, Justice Lewis Powell, a strong *Roe* supporter, surprised most Court watchers by resigning in the course of the Reagan presidency. With the Court apparently tied 4-4 on the question of reversal, pro-choice advocates led the fight to defeat Robert Bork, Reagan's first nominee to replace Powell. Bork had excoriated the *Roe* opinion publicly on a variety of occasions. At the moment, those on both sides of the abortion question wait with considerable anxiety for recently confirmed Justice Anthony Kennedy to show his hand. In his confirmation hearings he prudently avoided giving any

indication of his position on the question of reversing *Roe*.

*Abortion and the Constitution* opens with a pair of essays that focus upon the Supreme Court's experience with reversals of its own constitutional decisions. Such reversals are, of course, far from rare. Michael Pearce Pfeifer concludes, from a general examination of the history of reversals, that poorly reasoned decisions ultimately cannot survive. *Roe*, he concludes, will sooner or later go the way of such celebrated mistakes as *Lochner v. New York* and *Plessy v. Ferguson*. I am less sanguine. I see no compelling reason to believe that reason itself ultimately must triumph in constitutional adjudication (or anywhere else in this vale of tears). Pfeifer does, however, prove this much: 1) there are not insuperable institutional impediments to a reversal of *Roe*; and 2) the shoddiness of Blackmun's reasoning in *Roe* renders that decision particularly vulnerable to reversal.

Concentrating on a particular — and celebrated — Supreme Court reversal, Richard S. Myers attempts to extract lessons for pro-life lawyers from the successful efforts of NAACP lawyers to desegregate American public schools through constitutional litigation in the first half of this century. This required an overturning of the "separate but equal doctrine" set forth in the *Plessy* case. Myers observes that a series of carefully selected and well-argued cases set the stage for the ultimate blow against segregation in *Brown v. Topeka Board of Education*. The prudent strategy to achieve a reversal of *Roe*, according to Myers, is for pro-life lawyers to adopt the incremental approach taken by the NAACP. He argues that instead of going immediately for a straight out reversal, pro-life advocates should attempt to cut back the scope of prohibitions on state protection of the unborn by attacking the weakest aspects of the *Roe* opinion in a series of cases. But, as I have suggested, personnel changes on the Supreme Court make things look a bit different than they did in 1984. The five votes needed for reversal might well be there now. Thus, Myers's advocacy of incrementalism appears in 1988 to be somewhat overcautious.

Regardless, however, of whether the preferable strategy is a gradualist one or a frontal assault, the legal case for reversing *Roe* will need to exploit those weaknesses in Blackmun's opinion that render it particularly vulnerable. Here the contributions of several authors are helpful. Especially noteworthy are essays by Joseph W. Dellapenna, who brilliantly criticizes the historiography of Cyril Means, which figured so prominently in *Roe*, and Dennis J. Horan and Thomas J. Balch, who offer a cogent critique of the implicit constitutional theorizing and explicit reasoning contained in the Blackmun opinion. These contributors play Snigglesworth to Justice Blackmun's Piffle and carry out the exercise masterfully.

An essay by William Bentley Ball, the distinguished appellate advocate, stresses the need for skillful lawyering in the attack on *Roe*. Ball's courtroom combat training makes him a realist: he knows that just causes can be lost when zeal is made a substitute for painstaking advocacy. The pro-life movement, possessing zeal in unlimited supply, would do well to heed his counsel.

An interesting essay by the late Sen. John P. East and his former chief of staff, Steven R. Valentine, calls attention to the appalling gap between the 1886 case of *Santa Clara County v. Southern Pacific Railroad Co.* and *Roe*. These are the only two cases in which the Supreme Court has interpreted the meaning of the word "person" as used in the 14th Amendment. In the former case, corporations were held to be persons. In the latter, unborn human beings were held not to be.

The impact of the Supreme Court's most recent abortion ruling, in the 1986 case of *Thornburgh v. American College of Obstetricians and Gynecologists*, is the subject of a superb essay by one of the volume's co-editors, Edward R. Grant. In *Thornburgh*, the Court voted 5-4, with Justice Powell still sitting and voting with the majority, to invalidate several provisions of Pennsylvania's "Abortion Control Act". Taking note of the defensive tone of the opinions of the majority justices, Grant calls for special care in the drafting of pro-life legislation likely to go up to the Supreme Court for constitutional review, and echoes William Ball's concern for savvy lawyering in defense of such legislation.

In useful appendices, the editors include not only the opinions of the majority and dissenting justices in *Thornburgh*, but also the *amicus curiae* brief of Solicitor General

Charles Fried, who urged the Court to take the opportunity presented by *Thornburgh* to reverse *Roe*.

All of the essays included in *Abortion and the Constitution*, several of which I have not mentioned, are worth reading. Indeed, anyone interested in the fate of *Roe v. Wade*, whether pro-life or pro-choice, will find much that is important in the book.

One thing that will not be found, however, is a sustained analysis of a particular issue on which opponents of *Roe* are divided. This is the question of whether the proper re-interpretation of the Constitution would restore the *status quo ante*, leaving the regulation of abortion to the discretion of the several states, or require the states to protect the unborn as "persons" entitled to "the equal protection of the laws" under the 14th Amendment. This question implicates profound issues of American constitutional theory. Among the most dedicated pro-lifers are constitutional scholars who hold that the principle of judicial restraint precludes the constitutional protection of the unborn in the absence of a prolife constitutional amendment. Those taking this view maintain that the contrary position, while not guilty of the substantive injustice of *Roe*, shares with the position adopted by the Court, in that case both a disregard for constitutional principles of federalism and a constitutionally unjustified elevation of the authority of unelected judges over elected legislators in an important area of public policy. I disagree. But I recognize that their case is not a trivial one and thus deserves an answer. The editors would do us yet another service by providing a forum for this question to be debated in a second volume of essays on *Abortion and the Constitution*.

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