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THE WORST CONSTITUTIONAL DECISION OF ALL TIME

*Michael Stokes Paulsen**

A tumultuous decade ago, the U.S. Supreme Court decided the case of *Planned Parenthood v. Casey*,[1] reaffirming, in slightly modified form, the near-absolute constitutional right to abortion the Court had created a generation earlier in *Roe v. Wade*.[2] Like *Roe* before it, *Casey* was both a hugely controversial and a hugely consequential decision. Substantively, *Casey*'s reaffirmation of an abortion right that trumps essentially any government effort to restrict, limit, or prohibit abortion affects millions of lives a year, each year. On one view—the view of the majority in *Casey* itself—the decision vindicates the freedom of millions of women, indeed of *all* women (in the Court's formulation, the abortion right is solely that of women, with no formal role for fathers)[3] to control their own bodies and their own lives, by vesting in every woman the unrestricted power, should she ever become pregnant by choice, by chance, or by unfortunate circumstance, to terminate the life of the human fetus that she is carrying *in utero* and that is gestating within her womb, if she determines that the continued existence, and growth, of that embryonic human life might impair her freedom, health, economic opportunities, or social situation in some meaningful (or, for that matter, trivial) way.[4]

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* Briggs & Morgan Professor of Law, University of Minnesota Law School. I would like to thank the *Notre Dame Law Review* for inviting me to submit this tenth anniversary Article on *Planned Parenthood v. Casey*. I would also like to thank those who graciously agreed to read this Article in draft form and absolve them of responsibility for the words and ideas expressed.

1 505 U.S. 833 (1992).

2 410 U.S. 113 (1973).

3 *See Casey*, 505 U.S. at 895–98 (invalidating spousal notification provisions of Pennsylvania statute).

4 Under *Roe*, 410 U.S. at 113, and *Doe v. Bolton*, 410 U.S. 179 (1973), the constitutional right to abortion was plenary in the first trimester of pregnancy, and subject to limitation in the second trimester only in the interest of the "health of the mother." *Roe*, 410 U.S. at 163–64; *see also Doe*, 410 U.S. at 192. But if an abortion procedure would not in any way endanger the mother's health, the *reason* for the mother's decision to abort the unborn child in the fourth to sixth months of pregnancy is irrelevant

Merely to describe, in an unvarnished, direct manner, the freedom that *Casey* embraces and reaffirms is to suggest the stakes of the case viewed from the side of the opposing view. Just as *Casey* implicates the freedom of millions of women to have an abortion, it implicates the human *existence* of millions of lives a year. If the human embryo—which shortly later becomes a human fetus, and which not long after that, in the natural course of its development, is recognizably a human unborn child—is morally entitled to be treated as a

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under the analysis of *Roe*. Under the *Roe/Doe* framework, the right to abortion in the third trimester (that is, "subsequent to viability") may be limited by the state, "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe*, 410 U.S. at 164–65. "Health," however, is a legal term of art in the abortion context. *Roe*'s "life or health" exception to permissible abortion regulation was explained in *Roe*'s companion case of *Doe v. Bolton* as including a wish to abort for "family" or "emotional" reasons and vested the appropriate medical judgment in the agreement of the woman and the physician performing the abortion that these considerations permitted an abortion even of a viable unborn child. *Doe*, 410 U.S. at 192, 195–201 (striking down any two-physician or hospital committee review requirements); *see also Roe*, 410 U.S. at 153 (referring to the interest of the woman in avoiding "a distressful life and future," the "[m]ental and physical health" drains of caring for a child, the "distress, for all concerned, associated with the unwanted child," the "problem of bringing a child into a family already unable, psychologically or otherwise, to care for it," and the "difficulties and continuing stigma" of being an unwed mother). The result of this stylized definition of "health" is that, because of the "health" exception to abortion regulation in the last trimester, the mother may choose abortion for essentially any personal, family, or emotional reason, even in the last three months of pregnancy. This broad formulation would appear to include a right to abortion for essentially any reason.

Casey makes some slight modifications in the trimester framework of *Roe* (adopting instead a simpler viability/nonviability line, *see Casey*, 505 U.S. at 872–74, 878–79) and in the threshold at which a regulation concerning abortion so affects the woman's freedom to choose to have an abortion as to constitute the claimed constitutional injury (an "undue burden" exists if a law has the "purpose or effect [of] plac[ing] a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability," *id.* at 878), but neither of these changes would permit a state to prohibit abortions prior to viability because of the woman's *reason* for having an abortion. As was the case under *Roe*, the woman is permitted to have an abortion, prior to the child's ability to live outside the womb, for any reason. As to abortions after the point of viability (a point not necessarily congruent with the third trimester, as in *Roe*, but potentially extending somewhat earlier), *Casey* explicitly retained and reaffirmed *Roe*'s approach, including the sweeping "health" exception to permissible state regulation or prohibition of late-term abortions. *Id.* at 872–74; *see also* Stenberg v. Carhart, 530 U.S. 914, 930–38 (2000) (relying on "health" exception to invalidate a Nebraska law prohibiting "partial-birth" abortion even after the point of viability); *accord id.* at 947–51 (O'Connor, J., concurring). The result is that a woman's right to abortion, under present Supreme Court doctrine, extends to any reason the woman might have for wishing to have an abortion, throughout the entirety of pregnancy, if the performing physician is willing to perform the abortion.

human being, at any or all of these stages, then the regime created in *Roe* and dramatically reaffirmed in *Casey* creates an essentially unrestricted[5] substantive legal right of some human beings to kill—murder, really, since the power is plenary and requires no serious justification for its exercise—other human beings, at a rate of approximately a million and a half a year.[6] On this view, *Casey* affirms and embraces human genocide in the United States of a dimension exceeding, in the decade that has just past, that of the Rwandan genocide, the Nazi Holocaust, Stalin's purges, and Pol Pot's killing fields, *combined.*

On any view of the holding in *Casey*, then, its substantive consequences for human lives are absolutely enormous—larger than that of any Supreme Court decision ever (except perhaps *Roe v. Wade*, the decision it reaffirms, which had stood for nineteen years until *Casey* extended it for ten more, to date).[7]

But *Casey* is likely to outdistance *Roe* in its substantive effects. For *Casey* did more than merely perpetuate *Roe*, though that in itself would be significant enough. *Roe* had been teetering in the years immediately preceding *Casey*. A substantial body of informed opinion had it that the Supreme Court was ready to overrule *Roe* (or to continue an incremental overruling process begun three years earlier in *Webster v. Reproductive Health Services*[8]) and such was a reasonable prediction at the time. Had *Casey* done so, it would have placed *Roe*'s regime on a course toward ultimate extinction, and limited the impact of *Roe*'s creation of a federal constitutional right to abortion to a single generation of Americans.

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5 *See* discussion *supra* note 4.

6 Of course, the legal effect of the Court's abortion decisions is to say that acts that might otherwise be deemed a species of homicide (with a degree of culpability attached to such homicide depending on the actor's state of mind and justification) are, as a matter of law, not homicide, but instead have the status of federal constitutional rights.

7 The Court today appears to recognize the magnitude of the stakes. As the majority wrote in *Carhart*:

> Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child; they recoil at the thought of a law that would permit it. Other millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering.

Carhart, 530 U.S. at 920.

8 492 U.S. 490 (1989).

Casey, of course, went the other way: it reaffirmed the right to abortion. In doing so, *Casey* did not merely perpetuate *Roe* but *entrenched* it, or at least purported to do so. That consequence—especially because it was so dramatic, somewhat unexpected, and marked the end (at least for the time being) of what had been a serious and increasingly effective political and legal campaign to overrule *Roe*—is what makes *Casey* likely of more enduring significance than *Roe.*

Nor is it merely the fact of entrenching abortion rights, but the *manner* in which the *Casey* Court did so, that is significant. The Court did not hold that, upon further review, *Roe* was right after all. Rather, the doctrinal holding of the Court in *Casey* was that *Roe* must be adhered to "whether or not mistaken"[9] in its constitutional analysis, because of the judicial doctrine of stare decisis—a doctrine which, though implicit in many of the Court's cases throughout its history and discussed a great many times in a great many opinions, had never been given comprehensive, systematic, and (supposedly) definitive development, until *Planned Parenthood v. Casey.*[10] This is somewhat remarkable: a Supreme Court that has been in business since 1789 had not until 1992—over two centuries later—set forth a general theory of the role of precedent in constitutional adjudication. The setting forth of an ostensibly comprehensive theory of stare decisis, as a judicial governing principle of prospective force, and advanced as one of the most important features—perhaps *the* singular feature—of the rule of law, is a major, major jurisprudential development. It is *the* singular feature in the jurisprudence of *Casey* because without it, the Court seemed to have suggested, the decision would have gone the other way.[11]

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9 *Casey*, 505 U.S. at 857.

10 *See generally* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000).

11 *Id.* at 1537 & n.5 (discussing language of the *Casey* opinion supporting this view). The Joint Opinion in *Casey* strongly implies that at least some of the Justices forming the majority would not have thought *Roe* correct as an original matter, and that the result in *Casey* is largely explainable on the basis of the doctrine of stare decisis. *See Casey*, 505 U.S. at 861 ("Within the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have, not for overruling it."); *id.* at 858 ("Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty."); *id.* at 869 ("A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and

Extending that thought, the Court stated that adherence to that doctrine of stare decisis was especially important because of the implications of *non*-adherence to prior precedent for perceived judicial legitimacy in the eyes of the public, and, thus, for the Court's *power*—a power the Court deemed to be a power "to speak before all others" in the name of the Constitution.[12] Precisely because the Court had placed so much of its own prestige at stake in *Roe*, it was uniquely important to stick with the decision, according to the Court that decided *Casey*.[13] In other words, the error in *Roe*, "*if error there was*,"[14] was of such a magnitude—*so* large, *so* consequential, *so* dramatic—that the Court's concern with the maintenance of its own judicial power and with public perceptions of the Court's legitimacy and prestige required it to stick with what it had once decided, "whether or not mistaken,"[15] and irrespective of any other consequences.

These are dramatic, important assertions at a doctrinal level, for all of constitutional law. Not only for its effect on abortion is the case significant (though that would be quite enough, in terms of the significance of the right it entrenches). *Casey*, taken seriously on its own terms—and subsequent decisions and actions of the Court show that it must be so taken—establishes a comprehensive doctrine of stare decisis giving (or purporting to give) the Court's own decisions more authoritative weight than the Constitution itself. It establishes this doctrine in part as an instrumental necessity, in the Court's view, for preserving the institutional supremacy of the Supreme Court with respect to the Constitution and in relation to all other constitutional

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to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.").

12 *Casey*, 505 U.S. at 868; *see also id.* at 865 (speaking of "[t]he root of American governmental power" as being revealed "most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court," which in turn rests on the Court's "legitimacy" as derived from public perceptions of its fitness "to determine what the Nation's law means and to declare what it demands"); *id.* at 868 (speaking of the American people's "belief in themselves" as a Nation governed by "the rule of law" as being "not readily separable" from the Court's authority and legitimacy). The Court has said things like this before. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 704 (1974) (asserting that the Court must act as the ultimate interpreter of the Constitution); Powell v. McCormack, 395 U.S. 486, 549 (1969) ("[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution."); Cooper v. Aaron, 358 U.S. 1, 18 (1958) (asserting that the Court is "supreme in the exposition of the law of the Constitution").

13 *See Casey*, 505 U.S. at 867 (referring to *Roe* as being an instance of the Court's having "staked its authority in the first instance" such that overruling such a "watershed decision" would "subvert the Court's legitimacy").

14 *Id.* at 869 (emphasis added).

15 *Id.* at 857.

actors and interpreters. The past ten years have seen an enormous number of decisions of the Court displaying a kind of triumphalism—some might call it arrogance—over the organs of elected representative government. The Court has rarely in its history been so cavalier, so confident, so cocky, and so prolific in striking down legislative acts.[16]

In light of all this, the other doctrinally significant aspect of *Casey*—and the case is hugely significant on this score as well—seems almost ordinary: *Casey* reaffirmed, extended, and supplied a theoretical defense of judicial activism in the discovery of textually unspecified "substantive due process" legal rights of individuals against democratic governance, one of the most enduringly controversial and recurrent notions in our nation's constitutional history. That is no small matter. But it is a tribute to the significance of *Casey*'s other effects and legal propositions that its analysis with respect to "substantive due process" is not even the second—or third—most important feature of the opinion.[17] At every level, then, the case is significant—its effects, its methodology, its doctrine, its conception of the judicial role and of judicial authority, and its conception of what constitutes the rule of law. The decision in *Casey* came in the 203rd year of the Supreme Court's existence and is undoubtedly one of the most important decisions the Court has rendered in that two-century-plus history, easily outdis-

16 *See generally* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001). See, for example, Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (striking down damages relief against state agencies under the Americans with Disabilities Act); Stenberg v. Carhart, 530 U.S. 914 (2000) (striking down Nebraska statute banning partial birth abortion); Dickerson v. United States, 530 U.S. 428 (2000) (striking down federal statute prescribing a multi-factor "voluntariness" standard for determining the admissibility of confessions in federal criminal proceedings); United States v. Morrison, 529 U.S. 598 (2000) (striking down the Violence Against Women Act as being in excess of Congress's legislative powers under the Commerce Clause and the Fourteenth Amendment); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (striking down damages relief under the Age Discrimination in Employment Act as applied against the states); Alden v. Maine, 527 U.S. 706 (1999) (striking down provisions of the Fair Labor Standards Act as applied against states); and City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act as being in excess of Congress's legislative power under section five of the Fourteenth Amendment). Need I go on? Listing recent aggressive exercises of judicial power vis-à-vis Congress and state legislatures has become a routine feature of recent academic literature criticizing the Court, with the content of the list varying somewhat to reflect the scholar's sense of which judicial invalidations of statutory enactments were "bad."

17 The Court revised its substantive due process methodology yet again, just five years after *Casey*, in *Washington v. Glucksberg*, 521 U.S. 702 (1997). *See* Paulsen, *supra* note 10, at 1557–60.

tancing some of the most important-seeming "landmarks" of earlier eras.

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The reader may have detected—should have inferred—from the above discussion, if not from the title of this tenth-year retrospective Article, that *Casey*'s huge significance cannot come without a huge judgment attached to it. For at every level at which the case is hugely significant, it is hugely and horribly wrong. It is so wrong, in fact, that despite our closeness to it in time, and the lack of detachment this necessarily brings, it is possible to compare *Casey*'s wrongness with the wrongness of some of the Court's most magnificently wrong decisions in its history, and make a stunning, depressing declaration: *Planned Parenthood v. Casey* is the worst constitutional decision of the United States Supreme Court of all time.

And that is saying quite a lot. The U.S. Supreme Court has committed more than its fair share of judicial atrocities over the past 210 years: *Dred Scott v. Sandford*,[18] *Plessy v. Ferguson*,[19] *Korematsu v. United States*,[20] *Prigg v. Pennsylvania*,[21] *Lochner v. New York*,[22] *Roe v. Wade*,[23] and *Stenberg v. Carhart*[24] (the latter two cases being closely related to *Casey*) are among the many obvious rivals for the title of worst constitutional decision of all time. The list is so long, so infamous, and so disturbingly *regular*—recurring consistently over time—that one must seriously question whether the Supreme Court has been, on balance, a positive or negative force in our nation's constitutional history. Yet of all the bad things that the Supreme Court has done in its history, *Planned Parenthood v. Casey* is the worst. *Casey* is Public Enemy Number One on the list of the Supreme Court's crimes against the Constitution and against humanity.

In this Article on the occasion of the tenth anniversary of the *Casey* decision, I will defend my choice of *Casey* as the worst of the worst constitutional atrocities perpetrated by the U.S. Supreme Court. Part I sets forth my criteria for what makes a constitutional decision "bad." Part II explains why this makes *Casey* "The Worst"—worse, even, than its nearest rivals, *Dred Scott v. Sandford*, *Roe v. Wade*, and *Stenberg v. Carhart*. Finally, Part III ventures some concluding observations about the implications of all this for judicial authority generally,

18 60 U.S. (19 How.) 393 (1857).
19 163 U.S. 537 (1896).
20 323 U.S. 214 (1944).
21 41 U.S. (16 Pet.) 539 (1842).
22 198 U.S. 45 (1905).
23 410 U.S. 113 (1973).
24 530 U.S. 914 (2000).

for our faith in the courts as instruments of the rule of law and the protection of justice, and for our confidence in the progress of humankind and in our ability to learn from the atrocities and injustices of history.

A disclaimer and word of explanation: I do not pretend to be detached, neutral or objective. My conclusions are neither cheerful nor comfortable, and I do not intend them to be. I believe *Casey* is an atrocity, and I will defend that position passionately and uncompromisingly. I am very much a partisan on this constitutional issue, which I believe to be the most important legal issue of our time—*the* defining constitutional controversy of our age and one that affects all other aspects of our jurisprudence, much as slavery was the defining constitutional issue of nineteenth-century America.

But I am not a partisan on this constitutional issue without good reasons. This Article will set forth those reasons, and the reader is invited to evaluate them. I do not intend or expect that this Article will persuade partisans on the other side. In fact, I would expect that most such persons are no longer reading this. Nor is it designed to persuade the unconvinced (if there are such people), in the sense of changing their *convictions* with respect to abortion, either as a constitutional or a moral matter. Rather, it is designed to prod the middle (and tepid opponents of *Roe*) out of what I suspect is more likely complacency, indifference, or quiescence than lack of belief with respect to *Roe, Casey* and abortion, by advancing a strong view of the constitutional and moral stakes of such complacency. For if it is really the case that *Casey* is the worst constitutional decision of the Supreme Court of all time, then that is something about which we ought not be complacent, indifferent, or quiescent. If we are, that tells us something about our moral character, and about how we as individuals may have reacted to the atrocious injustices of the past had we been present at their infliction—injustices that we all today condemn, and which we are undeservedly confident (from the comfortable distance of decades or centuries later) we would have condemned had we been around at the time.

The point of this Article is to stake the claim that we are presented with precisely such an atrocity today—one that, like some in our past, has been perpetrated in the name of the Constitution—and to challenge the timidity of our reaction to it. Are "We the People" of the United States, living in the twenty-first century, able and willing to identify and respond to gross moral atrocities and betrayals of our Constitution when they are staring us in the face?

I. Criteria

How does one measure just how "bad" a particular U.S. Supreme Court decision is? One person's atrocity might be another's most cherished gem, if there are no generally accepted legal or moral criteria for judging constitutional decisions. The eye of the beholder is left to judge for itself on the basis of personal preference. This problem plagues all of constitutional law today. There is no general agreement on standards or interpretive method in constitutional law scholarship. Indeed, one common position is that there can be no agreement on standards or interpretive method. This Article cannot begin to remedy that discouraging situation, but I can at least make clear my own premises and the criteria that yield my conclusions.

I submit that a constitutional decision of the Supreme Court is "bad" to the degree it misconstrues the Constitution *and* such misconstruction produces harmful or evil results. By "misconstruction," I mean that a decision reaches a result not fairly attributable to a rule of law supplied by the text, structure, and history of the Constitution.[25] By "harmful or evil results" I mean what most people mean when they refer to "bad" things: a decision is harmful or evil when it imposes on innocent people death, oppression, deprivation of fundamental

25 Obviously, the question of what constitutes a "misconstruction" of the Constitution begs its own set of questions, requiring its own subset of interpretive criteria for faithful constitutional interpretation and generating its own (nearly infinite) sub-debate over these criteria. Once again, I can only state (and very briefly defend) my criteria here, as the debate over interpretive method has generated its own voluminous commentary. I submit that a judicial decision more faithfully interprets the Constitution to the extent that its result can be directly and fairly attributable to a rule or standard stated with reasonable precision in the actual written, enacted language of the Constitution, as those words would have been understood by an ordinary speaker or reader of the English language at the time the provision at issue was adopted; to the extent that such a decision is fairly traceable to a sound deductive inference from the overall structure and logic of the text, and analogic reasoning from its other provisions; and to the extent such a decision accords with historical evidence of the received understanding of the text and the intentions of its drafters and adopters. These criteria for faithful constitutional interpretation constitute, in approximately that order, a hierarchy of criteria for faithfulness in constitutional construction. The less well that a judicial decision can be justified under these interpretive criteria—the more it strains, bends, ignores, or mutilates constitutional text, structure, and history—the more it can be said to constitute a misconstruction or erroneous interpretation of the Constitution. For a comprehensive statement of (and defense of) an interpretive methodology of original public meaning textualism, see Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. (forthcoming 2003) [hereinafter Kesavan & Paulsen, *The Interpretive Force*]; *see also* Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 396–99 (2002).

human rights, deprivation of liberty, misery, discrimination, or indignity (in roughly descending order of importance).

Those are my two core criteria: serious misinterpretation—clearly legally wrong conclusions—and serious harm resulting from that misinterpretation. Both are essential elements of a bad judicial decision. Decisions that misconstrue the Constitution but that are of no enduring harmful consequence (or, it perhaps may be better to say, that are of *little direct* consequence, other than the fact that they are bad examples or that they may tend to generate further misconstructions of more harmful consequence), or that actually produce outcomes broadly recognized as *good* (i.e., saving lives, stopping injustice, relieving misery, etc.) are hard to nominate as among the very *worst* decisions of the Court. Conversely, a sound interpretation of the Constitution that produces a harmful outcome may not be worthy of two cheers, but the blame for the harm can hardly be laid at the feet of a Court that has faithfully applied the Constitution. Our Constitution permits or tolerates a number of harmful or evil results, if the choices of democratically selected representatives of the people yield those results. A judicial decision holding as much cannot fairly be blamed for the evil. The evil is, rather, the fault of an insufficiently just Constitution, or of insufficiently faithful representatives, or of an insufficiently virtuous people. There is probably very little evil that our Constitution actually *requires* (now that slavery has been abolished).[26] There is a great deal of potential evil that the Constitution *permits*, but that is a different type of problem.[27]

26 The Fugitive Slave Clause, U.S. CONST. art. IV, § 2, reinforced by other constitutional provisions accommodating and protecting slavery, *see, e.g.*, *id.* art. I, § 2 ("Three-Fifths Clause," providing, for purposes of representation, that each slave counts as 3/5 of a person); *id.* art. I, § 9 (Slave Importation Clause, prohibiting Congress from banning importation of slaves until 1808); *id.* art. V (Slavery Amendment Proviso, prohibiting amendment to 1st or 4th clauses of Article I, section 9 before 1808), produced substantively evil results that were mandated by the Constitution, in the form of legal assistance to private violence and oppression.

27 When (if ever) is a judge (or anyone else) justified in acting *against* the law, in the name of "justice"? For a discussion of what a judge should do when confronted with a duty faithfully to apply law, the honest application of which will result in a grave substantive evil, see ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975). For my review of Cover's magnificent book, and my answers to these questions, see Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33 (1989).

One could argue, I suppose, that a decision "misconstrues" the Constitution, thereby producing evil results, whenever it *declines* so to "construe" the Constitution as to avoid those results. Such a view, however, requires at bottom a hermeneutic in which the words of the Constitution are essentially irrelevant. The Constitution, properly interpreted (on such a view), forbids all seriously unjust outcomes.

I am addressing something more specific. If a judicial decision is both wrong—itself against the law—and harmful, the blame rests squarely with the Court that decided it. In such a case, the Court has been faithless to the Constitution, and the individual Justices faithless to their oaths, and in so doing produced harmful or evil results. *That* is the category of cases with which I am centrally concerned.

Building upon the core criteria of misinterpretation and resulting harm, if a judicial misconstruction is *intentional*—if it is knowing and deliberate in its misinterpretation of the Constitution and in its production of harmful or evil results—that makes the decision particularly egregious. Error is bad, but a deliberate breach of faith seems even worse. As the saying goes, even a dog knows the difference between being tripped over and being kicked. The criminal law distinguishes degrees of culpability based on the perpetrator's intention to cause specific or general harm, or intention to do a certain act, knowing what the consequences of that act are. If the Court is able to appreciate the nature and consequences of its own voluntary acts, and deliberately embraces an unjustifiable interpretation of the Constitution and the harmful consequences it entails, its decision is all the more atrocious. If the evil results of a judicial decision are clearly known and understood in advance, it becomes correspondingly hard to absolve the judge or judges of guilt and responsibility for a knowing, conscious, willful, and harmful misinterpretation of the Constitution.

Still more, I submit that a decision of such a type is especially bad if it also tends to generate *further* misinterpretations, resulting in further evils. Our legal system tends to value precedent, magnifying and proliferating the errors that result from earlier errors and the evils that result from earlier evils.[28] Not all such wrong, harmful decisions

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Whatever the attractions of such a hermeneutic, I set it to one side as not consistent with the idea of written constitutionalism. A written constitution that permits (or compels) bad results might be a bad constitution; there may be valid moral arguments for resistance to such a constitutional regime; and those arguments might even yield a conclusion that judges morally should resist the regime (even though they swore allegiance to it) through the guise of interpretation. But this is a separate set of issues. I am assuming that the written Constitution imposes limitations on what fairly can be called "interpretation" or "construction" of that written Constitution, and that a judicial decision that operates within those limitations cannot itself be blamed for the resulting harms of faithful constitutional interpretation.

28 I have criticized strong conceptions of stare decisis in earlier writing. *See* Paulsen, *supra* note 10; Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 678–81 (1995); Michael Stokes Paulsen & Daniel N. Rosen, Brown, Casey-*Style: The Shocking First Draft of the Segregation Opinion*, 69 N.Y.U. L. REV. 1287 (1994).

have such strong generative effects; they may be tightly limited to their facts, or involve highly idiosyncratic or unusual situations. Some clear errors have not endured long, having been reversed or limited by subsequent court decisions or constitutional amendments, with the harm of the decision thereby being limited to the brief period during which the error was alive.[29] But to the extent an un-reversed, erroneous, harmful decision is broadly cast and prospectively "legislative" in its rule of decision, or adopts an especially sweeping principle concerning the decision's own generative consequences (or the generative consequences of judicial decisions generally, independent of their correctness), a bad judicial decision is all the more bad.[30]

Is there anything flawed in these criteria? One might nibble around the edges of the definitions in order to tilt them away from certain conclusions. And one might disagree with how these criteria should be applied, and how particular decisions should be judged according to these standards. But in principle it is hard to deny that a constitutional decision by the Supreme Court is "bad" precisely to the degree it: (1) misinterprets the Constitution (that is, is unfaithful to the text, structure, and historical meaning of the provisions at issue); (2) thereby producing unjustifiable death, oppression, denial of liberty, human misery, discrimination, or indignity; (3) does so intentionally; and (4) does so in such a manner as to tend to generate further such results. I must confess that these criteria seem to me so obvious, so unassailable, and leave so little room for disagreement, except perhaps for matters of emphasis, that it is hard to imagine a reasonable argument to which to direct an anticipatory rebuttal. *A constitutional decision of the U.S. Supreme Court is "bad" to the degree it misconstrues the Constitution* and *such a misconstruction produces harmful or evil results.*

But the fact remains that precedent is highly influential in our Anglo-American legal regime, and that judicial decisions have a substantial generative, quasi-legislative prospective force with respect to subsequent decisions.

29 There are many possible illustrations of this. Just to pick one of my personal favorites, compare *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) (upholding expulsion of Jehovah's Witnesses from public school for refusal to perform compulsory flag salute, and rejecting Free Exercise Clause claim), with *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (striking down compulsory flag salute as violation of the Free Speech Clause).

30 The Civil War and the Thirteenth and Fourteenth Amendments "reversed" *Dred Scott* after a relatively short period of time, but (as I argue below) that reversal itself came at great cost in human life and human suffering, such that the short duration is hardly a fact in mitigation of *Dred Scott*'s evil. But at least *Dred Scott* is no longer good law; it failed to generate ongoing legal consequences over the long term.

The real question is how these criteria apply to decisions of the U.S. Supreme Court. Under these criteria, many of the Court's constitutional decisions have been bad. But of the bad, which ones are truly the worst? The hunt is for *error*; for *egregious error*; for *evil egregious error*; and for (the worst of the worst) *intentional, evil, egregious error.*

II. APPLICATION

What's wrong with *Casey*, under these criteria? Plenty. It perhaps makes most sense to start with what was wrong with *Roe*, and go from there, for one interesting question is what makes *Casey* genuinely worse than *Roe* to someone who finds both decisions wrong on the merits.

The result in *Roe v. Wade* was, to put the matter simply and directly, not warranted by *any* plausible argument from constitutional text, structure, or history. I begin with the obvious: *Roe* is utterly indefensible as a matter of constitutional *text*. The suggestion that the Due Process Clause of the Fourteenth Amendment ("[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."[31]) actually entails an affirmative right to abortion, immune from government restriction, is hard to take seriously as a matter of constitutional language or of the original understanding of its drafters or ratifiers. In fact, I know of no serious scholar, judge, or lawyer who attempts to defend *Roe*'s analysis on textual or historical grounds. A first-year law student who argued for such a position would likely get a "C-" in any good Constitutional Law course, and that's only because of grade inflation.

Professor John Hart Ely said it well in his *Yale Law Journal* comment shortly following the case:

> What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. . . . At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.[32]

Roe is pure judicial lawmaking. It is not merely an unjustified stretching of the language of the text; its result is wholly outside the range of plausible readings of the text. Indeed, it is not unfair to say

31 U.S. CONST. amend. XIV, § 1.

32 John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935–37 (1973) (footnote omitted).

that the Court's decision is not even constitutional *interpretation* at all. The Court just plain made up an abortion regulation über-statute, not even working very hard to disguise the fact. The result, with the elaborate three-stage trimester division, even *looks* like a statute. The result is a pure judicial ukase. It is anti-democratic and fundamentally anti-constitutional to a degree rivaled by very few, if any, important constitutional decisions in our nation's history. As a matter of constitutional interpretation, *Roe* is an embarrassment—perhaps the worst work-product the Court has ever produced.

To be sure, *Roe* has its defenders in terms of the Court's *result*; many law professors and activists *like* legal abortion on demand—unfettered private "choice." But I cannot recall ever seeing a serious scholarly defense of *Roe*'s legal reasoning, on its own terms, by a distinguished legal academic (or even by an undistinguished one).[33] Where the decision is defended, it is on grounds of "natural law" reasoning frankly divorced from any reliance on the written text,[34] or on

33 Laurence Tribe's defense of *Roe*, shortly after the decision, comes as close as any to defending the decision on "due process"-ish terms. Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973). But Tribe's 1973 theory is not at all identical to the Court's. *Roe* essentially announced a substantive right—an immunity from governmental regulation—ostensibly flowing from the Due Process Clause. Tribe's "model" was less explicitly *substantive* due process but argued instead that *Roe* could be defended in terms of "alternative allocations of decisionmaking authority" with respect to certain types of choices. It is not clear that this is much different in effect from the Court's theory, but it falls well short of defending *Roe* on its own terms.

34 *See, e.g.*, Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 707 (1975). A standard variant of the natural law argument that attempts to tie such reasoning to actual constitutional language is the idea that the Ninth Amendment authorizes judicial discovery (or creation) of substantive constitutional rights not specified in any other provision of the text. *See, e.g.*, Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987). This is surely a more plausible nominee than the Fourteenth Amendment's Due Process Clause (which appears rather plainly to be about procedure and not substance), but not all that much more plausible. The Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. On its face, the amendment plainly does not create any rights. It is a rule of construction ("shall not be construed") about the effect of the enumeration of other rights. Specifically, the enumeration does not displace ("deny or disparage") other rights; it does not "pre-empt" the field. The historical context makes this doubly clear: the Federalists had expressed concern that an enumeration of rights might be misconstrued as assigning all such rights to the domain of the national government. THE FEDERALIST NO. 84, at 476 (Alexander Hamilton) (Isaac Kramnick ed., 1987). But a federal constitutional rule of non-preemption clearly does not create or authorize future judicial creation of new federal law constitutional rights. It merely leaves unaffected existing state law, common law, and natu-

the basis of arguments very loosely extrapolated from the Equal Protection Clause concerning gender and feminism,[35] or, most recently

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ral law understandings. It neither constitutionalizes such understandings—that is, makes them a part of the body of federal constitutional rights—nor upsets them. It does nothing.

It is therefore theoretically possible that state constitutional law, state common law, or a state's understanding of natural law, creates a right to abortion. If those positive law sources or natural law understandings create legal rights aside from those created or recognized by the U.S. Constitution, those rights are *retained.* But they do not have federal constitutional law status. They have whatever status their source confers on them. In the Framers' world, for example, natural law principles were subordinate to enacted, positive law. *See generally* Paulsen, *supra* note 27 (collecting and discussing authorities). In most modern abortion cases, a challenge is being made to an enacted state law, on the ground that it is contrary to the federal Constitution. The Ninth Amendment cannot fairly and honestly be used in support of any such claim.

Natural law principles certainly can supply a powerful and important *critique* of positive, enacted law. *See id.* at 41–44 (collecting sources). Positive law that violates ("correct") principles of natural law is usually *bad* in the sense of producing wrong substantive outcomes—quite possibly including some of the evils I described above in discussing criteria for what makes a "bad" constitutional decision (i.e., death, oppression, injustice, etc.). I will address the relevance of "natural law" to the matter of abortion below, in discussing whether or not the abortion right created in *Roe* and reaffirmed in *Casey* is "good" or "bad." *See infra* notes 51–59 and accompanying text.

35 Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985) (arguing that the Supreme Court's decision in *Roe* is weakened by its failure to base the right to abortion on gender equality); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 963 (1984) (arguing that abortion regulations should be analyzed with respect to sex equality, and proposing a "unified approach to sex equality" that would take biological differences between men and women into account when appropriate); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991) (arguing that regulations prohibiting or limiting women's right to reproductive control are better analyzed under a sex equality principle than under a privacy principle, because the "private is a distinctive sphere of women's inequality to men"); *cf.* David A. Strauss, *Abortion, Toleration, and Moral Uncertainty*, 1992 SUP. CT. REV. 1 (1993) (suggesting that the conflict between fetal life and the effect of abortion regulation on women's status should be central to the legal debate over abortion).

The "Equal Protection" arguments purport to be derived from constitutional text, but with scarcely more connection to the language and meaning of the text than the arguments purporting to flow from the "Due Process of Law" clause. They are, like the Due Process Clause arguments in *Roe* (and in *Dred Scott,* as I discuss presently), essentially policy-driven arguments that make nominal reference to the text, not truly text-based arguments. Abortion restrictions do not impose legal burdens on the basis of gender, but on the basis of the asserted presence and value of a human life *in utero.* To be sure, only women become pregnant. But an abortion restriction's target category—pregnancies (or some subset thereof)—embraces all relevant instances of the identified harm that the restriction seeks to prevent. It is tightly drawn to its purpose of protecting the human life *in utero* (to some degree or another); it

does not regulate *women* as a class; it regulates the conduct of men and women relevant to commission of or assistance in abortion; and it affects no women who are not pregnant. *See generally* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 267–74 (1993) (holding that plaintiffs failed to show the class-based discriminatory animus necessary to form a colorable claim of conspiracy to deprive women seeking abortions of their right to interstate travel because opposition to abortion does not discriminate against women, but merely those women seeking abortions); Geduldig v. Aiello, 417 U.S. 484, 494–97 & n.20 (1974) (upholding California's exclusion of disabilities resulting from normal childbirth from its disability insurance system because pregnancy, as well as the ability to become pregnant, is a real difference between men and women, and thus does not violate equal protection); *cf.* Washington v. Davis, 426 U.S. 229, 242 (1976) (reasoning that the application of a facially neutral policy or statue that has a disparate impact on a minority group is not violative of equal protection, unless the policy is motivated by an "invidious discriminatory purpose"). *But cf.* UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (holding that a policy excluding women with childbearing capacity from lead-exposed jobs violated Title VII by creating a facial gender-based classification and explicitly discriminating against women on the basis of their sex). This is all quite aside from the question of whether, assuming the classification was one properly subject to some measure of Equal Protection review of a classification that creates disparate treatment of fundamentally similar things (i.e., disparate treatment of men and women with respect to abortion), there nonetheless exists a sufficiently compelling (or "important") state interest in protecting embryonic and fetal human life.

The Equal Protection/feminist-theory arguments are, in the end, less text-based or doctrine-based than "justice"-based. They are *substantive* claims that it is *harmful*, or *unjust*, or *oppressive*, in some way, to those women who become pregnant, to deny them an escape from the normal or natural consequences of pregnancy through the route of abortion. These arguments are, at bottom, arguments for a non-comparative substantive-justice right of *autonomy*, not arguments for a comparative-justice right to *equal treatment*. Abortion restrictions may limit the freedom of action of pregnant women (and, indirectly, their spouses or boyfriends). But they simply do not treat things that are alike in an unlike way or unlike things as if they were alike; nor do they inevitably mask a discriminatory animus for disparate treatment unrelated to any genuine objective.

"Equal Protection"/feminist-theory, *substantive-justice* or *autonomy* arguments for legal abortion have fascinating implications for present abortion law doctrine. For example, how is a substantive-justice claim, based on the asserted harmful or unjust or oppressive consequences of an abortion restriction on pregnant women, affected by the *reasons* for which an abortion is sought? Is the right lost where there is an especially unsympathetic or callous motivation for its exercise, such as abortion for pure economic or social convenience, or for gender selection of born children, or to spite a former boyfriend or husband? Do harm/injustice/oppression justifications thus suggest a narrower abortion right, limited to circumstances of need to avoid genuine harm to the pregnant woman and inapposite (or forfeited) where such a claim is not plausible? Surely the practice of sex-selective abortion turns substantive-justice gender/feminist arguments back on themselves. Similarly, if the abortion right is predicated on claims of harm and oppression to pregnant women, does the voluntariness of the woman's conduct in becoming pregnant become relevant to the existence or scope of the right? Finally, how is the autonomy argument affected by substantive-

and fashionably, on the basis not of the correctness of the decision at the time rendered but on the status the decision has obtained as a function either of the doctrine of stare decisis (the argument of *Casey*) or some notion that the Constitution operates more like a set of evolving common law principles than as an authoritative written legal text[36]—a point I take up presently.[37] But no one seriously defends *Roe* as a fair and plausible exposition and application of the meaning of the Due Process Clause of the Fourteenth Amendment. *Roe*'s reasoning is utterly laughable, a running joke in constitutional law circles.

The substantive due process reasoning of *Roe* most nearly resembles, of any historical precedent, the substantive due process reasoning of *Dred Scott v. Sandford*,[38] *Roe*'s doctrinal great-grandfather. *Dred Scott*, of course, is on everyone's all-time hit list of most atrocious constitutional decisions of the Supreme Court. And for good reason: in *Dred Scott*, the Court misconstrued the Constitution egregiously and, to all appearances, willfully, producing a bizarre, monstrously unjust, and politically destructive outcome. The case surely must be regarded as *the* principal rival to *Roe* and *Casey* for worst constitutional decision of all time. Yet the features of *Dred Scott* that make it such an infamous judicial atrocity furnish an instructive basis for comparison with the Court's abortion decisions over a century later, making *Dred Scott* worth an extended detour.

Much like *Roe*, the Court's legal conclusions in *Dred Scott* are utterly indefensible as a matter of the text, structure, and history of the Constitution. The two major holdings of *Dred Scott* make no sense, are

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justice arguments on behalf of the humanity of the fetus (quite apart from whether a human fetus is a "person" within the meaning of the Fourteenth Amendment)?

The Equal Protection/gender/feminist/substantive-justice argument for abortion raises fascinating issues that I will leave for another day. My simple point here is that those arguments have precious little to do with the Constitution's text, structure, or history and, as such, are less aptly classified as constitutional arguments than as policy arguments dressed in quasi-constitutional clothing. They are not arguments about the meaning of the words and phrases of an authoritative constitutional text, taken in linguistic and historical context. They are policy arguments for a desired outcome.

36 *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 934 (1996) (suggesting that American constitutional interpretation has taken on the characteristics of a common law system and approving this approach given that the "Constitution is much more, and much richer, than the written document").

37 *See infra* notes 77–103 and accompanying text.

38 60 U.S. (19 How.) 393 (1857).

arguably unnecessary to the outcome,[39] and are difficult to explain as anything other than deliberate efforts gratuitously to award as many issues as possible to the pro-slavery position. First, the Court held that blacks, even free blacks, were not and could never be "citizens" of the United States within the meaning of the Constitution[40] (the Court purporting to interpret, of all things, the grant of diversity of state citizenship jurisdiction to federal courts in Article III of the Constitution).[41] As so many have noted so many times (beginning with the dissenters in the case[42]), the citizenship holding was thoroughly atextual, ahistorical, and illogical, assuming its own conclusion as the racist premise for its analysis. The second holding, invalidating the power of Congress to regulate or restrict slavery in the territories,[43] is methodologically, and morally, even worse. The Court found in the Due Process Clause (of the Fifth Amendment) an inviolable constitutional right to own slaves as property, immune from national government interference even in the territories of the Nation,[44] even assuming Congress otherwise had legislative power to regulate or prohibit the institution of slavery in federal territories (which the Court, incredibly, also denied to be the case):

> [T]he rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed

39 Several historians and legal commentators have noted the existence of plausible legal theories that would have supported a holding against Dred Scott's claim to freedom and that would have broken no new ground. The simplest disposition of the case would have been that, in a suit in federal court in Missouri, Missouri law should govern the choice of law governing the status of a Missouri domiciliary, Scott, and that this might legitimately lead to the application of Missouri law, not Illinois law or the Missouri Compromise's prohibition of slavery in federal territories, to the issue of Scott's status as slave or free. And under Missouri law, Scott, a Missouri domiciliary and slave, having not sued for his freedom during his sojourn in Illinois or in Wisconsin territory, remained a slave. *See, e.g.*, PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS 31–32 (1997).

40 *Dred Scott*, 60 U.S. (19 How.) at 404–07.

41 *Id.* at 405–06.

42 *Id.* at 393, 529–64 (McLean, J., dissenting); *id.* at 564–633 (Curtis, J., dissenting).

43 *Id.* at 452.

44 *Id.* at 450–52.

> no offence against the laws, could hardly be dignified with the name of due process of law.[45]

The most brazen, egregious misinterpretations of the law are those that have no plausible basis in the authoritative legal text being interpreted and applied. But the most *insidious* misinterpretations are those that twist, distort, or cleverly misapply sound general principles of law. For in such cases the inclusion of seemingly correct statements of law creates a veneer of respectability and plausibility around the perversion. Chief Justice Taney's *Dred Scott* opinion correctly observed that the Constitution (at the time) was pro-slavery. The original document indeed recognized, accommodated, and sheltered the institution in important respects. And it is also true, as Taney argued, that the federal government has no right to deprive an individual of any of his constitutional rights no matter where he travels in the nation. But it is a classic lawyer's trick—a rhetorical and analytical fraud of the worst kind—to say that because the Constitution supports *X* in one respect that it should be presumed to support *X* in all respects, or that because the Constitution provides for *A*, *B*, *C*, and *D*, it logically implies *E*, *F*, and *G* as well. Quite the contrary, the extent to which the Constitution defines rights and powers also limits them. The presence in the Constitution of certain provisions in favor of slavery does not create, through the emanations and penumbras of such provisions, a *general*, super-protected federal constitutional right of citizens (defined by the Court to exclude blacks, of course) to own property in the form of slaves. It was not the case, and never was the case, as Taney claimed, that "the right of property in a slave is distinctly and expressly affirmed in the Constitution,"[46] in this strong sense. The Constitution protected slave-holders' property rights in certain respects, most notably by according them a constitutional right to recapture fugitive slaves. But the Constitution never contained a general federal substantive constitutional right to own slaves as property. Likewise, it is a perversion of the Fifth Amendment's protection against deprivation of property (or liberty) "*without due process of law*" to bend it into a free-floating constitutional right against substantive government regulation affecting property in the form of slaves.

One will recognize in this discussion of *Dred Scott* the elements of a similar critique of *Roe*: not only do *Dred Scott* and *Roe* share the same linguistically nonsensical constitutional theory of "substantive due process," they apply it in much the same mischievous way, extrapolating from specific provisions a new, general right. It was *Griswold v.*

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45 *Id.* at 450.

46 *Id.* at 451.

Connecticut,[47] of course, that first made "emanations" and "penumbras" household words for constitutional lawyers and scholars, and there is probably no better exemplar of such a methodology of manipulating specifics into generalities and back to new specifics not supported by the constitutional text. But *Roe* did *Griswold* (and, in this respect, *Dred Scott*) one better. The Court in *Roe* declined to be limited even by *Griswold*'s methodology, but simply used it as a data point for further extrapolation. *Roe* invented the abortion right out of the penumbras and emanations of *past decisions* that had invented new rights out of the perceived penumbras and emanations of constitutional texts. The Court reasoned from specific prior extrapolations (like *Griswold v. Connecticut*, *Eisenstadt v. Baird*,[48] and *Skinner v. Oklahoma*[49]) to a general "right of privacy" and then read that principle back into the Constitution to create a right to abortion. In *Roe*, there is even less pretense of a mooring in constitutional text than the Court faked in *Dred Scott*. *Roe* is *all* extrapolation from precedent and jumping back-and-forth between general and specific. Yet *Roe* lacks even any serious mooring in cases like *Griswold* that had extrapolated those other constitutional rights. In this respect, *Roe* took *Dred Scott* to a whole new level. In *Dred Scott*, one sees judicial willfulness disguised by the most flimsy and contrived distortion of the constitutional text one could imagine. In *Roe*, one sees the constitutional text essentially disappear entirely. *Roe* is judicial legislation completely cut loose from any pretense of textual justification.[50]

Roe and *Dred Scott* share another crucial feature of judicial atrocity other than atrocious reasoning: their results inflicted great harm on innocent lives. More than simply doing violence to the Constitution, *Roe* and *Dred Scott* authorized private violence against others, under color of the Court's interpretation of the Constitution. In the case of *Dred Scott*, the evil was the extension of slavery and the invalidation of political measures to contain it. *Dred Scott* essentially established a federal constitutional right to own slaves, at least as against action by the federal government, and assured slavery's political ability to expand

47 381 U.S. 479 (1965).

48 405 U.S. 438 (1972).

49 316 U.S. 535 (1942).

50 *See, e.g.*, *Roe*, 410 U.S. at 152 ("The Constitution does not explicitly mention any right of privacy. [B]ut the Court has recognized . . . ."); *id.* at 153 ("The right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . as we feel it is, or, as the District Court determined, in the [Ninth Amendment] . . . .").

into new areas of the nation.[51] In the case of *Roe v. Wade*, and in its companion case *Doe v. Bolton*,[52] the evil was the creation of a constitutional right to abortion, at the sole private choice of the mother, for essentially any reason, and throughout all nine months of pregnancy.[53] *Dred Scott* did not create slavery, and *Roe* did not create abortion. In each instance, (some) states' laws had already given legal protection to the respective practices. In each case, the practice may have flourished even without illegitimate judicial intervention in its favor. But in each case, *Dred Scott* and *Roe*, the Supreme Court's decision gave federal constitutional status and protection to the practice,

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51 A long-running historical debate asks whether the rationale of *Dred Scott* presaged a possible future decision—a "second *Dred Scott* case," as Senate candidate Abraham Lincoln contended in 1858—that would forbid free *states* from absolutely prohibiting slave ownership within their borders. ABRAHAM LINCOLN, "House Divided" Speech at Springfield, Illinois (June 26, 1857), *in* 1 ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858: SPEECHES, LETTERS, AND MISCELLANEOUS WRITINGS, THE LINCOLN-DOUGLAS DEBATES 426, 432 (Library of America ed. 1989); *see* DAVID HERBERT DONALD, LINCOLN 206–09 (1995); JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 176–89 (1988). A New York case in litigation at the time presented the question of whether the Constitution forbade New York law from making slaves free when voluntarily brought into the state by their masters, temporarily, while in transit from one slave state to another. (A Virginia family was traveling to Texas, ironically, by way of boat to New York to catch a boat to New Orleans.) *See* Lemmon v. People, 20 N.Y. 562 (1860) (4–3 decision) (rejecting federal constitutional challenges predicated on the Privileges and Immunities and Full Faith and Credit Clauses of Article IV, and on the Commerce Clause as an implied prohibition of state laws impairing commerce). The case never came before the Supreme Court because of the intervention of the Civil War.

The short answer is that there is no way to be sure what the Taney Court might have done had *Lemmon* come before it. Strictly speaking, the "reasoning" of *Dred Scott* does not resolve the issues in *Lemmon*. *Dred Scott* held that Congress lacked power to prohibit slavery in the Territories, and that the Due Process Clause of the Fifth Amendment (which applied only to actions of the federal government, *see Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833)), prohibited federal government interference with the right to own slaves. Nonetheless, language in *Dred Scott* implies (however absurdly) that the Constitution creates a general right of citizens to own slaves. It was certainly not inconceivable that the same Court that could decide *Dred Scott* the way it did could extend its reasoning to conclude (however illogically) that the right to own slaves was likewise one of those "privileges and immunities" of citizens that another state could not deny to such citizens when present (temporarily? permanently?) within their borders.

52 410 U.S. 179 (1973).

53 As noted above, *Doe v. Bolton* was, and remains, extremely significant for its constitutional definition of "health" for purposes of applying *Roe*'s required "life or health" exception to state laws prohibiting or limiting abortions even after the unborn child would be able to live outside of his or her mother's womb. *See supra* note 4.

authorizing as a matter of federal constitutional law—and, perhaps, thereby implicitly validating as a moral proposition[54]—dramatically increased private violence against third parties.

Which one is worse? We are in the strange land, now, of comparing seemingly incommensurable atrocities: private violence in the form of slavery and private violence in the form of abortion, each with fundamentally illegitimate judicial endorsement and protection.[55] To choose either is not to disparage the other. But if it is a horrible thing for one human to enslave another, with the backing of law, it surely is even worse for one human to *kill* another, with the backing of law. *If* the human life *in utero* is accorded the moral status of a human being, then an asserted plenary constitutional legal right of one person to abort the life of another person is the worst moral evil ever to be sanctioned in American law—worse than slavery, worse than internment on racial grounds,[56] worse than anything else in the history of American law.

That leads to the most important question in the abortion debate. *Is* the unborn human embryo or fetus entitled to the moral worth of a human being, such that his or her intentional killing by another should be regarded as a moral evil or moral wrong? That is the heart of the entire abortion issue. The question can be broken down into further components: first, is the human embryo or fetus *human life*? Second, is the human embryo or fetus human life *deserving of treatment as such*?

The first question is easy. A conceived human embryo is, biologically, *human* life. There can be no serious question about this. The full genetic makeup of a unique human being is present at conception, and that makeup constitutes a human life, shortly thereafter recognizable as such. There is no room for disagreement with the

54 For better or worse, the law is sometimes a pedagogue. On the possible role of Supreme Court decisions in forming popular views of right and wrong, see *infra* Part III.

55 It was sometimes argued, at the time, that slavery was a benign arrangement. But it takes little reflection to recognize that coercive slavery must ultimately be backed by force, and the force that the law sanctioned was often violent in the extreme. For a gripping example, see State v. Mann, 13 N.C. (2 Dev.) 263 (1829) (upholding plenary power of master to beat and even kill a slave, in order to vindicate the complete power of the master over the servant). It is equally clear that abortion is an act of private violence against another: abortion kills the human fetus. The only question posed by the debate over abortion is whether the fetus has moral status, such that violence against it is regarded as a moral wrong. I address that issue presently. *See infra* notes 58–64 and accompanying text.

56 The Supreme Court's decision upholding the infamous internment of Japanese-Americans during World War II is *Korematsu v. United States*, 323 U.S. 214 (1944).

scientific and medical evidence concerning the biological beginning of human life. The human embryo is a new, distinct human life. It is clearly *life*, and it is clearly *human* life. As I have written elsewhere:

> The life form is not that of a cow, or an amoeba, or a cancer cell. If implanted in the wall of the uterus and allowed to develop naturally thereafter (and absent a medical problem), this human life will very quickly—within a matter of weeks—grow into the recognizable form of a human baby. After conception and implantation, the process is one of human development along a continuum, greater in degree but little different in principle from human development that continues in the infant after birth. There is no principled line to be drawn between conception and birth, in terms of the question whether the biological being is *human life* (as opposed to the question whether that being is capable of survival independent of his or her mother). Biologically speaking, the human fetus is not "potential" human life, but *actual* human life whose potential for growth and development has not yet been realized.[57]

To claim that the pre-born human embryo is not human life is, from a scientific and medical standpoint, simply absurd. No serious physician or biologist would hold such a view. To so claim is either an act of ignorance or one of willful intellectual dishonesty.

In fact, few who argue for legal abortion rest their case on such a factually untenable position. Instead, the claim is that the human embryo or fetus is not morally entitled to be treated *as* a human being, for purposes of being protected from the private violence of others—or, at least, not *fully* entitled to such protection, depending on the stage of development.[58] The moral judgment of pro-choice advocates is that unborn human life is, at some or all stages of gestation, not morally worthy of protection against private violence. This formulation of the proposition may sound harsh, but I think it is a fair and dispassionate statement of the pro-choice moral position: essentially everyone who defends abortion does so, in substantial part, on the ground that the fetus, while "human life" in some technical biological sense, has no or very limited moral entitlement to be treated as human life comparable to born human beings, or that such moral entitlement fluctuates along a sliding scale with the stage of development of the fetus. At some or all points along this continuum, the human embryo or fetus is "so far inferior" in human qualities to born

57 Paulsen, *supra* note 27, at 47–48.

58 Of course, *Roe v. Wade*'s legal holding is somewhat distinct from this moral proposition and goes a step further yet: *Roe* holds that the state *may not* treat the human embryo or fetus as a human being, for purposes of being protected from the private violence of others.

persons that he or she has "no rights which the [born human population is] bound to respect" and thus "might justly and lawfully be reduced" to death.[59]

The quoted language is from *Dred Scott,* modified only slightly. Of course, nothing in *Dred Scott* addresses the substance of abortion. But it is appropriate to note the close affinity of the pro-choice philosophical argument with the moral stance of *Dred Scott.* In form, the argument for abortion is identical in its first step of *deciding to treat* a class of human life as nonetheless unworthy of equal regard *as* human life. In common with *Dred Scott*; in common with arguments advanced to justify the dehumanization and killing of Jews in Nazi Germany; in common with racist arguments for genocide of any kind; in common with arguments for apartheid or discrimination, a necessary premise of the decision in *Roe* is the *ex ante* decision—the *choice*—to deny or denigrate the human status of the victim, so as to be able to remove from moral blameworthiness the commission of harmful acts of violence or discrimination against such persons.

None of this decisively answers the question of *Roe*'s evil or the evil of abortion. It is possible to regard the denial of moral worth to whole categories of human life in other situations—by American slavery, or Nazi Germany, or the Rwandan genocide—as atrocities beyond belief but regard the denial of moral worth to human life in the form of an unborn human fetus or embryo as morally justified. But once the human fetus is understood to be human life, the presumption (and thus the burden of justification) should rest very strongly against those who would authorize, and constitutionalize, private violence against such human life on the premise that such human life is unworthy of protection.

A standard form in which advocates for a right to commit abortion seek to overcome this presumption and meet this burden is what I will call the "sliding-scale" argument, alluded to just a few paragraphs ago. *Roe*'s legal holding is, in form at least,[60] a version of this argument: the right to abortion varies with the stage of pregnancy. The philosophical argument is rarely cast in explicit terms, but must be that the "human" status of unborn human life, and thus the moral worth to which it is entitled, varies with its stage of develop-

59 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857); FINKELMAN, *supra* note 39, at 61.

60 But not in substance. As noted above, *Roe*'s trimester framework, when considered in combination with the holding of the companion decision in *Doe v. Bolton,* in fact creates a legal right of the woman to abort her child, for any reason or no reason, throughout all nine months of pregnancy, subject to no substantive restriction. *See supra* note 4.

ment. It is easy to see why this argument has some intuitive appeal. "Viability," especially, strikes many as a sensible line—could the unborn human life survive on his or her own, outside the womb. For others, the onset of brain-wave or nerve activity, or the capacity to feel pain, provides a line. Others, for traditional religious doctrinal reasons concerning when "ensoulment" occurs—when the unborn human life has been given a "soul," and is thus morally worthy to be treated as human life as a matter of such religious doctrine—draw a line at a somewhat different point ("quickening"), based on these religious intuitions.

But from a logical and biological standpoint, anyone who thinks seriously about the question must regard any such line as essentially arbitrary. It is the *positing* of a cut-off point, working backward along a continuous line of pre-birth human development, for according moral worth to human life. This is not to say that the "viability" intuition is foolish. As arbitrary moral cut-off points go, it is a fairly reasonable one. The same is true for the "brain-wave activity" point. It is also not to say that the religious belief concerning when "ensoulment" occurs is foolish. But from a purely secular, human perspective, such a line is *still arbitrary* (even if one believes, on religious principle, that God is entitled to draw lines that seem from a human perspective entirely arbitrary).[61] If one concedes that the human fetus is human life, one cannot find a logical, non-arbitrary, principled point at which to cut off the moral worth of that human life. If the human fetus is human life, and as such is morally worthy of human status, he or she is worthy of such status at all stages of pregnancy. To suggest otherwise is to say that human life is worthy of moral status *as* human life at

61 I deeply respect and value both religious liberty and religion and would not wish to be understood as disparaging religious principles in this regard. As I have written elsewhere, the First Amendment's protection of religious liberty is premised, at bottom, on the view "that God exists; that God makes claims on the loyalty of human beings; and that these claims are prior to and superior in obligation to the claims of the State." Michael Stokes Paulsen, *God Is Great, Garvey Is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1598 (1997). If God indeed has ordained that the "correct" line at which the human fetus is entitled to moral regard is "quickening," that surely would permit born humans to draw such a moral line. I do not believe that God in fact has drawn this arbitrary line. Still less would I believe that, even had God done so, that this would equal God's *authorization* of the destruction of a human fetus or embryo by other humans, for any reason or none at all, because of the existence of such a line. A claim of constitutional religious freedom to kill a human fetus, even where based on a sincere religious conviction, should not prevail over the *life* of another member of the human family, and such human status must be determined by objective criteria extrinsic to the religious faith of the person seeking an abortion.

some stages of life but not at others. Certainly some people might hold that view. On what principle, however, may one human being kill another human being on the ground that the second human being simply need not be regarded as such (according to the first)?

Other arguments for the permissibility of abortion implicitly (or even explicitly) concede the moral entitlement of the human fetus to respect as a form of human life, or at least do not vigorously contest such status. They grant that the human fetus *is* morally worthy of protection against private violence (or, less straightforwardly, bracket the issue by conceding only that the human fetus *sometimes may be* morally worthy of protection against private violence), but nonetheless maintain that the autonomy rights of the violent actor *trump* the rights of the fetus, in some or all circumstances. (This is the form of Judith Jarvis Thompson's classic argument for abortion.)[62] Or, in a slight variation, the argument is that the violent actor, and not his or her victim, should possess the exclusive right *to judge* whether the violent actor's autonomy rights trump the life of the victim. (This is, drastically compressed, the form of Professor Laurence Tribe's earliest argument for abortion rights.)[63]

A great many moral questions ultimately can be distilled to the weighing of competing claims of right, or of freedom of action. Abortion is no different. Even granting the status of the human fetus as human life, entitled to moral regard as such, there are doubtless "hard cases" where one might think that the value of giving full regard to human life must yield to another value. Traditionally, private violence against the life of another sometimes may be justified, or excused, when such violence is necessary to save one's own life or the life of an innocent third party. Thus, many pro-life advocates concede that abortion is morally justifiable (or excusable) where necessary to save the life of the child's mother. Conceding that the unborn human fetus has moral worth as a human being, however, should affect the range of values that might plausibly be thought to justify killing that human life. Abortion for reasons of what might, with varying degrees of cogency, be thought "self-defense" are one thing (e.g., life of the mother, physical health of the mother, emotional health of the

62 Judith Jarvis Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

63 Tribe, *supra* note 33. This is really the same argument as the argument that the violent actor's rights trump the victim's. Presumably if one did not think that the violent actor's rights were superior, one would not let that actor *judge* whether those rights were superior if such judgment could lead (as of course it could) to the violent actor judging his or her rights to be superior to those of his or her victim. The rhetoric of judgment, or choice, or decisionmaking autonomy, adds nothing to the argument that one person's rights are deemed to prevail over another's.

mother, rape, incest). Abortion for reasons of less morally defensible self-interest are quite another (e.g., social convenience, economic convenience, spite of the child's father, gender selection of a child, economic profit).

One serious problem with the "balance of interests" approach is that such determinations seem the natural province of the legislature and not the judiciary. It is hard to justify *Roe* on those terms. Another serious problem with this approach is that the rule of *Roe v. Wade* is one of completely unrestricted, *un*-"balanced" choice: a woman may choose abortion for essentially any reason at all, or no reason. Indeed, that is one of the grounds on which *Roe* may be regarded as a colossal moral atrocity: the decision is not only unjustifiable as a matter of first principles of the rule of law, but authorizes, by judicial decree, private violence against innocent human life *for any reason that the violent private actor may wish to engage in it.* Across a broad range of circumstances—in the overwhelming majority of morally very easy cases, as well as in hard cases involving a serious risk to the life or health of the mother—*Roe* grants a complete and unrestricted private license to some human beings to kill other human beings. That is a moral atrocity of enormous proportions and one that cannot begin to be justified by the existence of the far smaller number of exceptional circumstances where it reasonably might be argued that such killing is justifiable or excusable.

In short, the moral atrocity of *Roe* in terms of the substantive evil of its result must be ranked as being even worse than *Dred Scott.* Once the humanity of the human fetus is conceded, it all follows: it is worse for one human to murder another than to enslave another. And *Roe*'s sanctioning of abortion-homicide has produced such killing on a massive scale. Approximately a million-and-a-half abortions a year in the United States, for thirty years, is *forty-five million* acts of homicide authorized by judicial fiat unsupported by any fair reading of the Constitution.[64]

In one respect, however, *Dred Scott v. Sandford* may be worse than *Roe.* The opinion in *Roe* reads more like an act of utter constitutional incompetence than an intentional act of bad faith. The opinion is obtuse, indifferent to constitutional text, poorly reasoned, and unquestionably "legislative" in its style and substance. But that seems to

64 It is true, of course, that some of these abortions may have been committed in any event, either because state abortion laws did not prohibit them or as the result of illegal conduct. It is an interesting empirical question how many abortions per year in the United States are attributable to the Court's constitutionalization of abortion, but there is no doubt that it is a hugely significant number.

be what the Court, in 1973, thought it was supposed to do in such matters. Viewed from the perspective of thirty years' distance, *Roe* seems almost quaint—a relic of an era in which courts (and especially the Supreme Court) understood their role as being to make law; to resolve social issues; to prescribe rules for the nation.[65] The Supreme Court Justices in 1973 were, in a sense (at least to a degree), prisoners of their own era, trapped in a set of assumptions about the judicial role that were broadly accepted at the time, but are now regarded as largely a fad (like lava lamps or bell-bottoms). Even the young, long-sideburned Associate Justice William Rehnquist, in his *Roe* dissent, does not appear *outraged* by the majority's decision; the Court is wrong, and the Court is acting too legislature-like and *Lochner*-like, Rehnquist says in criticism.[66] But he does not brand it as monstrous or *Dred Scott*-like. He even says that the opinion "commands my respect"![67]

The contrast with, for example, Justice Scalia's impassioned dissents in *Casey*[68] (in 1992, nearly twenty years after *Roe*) and in *Stenberg v. Carhart*[69] (in 2000, twenty-seven years after *Roe*), in which *Dred Scott* is explicitly held up as the image in the mirror of the Court's abortion decisions, is striking.[70] And while it is clear to all today that *Roe*, in tandem with *Doe v. Bolton*, in fact created a regime of abortion-on-demand throughout all nine months of pregnancy for any reason agreed to by the mother and abortionist, the tone of the *Roe* opinion is moderate. The opinion purports to recognize competing interests

65 For a discussion tracing the changes in dominant constitutional interpretive paradigms, and noting the almost complete absence of prominent voices in support of reliance on constitutional text, structure, history, and original understandings, around the time *Roe* was decided, see Kesavan & Paulsen, *The Interpretive Force*, *supra* note 25.

66 Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).

67 *Id.* at 171 (Rehnquist, J., dissenting).

68 Planned Parenthood v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part and dissenting in part).

69 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

70 Justice Byron White's dissent in *Roe* contains some reasonably strong language, but still seems to concede that the Court legitimately possessed the authority to take the action it did:

> As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power .... In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of constitutional choice ....

Roe, 410 U.S. at 222 (White, J., dissenting).

of importance, and the "legislative" solution crafted has the look and feel of an attempt at compromise and balancing.[71]

To be sure, none of this excuses *Roe.* The Justices knew enough about reading the words of the Constitution—Hugo Black had not long been off the Court—that one can hardly say that this was an interpretive methodology that no one had ever heard of, or that was held in universal disrepute. And even if the Court conceived of its role as "doing justice," that would not excuse the terrible moral blindness and tragic perversion of substantive justice in the Court's actions. Nonetheless there is at least some sense in which the Justices in the majority surely thought that they were acting in entire good faith, and in accordance with their sense of constitutional duty and legitimate authority. Even those who vehemently oppose *Roe* might say the Justices (or some of them) ought to be forgiven, for they knew not what they were doing.

The judgment of history is that one cannot say even this for Chief Justice Taney's opinion for the Court in *Dred Scott.* If *Roe* reads like an act of gross negligence, *Dred Scott* reads more like a deliberate act of violence against the Constitution, for the sake of slavery. The Court seemingly went out of its way to create as much pro-slavery law, on as many points as possible, as absolutely as possible. More than that, *Dred Scott* was an arrogant attempt by the Taney Court to leverage the prestige of the Supreme Court to "settle" the divisive slavery issue for all time, in favor of one side—the South. In that respect, the evil of *Dred Scott* was enlarged by the Court's seemingly intentional, willful infliction of it, and its haughty pretension that it should be regarded as having the legitimate authority to impose its will on the Constitution and on the Nation.

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71 It is entirely possible that at least some of the Justices in the *Roe* majority did not realize the full implications of the *Roe* and *Doe* decisions. Chief Justice Burger joined the majority in *Roe,* then retreated thirteen years later, protesting that the course that abortion law had taken was not remotely what *he* thought he was agreeing to in 1973. Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 783 (1986) (Burger, C.J., dissenting) ("I regretfully conclude that some of the concerns of the dissenting Justices in *Roe,* as well as the concerns I expressed in my separate opinion, have now been realized."). For echoes of this phenomenon in the person of Justice Kennedy, a half-generation later, compare *Casey,* 505 U.S. at 833 (Joint Opinion, co-authored by Kennedy), with *Carhart,* 530 U.S. at 956–57 (Kennedy, J., dissenting) and Hill v. Colorado, 530 U.S. 703, 787–88 (2000) (Kennedy, J., dissenting). *See also Carhart,* 530 U.S. at 954 (Scalia, J., dissenting) (finding that result in *Carhart* is not "merely a regrettable misapplication of *Casey* . . . . but *Casey*'s logical and entirely predictable consequence"); *id.* at 955 ("There is no cause for anyone who believes in *Casey* to feel betrayed by this outcome."); *cf. Matthew* 27:3–5.

As I have set forth above, an already bad constitutional decision is all the worse to the extent it is made intentionally, with full knowledge of its terrible consequences, and in the arrogant expectation that it will work to entrench the Court's decision permanently. *Dred Scott* is of course atrocious for the evil it imposed: the dehumanization of blacks as having "no rights that the white man is bound to respect."[72] But *Dred Scott* did not create slavery and the Court could not properly have abolished slavery even if it were so inclined. Indeed, as noted above, a plausible argument can be made that Scott was not legally entitled to his freedom under the governing law of the day. Beyond its gratuitous racism, then, the chief evil consequences of *Dred Scott* were the *entrenchment* and *extension* of slavery, the invalidation of the Missouri Compromise, the resulting evisceration of any possibility of political compromise over the expansion of slavery, and the de facto outlawing of the Republican Party platform. It might be going too far to say that the *Dred Scott* decision was a proximate cause of the Civil War, but it certainly was, with other events, a significant catalyst in the chain of events leading to war and death on a massive scale. On any measure, *Dred Scott* produced harmful, evil results rivaled by few other decisions in the Court's history. What is interesting is that such evil resulted as much from the Court's authoritarian prohibition of political compromise, and its enshrinement of a permanent pro-slavery position as law of the land, as from its specific result.

The Court in *Roe* committed a grievous wrong, producing arguably a worse moral evil than did the Court in *Dred Scott*. Whether intentional or not, *Roe*'s grotesque deformation of the Constitution resulted in some of the greatest evil in our nation's constitutional history, authorizing private violence on an almost unimaginable scale. But the Taney Court that decided *Dred Scott* inflicted its evil with full knowledge of exactly what it was doing. The Justices may have thought they were doing right, but they could not have thought they were doing law. What makes *Dred Scott* especially maddening is the insidious manipulation of constitutional texts and legitimate methodologies. Taney's perverted legal "craftsmanship"—his supposed interpretation of legal texts and deference to the imputed intentions of the framers, and his manipulation of levels of abstraction (for example, transforming the Constitution's pro-slavery Fugitive Slave Clause into a general constitutional protection of slavery)—make it harder to disentangle the evil inflicted by the Court from the forms of law in which the Court wrapped itself. In this, too, the Court in *Dred Scott* knew what it was doing: it was imposing its will, contrary to the Constitution,

72 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

in order to support one side of a social dispute and to wrap that resolution, dishonestly, in the forms of law and in the Court's prestige, in order to insulate its action from challenge and to leverage its holding forward in time.

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Enter *Planned Parenthood v. Casey*. If *Roe v. Wade* equals *Dred Scott v. Sandford* in its lawlessness and exceeds it in the degree of harm or evil it produces; and if *Dred Scott* bests *Roe* in the category of the willfulness or intentionality with which the Court acted to impose its will and leverage its lawlessness forward, *Casey* combines the worst features of both. *Casey* reaffirms and extends the lawlessness and evil of *Roe*, and it does so willfully and intentionally, seeking to extend that result and insulate it from future challenge. What *Casey* adds to *Roe* is willfulness, full awareness of what was at stake, and deliberate entrenchment of a deeply vulnerable legal ruling and result that a majority of the Justices probably believed was wrong as a matter of first principles of constitutional law and of morality. It adds a somewhat more plausible, and therefore all the more pernicious, pretext of legal regularity than had been articulated in *Roe*, but it is not an honest one. It adds grandiosity, pomposity, and vanity—an almost comical arrogance and tone of self-importance. And it adds some outright authoritarian substance. If even half these charges are true, *Casey* handily outdistances *Roe* and *Scott* for the ignominious title of the "Worst Constitutional Decision of All Time."

Let me take *Casey*'s distinctive "contributions"—the ways in which it goes beyond *Roe*—one at a time:

First, *Casey* adds *knowledge and willfulness*. As noted, if the Justices who decided *Roe* can be let off the hook at all, it would be on the theory that they did not realize the full consequences of what they were doing; that they were prisoners of the jurisprudential perceptions of their age and honestly believed they were announcing a sensible, balanced compromise on the abortion issue. By the time *Casey* was decided in 1992, nineteen years later, it was clear to everybody how controversial *Roe* was, both as a matter of legal methodology and as a matter of morality and social policy. Indeed, it is no exaggeration to say that *Roe* had come to define the jurisprudential debate over the legitimate role of the judiciary in society and the proper scope and manner of constitutional review by the courts of legislative acts. Nearly a dozen abortion cases had made their way to the Supreme Court in the years after *Roe*. Just three years earlier, in *Webster v. Reproductive Health Services*,[73] the Court had come within a whisker's breadth

73 492 U.S. 490 (1989).

of straightforwardly overruling *Roe*, producing bitter rifts and frayed nerves among the Justices that burst into public view.[74] The *Roe* issue had energized advocates and academics on both sides. Other cases involving "substantive due process" claims had become obvious stalking horses for the more central issue of abortion.[75] For more than a decade before *Casey*, *Roe* had been the central "litmus test" question in Supreme Court judicial confirmation hearings—an experience made famous in the hearings on rejected nominee Robert Bork in 1987, but shared in substantial measure by Justice O'Connor (1981), Justice Kennedy (1987), and Justice Souter (1990)—the authors of the Joint Opinion in *Casey*—as well as by Justice Scalia (1986), Chief Justice Rehnquist (in the hearings on his elevation, in 1986), and Justice Thomas (1991). Massive protests and counter-protests over *Roe* and abortion had become regular occurrences surrounding the Supreme Court grounds. Abortion was a hot issue in 1973. It was an inferno by 1992. Everybody was fully aware of how much the Court's own decision in *Roe* had served to throw gas on the fire, fueling the social and political debate over abortion with an equally hot controversy over the Court itself.

Revealingly, the Court in *Casey* begins its opinion by noting these realities, and makes scattered references to them throughout. In the first paragraph, the Court notes that in the decade immediately preceding, the United States had five times filed briefs urging the Court

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74 For a good example, see Justice Scalia's concurring opinion, agreeing with the Court's disposition of the case but "strongly dissent[ing] from the manner in which it has been reached" and condemning the approach of Justice O'Connor's concurrence as one that "cannot be taken seriously." *Id.* at 532, 537 (Scalia, J., concurring).

75 *Bowers v. Hardwick*, 478 U.S. 186 (1986), is the most obvious example, with the Court splitting 5-4 on the legitimacy of judicial creation of new substantive due process rights, in a case involving a claim of homosexual sexual privacy as against a state sodomy prohibition. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), is another obvious example, with a divided Court splitting chiefly as to methodological premises—premises that obviously had a deeper potential impact on abortion than for the issue of family law paternity presumption disputes presented by the case.

My favorite example of a stalking horse is *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), a territorial jurisdiction case (of all things). The Court was unanimous that the California courts could exercise territorial jurisdiction in a family law dispute over a non-resident husband physically served with process in California while on a business trip and visit with his children. But the Court split vociferously on the methodology of interpretation of the Due Process Clause, in a way that seems explainable (in intensity at least) only on the ground that such methodological premises would presumably be transferable to the abortion dispute. (The anti-*Roe* "conservatives" disfavored evolving judicial standards; the pro-*Roe* "liberals" disfavored originalism as a limitation on judicial discretion.)

to overrule *Roe* as wrongly decided.[76] The Joint Opinion is careful to note, repeatedly and often quite awkwardly, that the Justices comprising the majority are not necessarily in agreement with *Roe*'s resolution of the constitutional issues with respect to abortion, even though they vote to uphold it on the basis of the doctrine of "stare decisis"[77] (a point I address presently). Indeed, given the votes and opinions of some of the Justices in the *Casey* majority in earlier cases, it is hard to avoid the conclusion that one or more of the Joint Opinion Troika believed that *Roe* was wrongly decided.[78]

All of this is by way of saying that one cannot forgive the Court in *Casey*, as one might charitably excuse the Court in *Roe*, on the theory that they knew not what they were doing. The Court in *Casey* knew *exactly* what it was doing. It knew the jurisprudential stakes; it knew the moral arguments; it knew the reality of what abortion was and what abortion does. The Court did what it did with full knowledge of the consequences. The Justices in the majority knew (or certainly should have known) that their decision would perpetuate a nationwide rule of freedom to commit abortion, and that legal abortion would continue to exist in the United States at a rate of a million-and-

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76 Planned Parenthood v. Casey, 505 U.S. 833, 844 (1992).

77 *Id.* at 857 ("whether or not mistaken"); *id.* at 861 ("with whatever degree of personal reluctance any of us may have"); *id.* at 869 ("A decision to overrule *Roe*'s essential holding . . . would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today."); *id.* ("We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate."); *id.* at 871 ("We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in *Roe*'s wake we are satisfied that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding."); *id.* at 901 ("We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all our precedents.").

78 Michael Stokes Paulsen, *Book Review*, 10 CONST. COMMENT. 221, 232 (1993) (noting that the decision in *Casey* was a change of positions for both Justice O'Connor and Justice Kennedy). Justice Scalia makes the point acidly: "It is particularly difficult, in the circumstances of the present decision, to sit still for the Court's lengthy lecture upon the virtues of 'constancy,' . . . of 'remain[ing] steadfast,' and adhering to 'principle' . . . . Among the five Justices who purportedly adhere to *Roe*, at most three agree upon the *principle* that constitutes adherence . . . and that principle is inconsistent with *Roe* . . . . To make matters worse, two of the three, in order thus to remain steadfast, had to abandon previously stated positions." *Casey*, 505 U.S. at 997 (Scalia, J., dissenting) (citations omitted).

a-half human fetuses a year. And they knew that the opposite decision, overruling *Roe*, would lead to a significant reduction in that number. The deaths of millions of unborn human fetuses rested on the Justices' decision. They knew that. And they consciously chose the course of reaffirming *Roe*, even though some of them undoubtedly believed both that *Roe* was wrong as a matter of constitutional law and that abortion is the taking of innocent human life.

It is worth pausing for a moment to let this sink in, for it is a sobering observation about the human condition. *Some of the individual Justices who voted to reaffirm* Roe *apparently did so in knowing violation of both law and personal conscience.* I will have more to say about this in the conclusion, Part III, of this Article. But for now it is sufficient to note that, if this is true, the votes of such Justices (a most inapt title under the circumstances) were cast in willful, affirmative, knowing complicity with evil.

There may be explanations that tend to mitigate the culpability of such complicity: an unintentional moral blindness as to consequences; a tendency to undervalue the lives of others as compared to one's other objectives (or the objectives of the society in which one lives); or ordinary human cowardice. But there is really no escaping the judgment that, for a Justice who believed that *Roe* was legally and morally wrong, deliberately and knowingly to reaffirm it is to act in complicity with evil. It is to be present at Auschwitz, with power to prevent it, but to look the other way; to tolerate and even endorse the Holocaust when one had the capacity to stop it.

How close a parallel is there between *Casey* and *Dred Scott* in this regard? Even if one is prepared to believe, charitably, that the Taney Court thought it was doing the right thing (by its own lights), it cannot be denied that what they believed *was* the "right thing" was the protection, and extension, of the institution of slavery, in a way not fairly attributable to the Constitution. The Taney Court *knew* the human consequences of its decision. *Casey* is arguably a little worse even than that. For if (some of) the Justices who decided *Casey* not only knew the human consequences of their act, but also thought that those human consequences were harmful and evil, their manipulation of legal forms in support of that conclusion properly might be deemed yet more blameworthy than the ridiculous textual mis-analysis of *Dred Scott* (and of *Roe* for that matter). The Joint Opinion in *Casey* contains considerable hand-wringing. There is evidence of a consciousness of guilt on the part of the Justices who wrote the Joint Opinion that is not present in *Dred Scott*. The *Casey* collaborators—those who thought *Roe* wrongly decided and who also understood, at some level, the moral wrong of abortion—evidently did not think that

their legal arguments were being put to the service of a *just* cause, in the way that the majority in *Dred Scott* may have thought they were doing.

Or did they? Does the parallel to *Dred Scott,* in terms of the Justices' mens rea in *Casey,* begin to fall apart if one grants (for the sake of argument) the possible sincerity of the Justices' views of the importance of the doctrine of stare decisis (a doctrine I will discuss presently)? Perhaps. But look where that proposition leads. It suggests that those Justices who believed *Roe* to be legally wrong as an original matter, and morally wrong as an ongoing matter, *valued more highly than the deaths of millions the institutional importance of the legal doctrine of stare decisis in maintaining public perceptions of the legitimacy and integrity of the Supreme Court.*

In previous writing, I have examined at length the doctrinal arguments advanced by the Court in *Casey* on behalf of the Court's general policy of stare decisis, and found them wanting.[79] I will not repeat that analysis here, in part because the *Casey* Court itself did not rest on these arguments. Rather, a significant part of *Casey*'s justification for the judicial doctrine of stare decisis (the doctrine, as the Court in *Casey* itself conceded, is one of judicial policy, not constitutional requirement)[80] is that it enhances public perceptions of the Court's (and its members') integrity, and thus safeguards the Court's *power.*[81]

Is this something to be praised? The Justices in the majority in *Casey* actually seem to have thought so. A great deal of the pompous, overwrought rhetoric of the opinion (Section III.C of *Casey*[82]) is directed toward convincing the reader of exactly that proposition. The Court spoke of "the terrible price" of overruling even an erroneous precedent, specifically, that it would "seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."[83] For us "[t]o understand why this would be so," it was necessary for the Court to explain the intimate relationship between "this Court's authority" and "the country's understanding of itself as a constitutional Republic."[84]

The *Casey* Court then goes on to say that "the Court cannot buy support for its decisions by spending money and, except to a minor

79 *See generally* Paulsen, *supra* note 10, at 1543–67.

80 *See id.* at 1537 n.1 (collecting cases); *id.* at 1543–51.

81 *Casey,* 505 U.S. at 864–69.

82 *Id.*

83 *Id.* at 864, 865 ("In the present cases . . . the terrible price would be paid for overruling.").

84 *Id.* at 865.

degree, it cannot independently coerce obedience to its decrees."[85] The Court continues, "The Court's power lies, rather in its legitimacy, a product of substance *and perception* that shows itself in *the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands*."[86] There is something to this, of course. If the nation came to view a decision of the Supreme Court as fundamentally illegitimate (much as a good part of the nation rapidly came to view *Dred Scott*), the Court could well find its decision not only disrespected, but disobeyed.

And properly so, I submit. Why should a lawless Supreme Court decision, manifestly contrary to the Constitution, have any claim to the obedience of other actors in our constitutional system? The Constitution is supreme law; judicial decisions contrary to it should be regarded as void, and should neither be enforced by the executive nor obeyed by the people.[87] Nor, I submit, should they be followed by judges in subsequent cases. By the same reasoning that yields judicial review—the supremacy of the Constitution, and the concomitant implication that acts of subordinate agencies, contrary to the Constitution, are void and should be given no effect[88]—a judicial decision contrary to the Constitution is void and should be treated as being of no obligation on the executive to enforce or on subsequent courts to follow as precedent.

Lurking in *Casey*'s ostentatious rhetoric is recognition of that truth: "our contemporary understanding is such that a decision without principled justification would be no judicial act at all," the Court concedes.[89] The Court then goes on to speak of the need, therefore, to guard itself against the public "questioning the legitimacy of the

85 *Id.*

86 *Id.* (emphasis added).

87 I have developed this proposition at considerable length in other writing. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217 (1994); Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993); *see also* Michael Stokes Paulsen, Nixon *Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1349–59 (1999).

88 THE FEDERALIST No. 78, at 438 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. . . . To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid."); *accord* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803).

89 *Casey*, 505 U.S. at 865.

Court,"[90] which it might do if the court were to overrule cases too frequently or overrule a "watershed" decision—that is, an especially controversial or divisive decision that constituted an abrupt or radical departure from prior understandings of the law.[91] Thus,

> [t]he Court's duty in the present case is clear. In 1973, it confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.[92]

This is an astonishing proposition. What if the thing that makes a decision a "watershed" is that it was a grotesque departure from the Constitution—a massive, unfounded judicial coup d'etat taken in the name of the Constitution? The notion that the more dramatic a precedent's departure from the Constitution, the more tenaciously the Court should cling to it—lest the people recognize the departure for the lawlessness it is—is positively repulsive. It stands on its head the very foundations of judicial review: the priority of the Constitution; the subordinacy of the agencies created under its authority; the duty to adhere to the former as against the departures of the latter. The Court in *Casey* instead says the most monstrous thing imaginable: that the Court should adhere to even clearly wrong decisions, and especially to its most egregiously wrong decisions, so that it can avoid damage to its own legitimacy and maintain its power.[93]

If the Court in *Dred Scott* was driven by the base motive of expanding and protecting slavery, the Court in *Casey* was driven by the base motive of expanding and protecting its own power. The Justices (or at least enough of them to make a difference to the outcome of

90 *Id.* at 866.

91 *Id.* at 867.

92 *Id.* at 868–69.

93 The Court's reasoning is illogical to boot. Why would public perceptions of the Court's legitimacy be better enhanced by stubborn adherence to erroneous precedent rather than a willingness to overrule it? As the *Casey* dissenters noted, the Court might just as readily (if not more readily) be perceived as succumbing to political pressure by adhering to *Roe* rather than overruling it. *Id.* at 963–64 (Rehnquist, C.J., dissenting); *id.* at 998–99 (Scalia, J., dissenting).

the case) valued this more highly than the human lives at stake and valued it highly enough to affirm a precedent they believed wrong. The point can be put more strongly yet: the Justices valued their own prestige and power enough to be willing to acquiesce in the death of millions of innocent human lives in order to achieve it.[94]

The Court knew what it was doing. It knew the consequences of its actions. It knew it was doing wrong. And it did it anyway, for the sake of enhancing its own power and prestige. This alone makes the reaffirmation of *Roe* in *Casey* a greater judicial atrocity than the original decision in *Roe.*

This brings me to the second thing (or cluster of related things) that *Casey* adds to *Roe. Casey* adds deliberate entrenchment of *Roe,* an attempt to leverage that entrenchment forward in time permanently, and an effort to *de-legitimize criticism* of both the Court's original decision and the Court's entrenchment of it.

Consider first the simple fact of entrenchment of *Roe.* I submit that one must rank *Casey* as a greater evil than *Roe* simply because it reaffirms, extends, and entrenches *Roe* for the foreseeable future. *Roe* had been around for only nineteen years when *Casey* was decided and was teetering on the edge of being overruled. If *Roe* worked a great injustice, it was an injustice with a relatively short shelf life but for *Casey*'s extension of it into the indefinite future. *Plessy v. Ferguson,* for example, ruled for seventy years before *Brown v. Board of Education* disapproved it.[95] Unless one thinks that the creation of a constitutional right to abortion *virtually compelled* its subsequent reaffirmation in *Casey*—an implausible position, in that the Court has never adhered to a strict notion of stare decisis (not to mention that it would suggest that *Plessy* virtually compelled its own reaffirmation in *Brown*)—it is impossible to blame *Roe* for abortion law after 1992. That blame rests with *Casey.* As noted at the outset of this Article, the long-term impact of *Casey* is likely to outdistance that of *Roe.* It is probable, I fear, that *Casey* will remain the governing constitutional rule for the lifetimes of everybody who is alive and old enough to read these words at or about the time they are published.

94 In addition to valuing its own power and prestige more highly than human lives and preserving the Constitution, the *Casey* Court's vision of what gives it "legitimacy" is also deeply flawed. The *legitimacy* of the Court in our constitutional system surely does not rest on its ability to garner public respect or to fashion astute political compromises, but on its ability to render objective legal judgment faithfully to the Constitution. *See* Paulsen, *supra* note 78, at 229–30.

95 Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled in pertinent part by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

There is a reason for this. The Court consciously intended that its reaffirmation of *Roe* be regarded as permanent, and that such permanence be viewed as indispensable to the rule of law.[96] Indeed, it is fair to say that attaining this goal, as much as justifying the Court's reaffirmation of *Roe*, is what the opinion labors so mightily to accomplish. *Casey* stakes the claim that adherence to stare decisis, at least with respect to dramatic, "watershed" constitutional rulings of the Court, is of fundamental importance to the rule of law. In the end, the Court's reasoning is unpersuasive at any of a number of levels (which I will discuss presently). But the claimed need to adhere to the doctrine of stare decisis has such a strong superficial appeal to lawyers steeped in the common-law method of lawmaking by judicial precedent, and has such a strong intuitive appeal to large segments of the general public, that it is difficult to disentangle and set straight. The Court's reliance on stare decisis, as a doctrine of supposed judicial restraint, creates a far more powerful image of adherence to the legal task than did *Roe*'s transparently legislative opinion creating constitutional abortion rights out of thin air and thin precedents. This makes *Casey* more insidious than *Roe*. Unlike *Roe*, the Court's opinion in *Casey* is likely to be *effective* in entrenching abortion rights.

And that is precisely what the Court set out to accomplish. As set forth above in Part I, the "criteria" Part of this Article, the more that an erroneous, harmful decision is broadly cast and prospective in its application, or adopts a sweeping principle concerning the decision's own generative consequences for the future, the more that the decision's evil is magnified and the more it should be regarded as an atrocity.[97]

Abraham Lincoln understood this danger. His 1858 senatorial candidacy, and his 1860 presidential candidacy, were largely driven by the notion that *Dred Scott* must not be allowed to be *repeated, confirmed,* or *extended.* He was prepared to accept the judgment of the Court, however incredibly flawed, as the judgment of the Court for that case, and even as stating the governing legal rule for future cases, unless overruled. But he was determined not to see a "Second *Dred Scott* decision" extending the right to own slaves into the free states as well, and thought it important to resist *Dred Scott* so that it not become a *precedent.*[98]

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96 *Casey*, 505 U.S. at 864–69.

97 *See supra* notes 28–30 and accompanying text.

98 Hear Lincoln on the force of precedent, first in his June 1857 speech on the *Dred Scott* case, and then in parts of his campaign debates with Stephen Douglas:

> Judicial decisions have two uses—first, to absolutely determine the case decided, and secondly, to indicate to the public how other similar cases will be

decided when they arise. For the latter use, they are called "precedents" and "authorities."

We believe, as much as Judge Douglas, (perhaps more) in obedience to, and respect for the judicial department of government. We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the court that made it, has often over-ruled its own decisions, and we shall do what we can to have it to overrule this. We offer no *resistance* to it.

Judicial decisions are of greater or less authority as precedents, according to circumstances. That this should be so, accords both with common sense, and the customary understanding of the legal profession.

If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.

But when, as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country . . . .

ABRAHAM LINCOLN, Speech on Dred Scott Decision at Springfield, Illinois (June 26, 1857), *in* 1 ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858: SPEECHES, LETTERS, AND MISCELLANEOUS WRITINGS, THE LINCOLN-DOUGLAS DEBATES 390, 392–93 (Library of America ed. 1989). On the potential for the Court to render a "Second *Dred Scott*" decision, see ABRAHAM LINCOLN, "House Divided" Speech at Springfield, Illinois (June 16, 1858), *in* 1 ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858: SPEECHES, LETTERS, AND MISCELLANEOUS WRITINGS, THE LINCOLN-DOUGLAS DEBATES 426, 432 (Library of America ed. 1989) ("We shall *lie down* pleasantly dreaming that the people of *Missouri* are on the verge of making their State *free*; and we shall *awake* to the *reality*, instead, that the *Supreme* Court has made *Illinois* a *slave* State. To meet and overthrow the power of that dynasty, is the work now before all those who would prevent that consummation."); ABRAHAM LINCOLN, Portion of Speech at Edwardsville, Illinois (Sept. 11, 1858), *in* 1 ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858: SPEECHES, LETTERS, AND MISCELLANEOUS WRITINGS, THE LINCOLN-DOUGLAS DEBATES 580, 584 (Library of America ed. 1989) ("I have stated what cannot be gainsayed—that the grounds upon which this decision is made are equally applicable to the Free States as to the Free Territories, and that the peculiar reasons put forth by Judge Douglas for endorsing this decision, commit him in advance to the next decision, and to all other decisions emanating from the same source."); ABRAHAM LINCOLN, Fifth Lincoln-Douglas Debate at Galesburg, Illinois (Oct. 7, 1858), *in* 1 ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858: SPEECHES, LETTERS, AND MISCELLANEOUS WRITINGS, THE LINCOLN-DOUGLAS DEBATES 701, 715 (Library of America ed. 1989) ("[I]t is

Casey makes *Roe* a precedent. Rather than a discredited doctrine, repudiated by subsequent cases, *Roe* became, at a critical point ten years ago, a repeatedly reaffirmed decision. *Casey* is, with respect to *Roe,* Lincoln's feared "Second *Dred Scott.*" Its principal effect is to entrench and legitimize *Roe.* If one grants that *Roe* was wrong as an original matter, as even some of the Justices in the *Casey* majority appear to do, *Casey*'s principal effect is deliberate entrenchment of what had been (prior to *Casey* itself) the most egregious error in our nation's constitutional history. As Lincoln well knew, the repeated reaffirmation of a doctrine *does* tend to entrench it. As a practical matter, *Casey* may have made, and certainly appears to have been intended to make, the constitutional right to abortion *irreversible* by our legal system—even though a majority of the Court apparently believed that *Roe* was wrongly decided.

That is outrageous enough. But the Court not only deliberately entrenched an egregious error, it adopted a Grand Theory of Egregious Error Entrenchment—a full-blown (if still incoherent) doctrine of (selective) stare decisis, occupying nearly sixteen full pages of the *United States Reports,* and possessing a superficial veneer of lawfulness. It is that veneer of lawfulness, and the substance beneath it, that makes the decision in *Casey* so pernicious. The stare decisis doctrine articulated by the Court in *Casey* is not very defensible on its own terms. The doctrine is transparently manipulable. The obligation to adhere to precedent is not absolute. None of the factors is absolute. In fact, it is fair to say that, under *Casey,* the present doctrine of stare decisis does not require adherence to the present doctrine of stare decisis, but fails on each and every factor the Court articulated—workability, reliance, stability, consistency, and even the objective of preserving public impressions of judicial integrity.[99] In practical terms, the doctrine means that precedent is followed, except when it isn't.[100]

It was utterly spurious for the Court in *Casey* to have claimed that the doctrine of stare decisis compelled its decision, for it plainly did

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my opinion that the Dred Scott decision, as it is, never would have been made in its present form if the party that made it had not been sustained previously by the elections. My own opinion is, that the new Dred Scott decision, deciding against the right of the people of the States to exclude slavery, will never be made, if that party is not sustained by the elections."). *See also* ABRAHAM LINCOLN, First Inaugural Address (Mar. 4, 1861), *in* 2 ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859–1865: SPEECHES, LETTERS, MISCELLANEOUS WRITINGS, PRESIDENTIAL MESSAGES AND PROCLAMATIONS 215, 220–21 (Library of America ed. 1989).

99 For a point-by-point doctrinal critique of *Casey*'s doctrine of stare decisis, see Paulsen, *supra* note 10, at 1543–67.

100 Paulsen, *supra* note 28, at 678–81.

not, even on the terms the Court claimed for the doctrine.[101] It is not, and cannot be, the true ground for the decision in the case—the Court *overruled* two previous cases and reconfigured its trimester framework extensively in concept (though not with much effect on the substance of the abortion right created by *Roe*). How could the Court have overruled two other abortion decisions if stare decisis were seriously understood to require adherence to precedent "whether or not mistaken"?[102] The Court's stated reliance on an elaborate doctrine of stare decisis for the result in *Casey* appears to be a disingenuous "cover"—and not a very good one—for a decision reached on the grounds of perceived political expediency and the desire to enhance the Court's political power. The stare decisis rationale in *Casey* is, thus, not only incoherent and unprincipled. In the circumstances of the case, in light of what the majority actually did, to invoke a grand doctrine of stare decisis as a ground of decision was outright dishonest.[103]

A third thing *Casey* adds to *Roe*—beyond knowledge and willfulness; beyond deliberate entrenchment of error and a dishonest rationale to justify it—is the distressingly *authoritarian* nature of the decision. To be sure, for fifty years (at least), the Court has asserted its supremacy over all other branches of government with regard to constitutional interpretation.[104] But rarely, if ever, has the Court been so brazen in its assertions that disagreement with its constitutional interpretations is not merely ineffective, but *illegitimate*. *Casey*'s rhetoric seeks not only to legitimize the Court's adherence to *Roe*, but to *de*-legitimize any continued opposition to *Roe* or *to the Court's au-*

101 If stare decisis compelled *Casey*, then it would have compelled reaffirmation of *Plessy* in *Brown*. *See* Paulsen & Rosen, *supra* note 28, at 1297–3000 (satirizing *Casey* by changing the subject matter, and a relatively very few words from the passages concerning stare decisis).

102 *Casey*, 505 U.S. at 857. The two cases overruled in *Casey* were *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), and *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). *Casey*, 505 U.S. at 882.

103 To the extent the doctrine of stare decisis is taken seriously, it is also *unconstitutional*. Consider what *Casey* claims: a decision must (sometimes) be adhered to "whether or not mistaken." *Casey*, 505 U.S. at 857. This contradicts the first principle of constitutional supremacy, the foundation of *Marbury v. Madison* and all of judicial review. If a prior judicial decision is contrary to the Constitution, a subsequent interpreter must adhere to the Constitution, not to the faithless judicial misinterpretation. *See also* Paulsen, *supra* note 10, at 1548–49 n.38 (collecting authorities and arguments for the proposition that stare decisis, if taken seriously, is affirmatively unconstitutional under the reasoning of *Federalist No. 78* and *Marbury v. Madison*).

104 I have challenged this assertion at length in earlier writing. *See* sources cited *supra* note 87.

thority generally. Casey not only makes *Roe* a precedent. *Casey* itself is a precedent about precedents and about the duty of all others *to comply* and *to submit. Casey* proclaims that the time for resisting *Roe* has ended. The Court has "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[105] Then, in a passage that has already gained a fair degree of familiarity and notoriety as the "tested by following" passage, the Court writes as follows:

> Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence. An extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing.[106]

Putting aside the Court's self-praise of its own virtue, this is a not-very-subtle authoritarian lesson. Those who disapprove of the Court's "results when viewed outside of constitutional terms"—the implication being that disliking results is understandable but that the Constitution impersonally commands this result—but who, as all good and virtuous citizens should, in the Court's view, "nevertheless struggle to accept it" are to be commended and protected, because they have been "tested" and found loyal to the Court. They have accepted what they believe is wrong "because they respect the rule of law"—a concept the Court finds identical with its own decisions. The Court proceeds in the next paragraph of the opinion to refer to "the character of a Nation of people who aspire to live according to the rule of law" as being "not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals."[107] The Court in *Casey* wants us to know just how important it is to love Big Brother.

It is difficult to imagine a more un-democratic sentiment, one less faithful to the Constitution or the principles of the American Revolution, and one less consonant with the idea of the "rule of law." For the *Casey* Court, the "rule of law" is obedience—obeisance—to the

105 *Casey*, 505 U.S. at 867.

106 *Id.* at 867–68.

107 *Id.* at 868.

authoritarian rule of the Court. Liberty finds no refuge in a jurisprudence of authoritarianism.

Casey's stare decisis reasoning is dreadful on three levels. First, it reaffirmed and perpetuated *Roe*. Second, it adopted a Grand Theory of Error Entrenchment that is awful in its own right. And third, it declared opposition to its entrenchment of *Roe*, to its grand theory, or to the Court, as opposition to the rule of law itself.

As set forth in Part I, the tendency of a decision to generate additional evil is yet a further strike against it.[108] A discussion of how *Casey* has magnified and multiplied *Roe*'s wrong would not be complete without a brief look at the Supreme Court's most recent abortion decision, *Stenberg v. Carhart*.[109] *Carhart* is the "partial-birth" abortion case, decided by the Court by vote of 5-4, in 2000. A "partial-birth" abortion (otherwise known as "dilation and extraction" abortion, or "D&X") is accomplished by inducing labor late in the second or third trimester of pregnancy, delivering the entire infant except the head, crushing the infant's head with a scissors, vacuuming the infant's brains out of the head, collapsing the skull, and then delivering the rest of the child's remains. The majority described the procedure with a cold, clinical, bloodless candor that is positively stomach-churning.[110]

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108 *Casey*'s theory of stare decisis, notwithstanding its incoherence, may well have had the consequence of generating further harm in the form of leading to the reaffirmation of *other* judicial errors in unrelated areas of constitutional law. (And, of course, *Casey*'s doctrine of precedent and judicial power could generate other errors in the future.) To be sure, it is difficult to say how far *Casey* truly has caused the Court to rely on stare decisis in other cases, precisely because the doctrine is manipulable. But the doctrine still retains a great capacity to mislead and confuse, and the Court has, in the decade since *Casey*, reaffirmed at least one other dubious precedent of major substantive consequence—*Miranda v. Arizona*—largely on the basis of principles of stare decisis. *See* Dickerson v. United States, 530 U.S. 428 (2000), *reaff'g* Miranda v. Arizona, 384 U.S. 436 (1966).

109 530 U.S. 914 (2000).

110 Citing medical evidence, the Court stated,

> If the fetus presents head first (a vertex presentation), the doctor collapses the skull; and the doctor then extracts the entire fetus through the cervix. If the fetus presents feet first (a breech presentation), the doctor pulls the fetal body through the cervix, collapses the skull, and extracts the fetus through the cervix.

Id. at 927. The Court also quoted the American College of Obstetricians and Gynecologist's description of the "breech-conversion intact D&E" as

> including the following steps: "1. deliberate dilation of the cervix, usually over a sequence of days; 2. instrumental conversion of the fetus to a footling breech; 3. breech extraction of the body excepting the head; and 4. partial

The majority in *Carhart* held that the Constitution forbids a state from enacting laws prohibiting this type of abortion procedure. The Court, in an opinion by Justice Stephen Breyer, relied on *Casey* and stare decisis as its starting point. There was no need to consider the question of whether the Constitution confers a right to abortion, notwithstanding the conceded importance of the issue, and the stakes to both sides; that question, the *Carhart* majority said, was already resolved. The only question was how to apply the Court's abortion jurisprudence to the procedure in question.[111] The majority concluded that Nebraska's prohibition of this procedure "violates the Federal Constitution, as interpreted in *Planned Parenthood of Southeastern Pa. v. Casey* . . . ."[112] relying to a significant degree on the absence of an exception to this prohibition, even as to viable fetuses, for the sake of the mother's "health" as that term was defined in *Doe v. Bolton.*[113] The five Justices in the *Carhart* majority did not blink. They looked the horror of this killing procedure straight in the eye and explained that their past abortion decisions should be extended to create a constitutional right to commit what is essentially infanticide as well.

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evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus."

Id. at 928.

111 *See id.* at 920–21. The Court stated,

> We again consider the right to an abortion. We understand the controversial nature of the problem. Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child; they recoil at the thought of a law that would permit it. Other millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering. Taking account of these virtually irreconcilable points of view, aware that constitutional law must govern a society whose different members sincerely hold directly opposing views, and considering the matter in light of the Constitution's guarantees of fundamental individual liberty, this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right tc choose. Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992). We shall not revisit those legal principles. Rather, we apply them to the circumstances of this case.

112 *Id.* at 929–30.

113 As noted above, the *Doe* "health" exception requirement essentially means that abortion can be had for any reason through all nine months of pregnancy. *See supra* note 4.

III. Conclusion and Judgment

All of this makes *Casey* the worst constitutional decision of the Supreme Court in our nation's history. The decision wrongly holds that the Constitution of the United States enshrines as a nearly absolute right the prerogative of a woman to abort her unborn child for essentially any reason. There is no basis—absolutely no basis—in the language of the Constitution for such a holding. It is thus a fundamental betrayal of the Court's responsibility of faithfulness to that document. The decision produces—perpetuates—a great substantive evil, sanctioning an ongoing American genocide of amazing proportions. The decision does all this knowingly and intentionally. This was no accidental or negligent misreading of the Constitution or misfiring of analysis. The Court that committed *Casey* committed it with full knowledge of what it was doing. Some of the Justices, it can be said with reasonable certainty, did it while simultaneously believing that *Roe* was wrongly decided and with a full understanding as well that *Roe*'s result produced exactly the described substantive evil of the killing of millions of embryonic human lives. But they did it anyway, out of concern for the Court's own image and power, lest the Court be embarrassed, and individuals on it perhaps disparaged, for departing from a precedent that a substantial portion of elite opinion cherished and continues to cherish. They did it, that is, out of vanity and self-interest. And they did it on the basis of a doctrine of stare decisis that is deceptively appealing, but in the end became, in the *Casey* Court's hands, an arbitrary and dishonest tool of enhanced judicial power, designed to entrench the Court's specific judgment, its future judgments, and (if successful) to de-legitimize resistance to the Court's judgments, even when—especially when—it has departed grotesquely from its constitutional duties and powers.

If I am right about how wrong *Casey* is—and I recognize that a great many others, indeed probably a clear majority of the constitutional law professoriate in America today, *approve* of the decision, and of the right to abortion—it tells us some sobering things about the state of the human condition at the turn of the twenty-first century. In fact, if I am right about how wrong *Casey* is, the very fact that so very many otherwise intelligent and (one would like to believe) morally aware people would vehemently disagree with everything I have written here, tells us some sobering things. It tells us that, much as we would like to believe that human beings have become more morally conscious, more sensitive to injustice and intolerant of clear evil, it remains the case that we often fail to recognize it in our midst, and that we are often morally blinded by self-interest.

The magnitude of the atrocity validated in the Court's abortion decisions, and our acquiescence in it, invites moral comparison with other such situations in American and world history. The most obvious American parallel is slavery, America's original sin. The moral wrong of human slavery was always self-evident, yet the mental gymnastics of justification and equivocation proved equal to the task of defending the continued existence of this evil institution for decade after decade, and led to civil war. Self-interest was able to obscure moral sense; and quiescence and passivity (and perhaps fear and hypocrisy) were able to silence most criticism, for a long time. Did Americans at the time, north and south, truly not *understand* that African slaves were human beings, or that the institution of slavery was morally indefensible? I doubt it. Rather, they were able to look the other way or to rationalize their acceptance of injustice. Those few who did not tended to be regarded as cranks or kooks or intolerant extremists—moralizing troublemakers unwilling to live and let live, to respect the social arrangements of others.

So too today. I doubt that more than a small percentage of Americans, if pressed on the point, would dispute the fact that abortion is the killing of human life in its prenatal state and that, outside of a few truly extreme situations, such killing is morally unjustifiable. But nobody really wants to be pressed on the point. (And most regard the "pressers" as kooks, cranks, and intolerant extremists—persons flouting social convention and unwilling to live and let live and respect the choices of others.) We are willing to shut the problem out of view, and to suppress moral evaluation in the name of the supposedly more important American virtue of tolerance of the views and actions of others. And so we rationalize. Some rationalize the permissibility of abortion in the name of uncertainty as to the moral entitlement of the human fetus not to be killed, the necessity to respect difference of opinion in this regard, and the rhetoric of "choice." Some rationalize the rationalizations, though they are not themselves persuaded by them, in the name of some larger good of decorum or social order. Like the slaveholders of the past, we sometimes know the wrongness of our institutions but go along anyway, and we sometimes shut our eyes to, or deny, the wrongness of our institutions as a way to be able to go along. As Martin Luther King, Jr. wrote in his *Letter from Birmingham Jail*: "We will have to repent in this generation not merely for the hateful words and actions of the bad people but for the appalling silence of the good people."[114]

114 MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, *in* WHY WE CAN'T WAIT 86 (1963).

Is it possible for America in the twenty-first century to tolerate, and embrace in its constitutional law, the gravest of moral evils and not recognize it as such? Surely we would recognize a *true* horrible evil, if there really were one, wouldn't we?

I am not so sure. There is a good basis for questioning the confidence we as a society seem to have in the steady improvement of our collective moral discernment. For all our advances in technology, in sophistication, in *ability* to learn, recognize and understand, we are kidding ourselves if we think that our level of moral understanding has advanced significantly. We are probably no different from the German people in the 1930s and 1940s.

Is this too harsh a comparison? The "Nazi" card is a heavy rhetorical trump to play. The Holocaust analogy is in some ways obvious—if abortion is the killing of forty-five million babies by deeming them non-persons, it *is* like the Nazi Holocaust inflicted on Jews and others in the mid-twentieth century. But in other ways the analogy is so dramatic and mortifying that it is a conversation-stopper. It is horrible to think of Americans who tolerate abortion as complicit in the equivalent of the Nazi Holocaust. And so that ends the discussion. For it just *cannot be* a valid analogy.

Perhaps what is most horrifying of all is the analogy's effect on our ability to condemn, from a safe distance, what my beloved teacher, the late Robert M. Cover, once called "the screaming silence of the German people"[115] without realizing that we might have behaved, and might be behaving, no differently. The magnitude of the evil of abortion forces the comparison.

As noted before, the Supreme Court did not invent abortion. There might be plenty of abortion, perhaps authorized or permitted by state laws, even without *Roe* and *Casey*. Moreover, the Court is, arguably, not directly responsible for the wrong moral choices of individuals that the Court's decisions *permit*. Finally, the Court is not responsible—*cannot* be responsible, consistent with its constitutional role—for correcting all injustices, even grave ones. But the Court *is* responsible for the injustices that it inflicts on society that are *not* consistent with, but in fact betray, its constitutional responsibilities. To the extent that the Court has invalidated essentially all legal restriction of abortion, it has authorized private violence on a scale, and of a kind, that unavoidably evokes the memories of American slavery and of the Nazi Holocaust. And by cloaking that authorization in the

115 Robert M. Cover, Book Review, 68 COLUM. L. REV. 1003, 1006 (1968) (reviewing RICHARD HILDRETH, ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION (1856)).

forms of the law—in the name of the Supreme Law of the Land—the Court has taught the American people that such private violence is a *right* and, by clear implication, that it is *alright.* Go ahead. The Constitution is on your side. This is among your most cherished constitutional freedoms. Nobody ought to oppose you in your action. We have said so.

The decision in *Casey*, reaffirming *Roe* and itself reaffirmed and extended in *Carhart*, in my view exposes the Supreme Court, as currently constituted, as a lawless, rogue institution capable of the most monstrous of injustices in the name of law, with a smugness and arrogance worthy of the worst totalitarian dictatorships of all time. The Court, as it stands today, has, with its abortion decisions, forfeited its legal and moral legitimacy as an institution. It has forfeited its claimed authority to speak for the Constitution. It has forfeited its entitlement to have its decisions respected, and followed, by the other branches of government, by the states, and by the People. The enthusiasm of liberal intelligentsia for the Court's abortion decisions, the sycophancy of the law professorate, of the legal profession, and of our elected officials, and the docility of the American people with respect to our lawless, authoritarian Court rivals the pliancy of the most cowardly, servile peoples toward ruinous, brutal, anti-democratic regimes throughout world history. We suffer people to commit despicable acts of private violence and we welcome—some of us revere—a regime that destroys popular government for the sake of perverted, Orwellian notions of "liberty." After a twentieth century that saw some of the worst barbarisms and atrocities ever committed by humankind, at a time when humankind supposedly had progressed to more enlightened states, we still have not learned. The lesson of the Holocaust—"Never Forget"—is lost. We fail to recognize the amazing capacity of human beings to commit unthinkable, barbaric evil, and of others to tolerate it. We remember and are aghast at the atrocities of others, committed in the past, or in distant lands today. But we do not even recognize the similar atrocities that we ourselves commit, and tolerate, today.