

Abortion and a Constitutional Showdown

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INTRODUCTION

America's political landscape is changing dramatically and things now routinely happen in our legislative process that would have been considered unimaginable just a few years ago. For example, states are now passing legislation that allows the production, possession, use and marketing of marijuana despite the fact that federal law classifies marijuana as a Schedule 1 illegal drug. Obviously, these states have made a conscious decision to openly defy federal law.

Another example of this, and the one the pro-life movement should be paying close attention to, is the sanctuary city issue. If a poll of the American people had been taken just ten years ago, how many of them would have predicted that the mayors of major cities and the governors of our largest states would soon be openly defying the federal government's Constitutionally established authority to control immigration? And how many of them would have said that candidates would be campaigning for office on an "open borders" platform and a promise to put federal law enforcement officers in jail if they attempt to enforce the nation's immigration laws? And how many people would have said that elected officials would be calling for illegal aliens to be given free college tuition, free healthcare, and the right to vote in American elections?

The list goes on and on, but the point is that no more than ten years ago conventional wisdom would have been that these ideas are preposterous and would not be tolerated by the public. But as we now know, conventional wisdom would have been wrong.

What the pro-life movement needs to understand is that conventional wisdom can also be wrong about the battle over abortion. And what I'm suggesting is that the Left's frontal assault on America's immigration laws may have created a model for what the pro-life

movement can do to protect the unborn, and their sanctuary city campaign may have paved the way for us to use that model.

GROUND ZERO

The *Roe vs. Wade* decision was issued in January of 1973, and since then two types of justices have dominated the Supreme Court. With extremely rare exceptions, they have been those who are resolutely pro-abortion and those who might lean pro-life but have tacitly accepted that abortion is “settled law” and not open to reconsideration.

What these two factions have in common is that neither one wants to see a case brought before the Court that would force them to re-examine the fundamental justification for legalized abortion that was manufactured in *Roe*. So they have spent almost 50 years artfully dodging any case that would put them in that situation, and only rendering decisions that allow for a bare minimum of abortion regulation.

It is obvious that the abortion lobby and the Supreme Court have concluded that the rationale upon which *Roe* was built is legally fragile and cannot survive scrutiny. Some of them have even stated this in public. It is reasonable to assume that technology also played a role in their misgivings about the long-term future of *Roe*. In 1973, it was easy to dismiss the contention that the unborn are living human beings as mere opinion, but since then scientific breakthroughs like ultrasound coupled with advances in fetal medicine have turned that opinion into an observable fact. The reality is, one hundred percent of the technology that has come along since *Roe* was issued has reinforced the pro-life position, and that trend will continue with new technology that is on the horizon.

At this point, it is clear that both the Court and the abortion lobby accept that if *Roe* is ever revisited – it is doomed. That has created their mutual dependence on the concepts of settled law, precedent and *stare decisis*.

This was never more evident than it was in the hearings over the confirmation of Brett Kavanaugh to the Supreme Court. Early on, Kavanaugh's enemies saw that he was well qualified for the position and if traditional standards for evaluating Supreme Court nominees were used, he would be easily confirmed. So they abandoned those standards as irrelevant and accused him of being a violent sexual predator who did not have the proper "judicial temperament" to be on the Court.

By the end, these hearings had devolved into a national embarrassment. It also became undeniable that this circus-of-the-absurd had nothing to do with temperament or these bizarre and unsubstantiated sexual assault charges. It was about abortion.

Although Kavanaugh was eventually confirmed, it would be shortsighted for the pro-life movement to take an "all's-well-that-ends-well" attitude. Instead, we need to see the depravity and the corruption displayed in these hearings as a flashing red warning sign. Kavanaugh's enemies carried out a scorched earth campaign to defeat him and they didn't care what was true, what was a lie, or how many innocent people got trampled in the process. In their minds, he was going to tip the scales against legalized abortion despite the fact there was nothing to support that assumption in his writings, in his prior decisions, or in the testimony he gave during the hearings.

Of course, all their hand wringing and doomsday predictions were quickly exposed as complete nonsense. Just five months after being sworn in, Kavanaugh teamed up with the Court's most radical abortion supporters to reject a case that would have prevented taxpayer funding for Planned Parenthood. And with that, the covert pro-life agenda his enemies claimed to see so clearly, turned out to be a mirage.

But the question is: what will happen when a case is accepted by the Supreme Court that could actually lead to personhood for the unborn; or a piece of legislation is proposed in Congress to end legalized abortion by statute that has a realistic chance of passing? In either of those two scenarios, the ensuing battle would be so vicious and so protracted

that it would make World War II look like a pillow fight at an 8-year-old girl's sleepover. And the Kavanaugh confirmation process proves it.

In the end, the Kavanaugh hearings reaffirmed two basic truths about contemporary American politics. The first is that the Left is populated, dominated, and financed by totally amoral people who will wallow in any cesspool and do whatever it takes to advance their godless agenda. As for the conflict over abortion, they figured out long ago that it is the political equivalent of a knife fight in a waterfront bar, and they made a decision that nothing would be too savage, too immoral, or too nasty for them to use.

The second truth is that, even after all these decades, there is not one shred of evidence that the ivory-tower intellectuals who sit on the Supreme Court, or the gated-community country-club patricians who own the Republican Party, have what it takes to fight for the unborn against those kind of people in that kind of environment. To the contrary, the pro-life movement has many examples, over many years, that when the first punch is thrown in a waterfront bar fight these guys are out the door with their heads on fire.

DISPELLING A COMMON MISCONCEPTION

Many people within the pro-life movement appear to believe that simply overturning *Roe* will accomplish our mission. That is not necessarily true. On one hand, because the Constitution acknowledges a right-to-life for all "persons," if the Court were to reverse *Roe* on the basis that the unborn are persons, their Constitutional right-to-life would be affirmed and the battle would be over. This was even stated within the text of *Roe* by its author, Harry Blackmun, when he wrote that if the personhood of the unborn is ever established, the Constitutional right to abortion collapses.

But it is possible for the Court to overturn *Roe* while completely ignoring the personhood argument. All they have to do is rule that the Constitution is silent on abortion and that it is, therefore, a "states' rights" issue. And most legal experts on both sides of the conflict

have consistently predicted that, if the Court overturns *Roe*, this is the basis upon which it will do so.

For the Supreme Court, a states' rights ruling would be the easy way out of the abortion quagmire. It would allow them to dodge the "can-a-living-human-being-be-a-nonperson" argument, and by sending the issue back to the states they will have washed their hands of it once and for all. For them, that's a win-win situation.

But for the unborn, a states' rights ruling would be a disaster. In a short time, the United States would become a "patchwork quilt" of laws in which some states would prohibit all abortions, others would allow them with no restrictions, and the remaining would take some middle ground approach. The problem is, given that state lines are freely crossed, there would be nothing to prevent an unborn baby in Texas – whose life might be protected by state law – from being transported to California or New York for execution. In fact, because of the vast amount of financial profit involved, some states are certain to set themselves up as "destination sites" for abortion, especially those that border a state (or states) that restrict or prohibit abortion after *Roe* falls.

What this means is that, since a states' rights approach cannot protect every baby in every state, it doesn't protect any baby in any state, and that would leave every unborn child in America vulnerable to abortion. It would also guarantee that the battle would go on indefinitely and that the tiny corpses would continue to pile up.

A LINE IN THE SAND

Today, the abortion issue is like a chicken bone that's stuck in the throats of the American people. It is too painful for them to live with, but they can't pull it out and they can't swallow it. This has created what I call "abortion fatigue syndrome." The public is sick of hearing about abortion; they don't think there is any way to resolve the battle over it; they know neither side is going to quit nor compromise; and they would like nothing more than to see the whole issue just go away.

Abortion fatigue syndrome is also evident among the Justices on the Supreme Court. For that reason, if they were to render a decision that sends the issue to the states, it is highly unlikely they would ever agree to hear a case that would drop the issue back into their own laps. In effect, a states' rights ruling could insulate the Supreme Court from any future abortion-related cases including those that might result in personhood for the unborn. If that were to happen, the "patchwork quilt" phenomenon described earlier would become the permanent and defining element of American abortion policy. This is a bomb that has been quietly ticking in the background of the pro-life movement for decades, and it could blow up in our faces at any moment.

At this point, what we need to remember is that there are three kinds of people in the world: those who make things happen, those who watch things happen, and those who wonder what happened. Because thousands of babies are still being butchered every day, and because the Republican Party and the Supreme Court have shown that they cannot be trusted with the fate of the unborn, and because of the bomb that's ticking away in the background, it is time for the pro-life movement to make something happen. And it may be that the smartest thing we could do is force a case to the Supreme Court that combines the states' rights argument with the personhood argument, using laws that are already in place. With that in mind, imagine that the governor or attorney general of a state calls a press conference and announces the following:

Governor/AG:

"Given modern medical technology, it can no longer be reasonably denied that the unborn are living human beings. It is also true that no material distinction exists between a human being and a person. Rationally speaking, there is no such thing as a human being who is not a person and this is reflected in the fact that the English language does not have a word for a human being that is not a person. For those and other reasons, it is clear that the unborn are entitled to equal protection of the law under our state's homicide statutes. Therefore, starting today I am directing every official within the state who has authority to

bring criminal charges, to prosecute anyone found to have intentionally caused the death of an unborn human being.”

Reporter:

“Isn’t this in direct contradiction of a woman’s Constitutional right to abortion as established by the Supreme Court in Roe vs. Wade?”

Governor/AG:

“The issue being addressed here is homicide, and homicide statutes fall within the jurisdiction of the states. Abortion is simply one method used to commit a specific type of homicide. If someone in our state intentionally takes the life of another individual, whether by abortion or by any other means, we have a duty to prosecute them for that homicide and that’s what we will do. I also point out that, in the case of abortion, there may actually be a heightened exposure to criminal prosecution. Given that someone accepts financial compensation for committing a homicide, it may be that abortions could be prosecuted as contract killings.”

Reporter:

“If a federal judge orders you not to enforce the state’s homicide statutes against those who do abortions, will you comply?”

Governor/AG:

“As I said, homicide statutes are a state matter and the federal government has no authority to order us to single out and exclude any class of human beings from the protection of those statutes. The federal courts are free to ignore the biological and scientific realities of human existence if they choose to do so, and they can also accept the illogical, baseless, and arbitrary distinction between human beings and persons that was invented in Roe. But that is not the issue here. Again, homicide statutes are a state matter and it is my duty to see that they are enforced whenever any human being in this state – whether born or waiting to be born – has his or her life intentionally taken.”

Reporter:

“If this situation ends up in the Supreme Court, and it rules that you cannot enforce the state’s homicide statutes against those who perform abortions, would you then comply?”

Governor/AG:

“Once more, homicide statutes are a state matter and the Supreme Court does not have the authority to force a state to discriminate against a particular category of victims due to their birth status or because they have been arbitrarily classified as non-persons.”

Reporter:

“Will you also file charges against women who have abortions?”

Governor/AG:

“We will exercise prosecutorial discretion in that matter. Because of the way abortion has been portrayed and marketed over the years, many people have been convinced that an abortion is simply the removal of an inert mass of cells and are not aware that it actually ends the life of a living human being. We also know that a certain number of women who have abortions are forced, threatened or coerced to do so by others. Convicting a woman who had an abortion of homicide, would require us to prove in court that she knew that she was taking a human life and that she was doing so of her own free will. In cases where either of those things would be impossible to prove, prosecuting the woman who had an abortion would be an irresponsible waste of the state’s time and resources. However, due to the medical training abortion providers receive, there can be no doubt that they know what they are doing. Because of that, and because they are not being compelled by others to participate, it is appropriate that they face criminal prosecution.”

Reporter:

“Does that mean you would file charges against women who have abortions if you could prove that they knew it was murder and were not being forced?”

Governor/AG:

“Again, we will exercise our right of prosecutorial discretion and consider each case independently on its own merits.”

Reporter:

“Will you file criminal charges against members of the medical staff who assist in an abortion?”

Governor/AG:

“We will treat anyone within our jurisdiction who knowingly facilitates the intentional taking of a human life as an accessory to homicide, including those who do so by way of abortion.”

Reporter:

“Could this include school counselors or others who refer for abortions, or those who make arrangements for abortions, or the clinic receptionist who schedules abortions?”

Governor/AG:

“If it can be shown that their actions were part of a chain of events that resulted in the intentional taking of a human life through abortion, and they knew or should have known that this was a foreseeable outcome, criminal charges are certainly possible.”

– NOTE –

I refer to a governor or attorney general as the person who sets this campaign in motion, but it could be anyone who has the authority to either bring criminal charges or direct that

criminal charges be brought. Possibilities might be district attorneys, state's attorneys, state law enforcement officials, etc.

BLOWBACK

When the campaign is launched, the Left will go into a feeding frenzy of lawsuits and court injunctions, backed up by various forms of saber rattling and street theater. At the same time, their flunkies in the media will start characterizing the effort as “anti-choice extremism” and breathlessly warning the public that if it succeeds it will signal the end of western civilization. In short, the Left's standard dog and pony show.

The important thing is that our goal of getting this case to the Supreme Court is all but assured. The only real unknown is: what actions will the Court take against a state that openly refuses to comply with one of its rulings? Remember, by the time they get this case, the governor or attorney general involved will have already made it clear that he or she will not back down no matter how much pressure is applied, what kind of pressure is applied, or where the pressure comes from. At every stage along the way, the message will have been sent that (a) homicide statutes are a state matter over which the federal courts have no authority, (b) those statutes will be enforced regardless of the victim's birth status, and (c) this principle is not open to compromise or negotiation.

With that as a backdrop, would the justices be willing to issue a ruling that creates an intractable Constitutional crisis? Would they be willing to see the National Guard called up to take control of this state? If an abortionist has already been indicted and is being held on a million dollar bond, would they be prepared to see federal troops sent in to break him out of jail?

The thing to keep in mind is that, for the kind of person who ends up on the Supreme Court, this is uncharted territory. When the Court's transition from a judicial body into a political body was complete, by default its justices became politicians. The problem they have – and the reason they are not equipped to deal with this sort of situation – is that

they did not come up through the rough and tumble world of politics. They are academicians who were appointed to this elitist enclave, given lifetime tenure, told that they are the unquestionable authority on every aspect of American society, and assured that because of their god-like status they never have to publicly defend their actions to anyone. In the case of abortion, Supreme Court discussions are sterile and philosophical, and played out in the rarefied air of mahogany lined chambers. It is an environment in which the babies sentenced to die only exist as legal theory.

The initiative proposed in this document is intended to drag these people out of that ivory tower and into the streets.

I am certainly aware that when the Supreme Court stopped deferring to the Constitution as its controlling authority, predicting its behavior became a fool's errand. Let's not forget that ObamaCare was challenged in the Supreme Court on the basis that it gives the federal government the power to force citizens to purchase a product that many of them do not want. Since no such power is found in the Constitution, there was no way for the Court to get around that argument. Their solution was to declare that ObamaCare is a tax and the government has a right to compel the payment of taxes. And with that, George Orwell was again proven right when he said, *"There are some ideas so absurd that only an intellectual could believe them."*

So, yes, the Court is unpredictable, but what I am proposing here would seem to leave only two basic options. The first would be for the Court to rule that the governor or attorney general is correct in saying that the unborn child is entitled to be protected by the state's homicide statutes. Logically, this would acknowledge the personhood of the unborn and, under the Fourteenth Amendment, apply to every state in the union.

The alternative would be to rule that the governor or attorney general is not correct, and on the surface this would seem to be the safer course of action for the justices to take. But they also realize that such a ruling could lead to a physical confrontation between this state and the federal government, and they may even be concerned that it could become a

threat to their own institution. Given that the Court is made up of people in black robes and not black leather, they may not be eager to light that fuse – especially if they are convinced that this governor or attorney general is not going to blink.

TACTICAL ADVANTAGES

When analyzing this proposal, several things need to be acknowledged. The first is that it is far better grounded in both law and logic than is the sanctuary cities campaign. The second is that no new legislation is needed to launch this effort. And the third is that the success of this initiative is not dependent on a Republican Party that has betrayed the unborn so many times in the past.

Right now, the pro-life movement is frozen in place and the only way we are going to get out of this trap is for our movement to break loose and do something bold and innovative. We need to recognize that the opportunities we have today and didn't have in the past, we are not likely to have in the future. It is time to act, and act decisively.

THE CHALLENGE

One thing we need to keep in mind is the ticking bomb described earlier. If the Supreme Court takes a case that allows them to issue a states' rights decision, that bomb explodes and the personhood issue goes up with it.

It is interesting to note that the abortion lobby has dramatically accelerated its efforts to codify *Roe* into the laws of several states. Recent high profile examples occurred in New York and Virginia, but it is happening across the country. This could indicate that our enemies have figured out that allowing *Roe* to be overturned on a states' rights basis and then falling back on the "patchwork quilt" phenomenon, may be in their best long-term interest. In fact, I would not be at all surprised to see that the next time a case comes along that could threaten *Roe*, they check their egos at the door and don't oppose it as long as they are confident it cannot be used to establish personhood.

In a sense, we are in a race to get to the Supreme Court first, and for us to win we have to find the right governor or attorney general. By any yardstick, that is the “make-or-break” element in this campaign. Once it is launched, it will immediately become a brutal test of wills, and any governor or attorney general who does not have the resolve, the strength, and the character to see it through to the end, has no business getting involved. What we need, and what we had better be looking for, is our General Patton.

As we do that, we should not be naïve about the practical effects of this campaign, nor should we sugar coat them for the governor or attorney general we might be recruiting. We should not downplay the possibility – perhaps even the likelihood – that this person will have his or her political career destroyed by this campaign whether it is successful or not. On the other hand, it is likely that there will be \$50,000-a-night speeches to conservative organizations lined up as far as the eye can see. But more important than that, when the day comes that this tragedy is over, the American people are going to look back at it with the same revulsion they now have for slavery and wonder how our great nation could have been caught up in something so horrific and so immoral. They will also see this person’s name and picture in history books as the hero who had the courage to get us out of it.

Someone once said, “*One crowded hour of glorious life is worth an age without a name.*” and I believe this will be the silent motto of the governor or attorney general who takes up this fight. But having that “*crowded hour of glorious life*” should not be the motivation for doing this. The motivation should be that it is simply the right thing to do and it is what God expects. It may be difficult for us to find someone who sees that as a sufficient reward, but if we settle for less this effort will neither succeed nor deserve to.

CAN IT WORK

I once read that when Alfred Sloan was the head of General Motors, he had a plan for using some of the company’s stock in a way that would significantly increase its value.

He called the board of directors together and ordered the head of his legal department to produce a report on how this stock transaction could be done legally. A short time later, the man issued a report advising the board that the plan was illegal. Immediately, Sloan fired him, pointing out that his assignment was not to tell the board whether this plan was legal or not, his assignment was to tell them how it could be done legally. Apparently, the next head of the legal department was paying attention since he was able to provide a report detailing exactly how the plan could be legally implemented.

I don't know whether this story is true or not, but the principle behind it is unassailable. What it means is that if someone is looking for ways the plan I am proposing here cannot succeed, they will surely find them. If they are looking for how to make it succeed, they may find that as well. We just need to remember that the pro-life movement has always had its share of oracles, gurus, wizards, soothsayers and pundits who can be counted on to tell the rest of us – with crystal clarity and arrogant certainty – what can and cannot be done. They do this despite the fact that history is teeming with examples of new ideas being ridiculed and dismissed as impossible, right up to the moment they succeeded.

With that in mind, I fully expect that what I propose here will quickly be shot full of holes, and there is no doubt that some of those criticisms will have merit. But at the same time, it is dangerous to blindly accept as gospel the opinions of experts simply because they are experts. The trick is to take the council of the wise, while never forgetting that amateurs built Noah's Ark and experts built the Titanic.

One thing I know for certain is that the most effective way to guarantee our failure is to wait around for a plan to come along that we all agree cannot fail. Another thing I know is that it is time for us to do whatever it takes to end this senseless slaughter. In Texas we have a saying: if you always do what you always did, you'll always get what you always got. Well, what we've got is over 60 million dead babies with another 3,000 being added every day. And if we don't change, then we had better be prepared for another 60 million, and another 60 million, and...

IN THE FINAL ANALYSIS

I have always believed that fortune favors those who are bold, innovative, and impatient. Ironically, a textbook example of this concept can be seen in the way abortion was legalized in the first place.

In the early 1970s, two unknown twenty-something attorneys, Sarah Weddington and Linda Coffee – both relatively fresh out of law school and with little or no courtroom experience – set out to make abortion-on-demand legal nationwide through all nine months of pregnancy. Toward that goal, they took a case they knew was based on a fraudulent rape claim by a client with a very blemished past, and filed it in a venue that would pit them against the most powerful district attorney in one of the most conservative states in the country. They also had to buck public opinion that was strongly opposed to legalizing abortion. In fact, the only reason this issue ended up in the court system to begin with is because the abortion lobby had seen their agenda repeatedly and soundly defeated in the political system. The courts were their last hope.

Given that environment, if the abortion lobby's oracles, gurus, wizards, soothsayers and pundits were consulted about *Roe vs. Wade* before it was filed, there can be little doubt that they sneered at it. It is also safe to assume that Weddington and Coffee were told more than once that this was not the right case; this was not the right client; this was not the right venue; this was not the right time; they were not the right attorneys; their legal theory was fatally flawed; and when they lost they were going to set the abortion-rights movement back years, if not destroy it altogether. But they went forward anyway, and when the dust settled America had what is still to this day the most liberal abortion policy in the industrialized world. In a nutshell, the American holocaust started because a couple of lawyers were not smart enough to know that what they wanted to do was impossible. So they just went out and did it.

Maybe there is a message in that for the pro-life movement.