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PROSPECTIVE ABOLITION OF ABORTION: ABORTION AND THE CONSTITUTION IN 2047

MICHAEL STOKES PAULSEN*

What if the Missouri Compromise of 1820, instead of admitting one free state and one slave state into the Union, and drawing a latitude line constraining the expansion of slavery into new territories and new states, had drawn a *time* line instead? What if, say, Congress had proposed instead a constitutional amendment prospectively abolishing slavery *everywhere* in the Union, as of 1860 – forty years into the future. With the benefit of 20-20 hindsight, the Nation might have been spared much strife, much bloodshed through civil war, and, probably, much slavery. If our nation's political leaders at the time had known, or had they the foresight to imagine, what lay ahead and possessed the political courage and will necessary to the situation, they might have thought to abolish slavery as of some date in the seemingly distant future and give the nation time enough to prepare and adapt. After all, slavery at the time was thought even by its defenders to be an evil, but an unavoidable one. Why not commit to a national policy of working, over the long haul, toward the goal of rendering the evil *unnecessary* and something that can eventually be eliminated? Such political foresight, and patience, might have made 1861 a year of unity and celebration rather than the beginning of a long and bloody Civil War.

In fact, one can go back further and make the same speculation with respect to the framers of the Constitution. Rather than adopt the notorious Three-Fifths Compromise; rather than adopt a Fugitive Slave Clause; rather than commit not to abolish the international slave trade until 1808, wouldn't the nation have been better off – would not African-Americans have been better off – if the framers somehow could have managed prospectively to abolish slavery in the United States, as of the distant-future date of 1827, a half-century after the drafting of the Constitution? To be sure, it may not have been possible to attain such a result at the time. I leave for historians

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the question of whether the Constitution was the best deal to be had at the time, with respect to slavery, or craven appeasement of a particular section. But if it *had* been possible, would not this have been better than what actually happened?

My proposition here is that we should seriously consider today, with respect to the evil of abortion, the road not taken early in our nation's history with respect to the evil of slavery. The simple idea is this: Abortion is regarded by many, probably the overwhelming majority, as an evil. But it is also regarded by many, probably a somewhat different majority, as an *unavoidable* or even a *necessary* evil that our society is not yet prepared to abolish and cannot abolish without severe disruptions to the fabric of society. Few regard abortion as a "positive good." Those who do are rightly regarded as extremists.

This is much like America's earlier seemingly intractable moral issue, slavery, in the eighteenth and early nineteenth centuries. Might it be possible to reach broad agreement that, at some date in the future, more than a generation from now, abortion should be abolished or somehow rendered unnecessary? Might it be possible to reach consensus that our children's children should not abort *their* children? That by 2047 we should have *solved* the abortion issue, in a way that it seemingly cannot be *resolved* definitively today? That within forty years we can reach a state of biotechnology, and a condition of public morality, that permits us to be *both* pro-life – protecting the lives of embryonic and fetal human beings from violent destruction – *and* protect the asserted "autonomy" rights of women to reproductive "choice"?

I must confess that I am of two minds about my own idea. I offer it half as thought-experiment and half as serious proposal, for I am personally torn by the same competing considerations as divided the anti-slavery movement in the eighteenth and nineteenth centuries. I am pro-life. I have written, and argued, that the deliberate destruction of millions upon millions of living human embryos and fetuses – very young, innocent human children – for reasons of choice or convenience, is a monstrous human evil on par with the Holocaust, and that the decisions of the Supreme Court creating and reaffirming this as a constitutional right are the most atrocious decisions the Court has ever rendered (and it has committed its fair share of other atrocities).¹ It grieves me greatly to know that I live in a society that commits mass murder of its own children. To *compromise* with such horrible evil is a terrible, terrible thing. I am instinctively something of a "Garrisonian" on this issue.

1. Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003); Michael Stokes Paulsen, *Paulsen, J., Dissenting*, in *WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION* 196, 196–229, 239–42 (Jack Balkin ed., N.Y. Univ. Press 2005).

But what if the alternative is *more* mass murder, a *longer* period of darkness, and *no* prospect of change for generations? The pro-life cause has been working, without any success, on constitutional amendment proposals for over thirty years. The prospects of a constitutional amendment banning abortion are perhaps poorer now than they have ever been. A national ban is not even on the table in serious discussions of pro-life proposals. It is simply unattainable, at present.

The prospects of overruling *Roe v. Wade* through the courts are not noticeably better. That strategy has been pursued for over thirty years. It came close, but *Planned Parenthood v. Casey*, the most consciously evil Supreme Court decision of all time, probably sealed the existence of a constitutional right to abortion-on-demand for the rest of our lifetimes – absent a constitutional amendment.² Pro-life legal advocates are reduced to nibbling away at the margins, even then not with great success: informed consent laws, waiting periods, and the like appear to be the best that we can do. But none of these measures legally prevents any abortion, committed for any reason. Even when a partial-birth abortion ban is upheld, barely, by the Supreme Court, it is on the not-very-comforting ground that it is permissible to prohibit the killing of a partially-delivered, intact, living human fetus because it is always possible (and one's constitutional right) to obtain an abortion by way of systematic dismemberment and killing of the same human fetus prior to initiating delivery.³ Moreover, even if *Roe* and *Casey* were somehow, miraculously overruled, abortion likely would remain legal throughout much of the nation. The political climate does not exist, *now*, to prohibit abortions *now*.

But it is possible to imagine a consensus being forged *now* to prohibit abortions at some date *in the future*. If supporters of the right to life do not agree to such a policy of prospective abolition, it is worth asking (as the framers of the Constitution perhaps should have asked in 1787, or the framers of the Missouri Compromise perhaps should have asked in 1820) what the world might look like with respect to this issue forty years from now. What might the nation's policy be with respect to abortion in the year 2047, if we do not agree *now* to place abortion on a course toward ultimate extinction by that date?

Of course, achieving even such a modest result, by constitutional amendment, would be very difficult. But think about it: Could pro-abortion forces truly sustain, in the arena of public opinion, the proposition that we should have *abortion forever*? An amendment prospectively banning

2. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

3. *Gonzales v. Carhart*, 550 U.S. -- (2007), No. 05-380, slip op. at 26 (U.S. April 18, 2007) (“Respondents have not shown that requiring doctors to intend dismemberment before delivery to an anatomical landmark will prohibit the vast majority of D&E abortions. The Act, then, cannot be held invalid on its face [as imposing on “undue burden” on abortion] on these grounds.”).

abortion powerfully puts to the test the position of less-extreme abortion-rights defenders, that abortion is a necessary evil, a wrenching personal choice that nonetheless must be available. To those, whose stated views may be deeply misguided but, if sincere, not beyond the reach of persuasion, the pro-life movement can put the hard question: *Can we commit, together, to eliminating this “necessary evil” within two generations?*

The most difficult barrier to achieving such a result is the unwillingness of so many, who have defended abortion, had an abortion, or acquiesced in an abortion, any longer to acknowledge abortion as an “evil” of any sort. The moral and cognitive dissonance is too much to bear. Folks will go to almost any length to avoid thinking of their own conduct or views as involving a grave moral wrong. (A similar phenomenon occurred with respect to slavery, beginning in the 1820s and 1830s and crescendoing into the Civil War. Defenders of slavery moved from the position that maintaining the peculiar institution was a regrettable but necessary evil to the fire-eating view of slavery as a positive good, morally justified on its own terms.) Reaching consensus on a prospective ban on abortion may require the pro-life movement to soften its rhetoric more than many are willing to do; and even that may not soften the hearts of many abortion defenders.

At the same time, however, public opinion polls consistently show that most Americans oppose most abortions – including many who identify themselves as “pro-choice.” There is a vast, untapped middle ground of not-perfectly-coherent views that thinks of abortion simultaneously as *morally wrong* but a moral wrong that people must be *free to choose* under at least some circumstances. People holding such views are potential allies in an effort that envisions a future where the evil of abortion is prohibited, and no longer regarded as a necessary evil. Such persons should be pressed on the point – encouraged to join in support of prospective abolition, or else exposed as favoring abortion, without limitation, forever.

If it were possible to reach agreement on a constitutional amendment to abolish legal abortion as of 2047, I predict that abortion would be long gone well before that date. Once having decided on that future policy, and having set that goal as a milestone, there might very well come to exist a certain momentum for accelerating its attainment, especially if other areas of technological and socio-economic progress, spurred by the deadline, begin to make its attainment increasingly painless to all sides. An amendment can readily be drafted that would not foreclose earlier legislative bans on some or all abortions, if *Roe* is overruled or limited. There would thus be no need to fear that an amendment would have the accidental effect of entrenching the constitutional right to abortion for forty more years, absent truly terrible draftsmanship.

In short, the pro-life movement would in no event be in a worse position by adopting such a constitutional amendment than it is in now. It could do no harm. It could only do good. It might not work for forty years, but it might spur progress long before that time. It would not accomplish, all at once, what pro-lifers want to achieve right now. But it would provide the hope that, perhaps within some of our lifetimes, we will see (even if we do not enter) the promised land in which every human being is welcomed in his or her most fundamental right – the right to live.