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**GREAT EXPECTATIONS AND SOBERING
TRUTHS:
PARTIAL-BIRTH ABORTION AND THE
COMMERCE CLAUSE**

**REMARKS TO THE UNIVERSITY OF ST. THOMAS JOURNAL
OF LAW & PUBLIC POLICY**

MINNEAPOLIS, MINNESOTA

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It must be one of the lingering mysteries in our politics, or perhaps one of the oddities that seize people on the issue of abortion, that the hopes and fears of people seem so untethered from their experience. During the past summer, both sides in the culture war were converging in their preparations for the oral argument in November on the federal bill on partial-birth abortion. And to listen to both sides, one might think that there was an imminent possibility that *Roe v. Wade* would actually be overturned. Of course, for the partisans of abortion-rights, there is always an interest in claiming that we are standing at the very edge of *Roe* being overturned—if Republicans are elected and if Democrats don't control either the White House or the Senate. But even many pro-lifers, who by now should be seasoned with experience, genuinely seemed to believe that the Court could use *Gonzales v. Carhart*¹ and *Gonzales v. Planned Parenthood Federation*² as the occasion to do something dramatic and overturn *Roe*. In my own sober reckoning, it is quite unlikely that the Court will do something that portentous and astounding. But an outcome that dramatic may not strictly be necessary, and it may not even be prudent quite yet for the pro-life side. The decisive question, on which everything else hangs, is whether the Court will manage to “flip” the decision it handed down six years ago on partial-birth abortion. In that ill-starred case, *Stenberg v. Carhart*, Sandra Day

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1. See *Gonzales v. Carhart*, 413 F.3d 791 (8th Cir. 2005), rev'd, 550 U.S. --, 127 S.Ct. 1610 (2007).

2. See *Gonzales v. Planned Parenthood*, 435 F.3d 1163 (9th Cir. 2006).

O'Connor provided the fifth, deciding vote, and the Court overturned the law on partial-birth abortion in Nebraska (and by inference, in 30 other States).³ With O'Connor replaced now by Roberts or Alito, it seems a likely bet that the Court would overturn that judgment as it applied to the *laws of a State*. Whether it would reach the same result for a bill on partial-birth abortion emanating from the federal government is a notably different question, affected with far more complications for the conservative judges. And that is why I've asked my good friend David Forte to join me in this program: I'd like to offer an argument on that matter of the federal reach, and Professor Forte is one of the best people to turn that puzzle about and test the seams of the argument.

If Roberts and Alito help simply to overturn that decision on partial-birth abortion, my own judgment is that the regime of *Roe* would have come to an end, regardless of whether the Court takes that particular moment to declare that notable, vexing decision overruled. For what the Court would be saying then, in effect is, "We are now in business to consider seriously, and to sustain, many plausible measures that may impose real restrictions on abortion." With that move, one could virtually count on a stream, nay a flood of measures, enacted within the States, coming seriatim to the Court. They might be measures to restrict abortion after the point of viability, but even earlier, restrictions with the first evidence of a beating heart. There might be requirements that abortionists use a method of abortion more likely to yield the child alive. Or provisions that no abortion shall be performed on a child likely to be afflicted with disabilities, such as Down syndrome—in other words, the kinds of discriminations that are now barred under federal laws that do not deal with abortion. With each step, the restrictions would command the support of about seventy to eighty percent of the country, including many people who describe themselves as pro-choice. And step by step, the public would get used to these cardinal notions: that the freedom to order abortions, like any other kind of freedom, may be subject to many plausible restrictions; that it is legitimate for legislatures to enact those restrictions; and that it is in fact possible for ordinary folk, with ordinary language, to deliberate together again about the grounds on which abortions could be said to be justified or unjustified.

This seems to me the path far more likely to be taken by men of the judicial temperament of John Roberts and Samuel Alito. And for reasons that many pro-life leaders have begun to appreciate, it may in fact be the preferred path, the more prudent path to take. To overturn *Roe* in one decisive stroke runs the risk of setting off a panic overnight among people who have been led to believe that they would be dispossessed, at once, of

3. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

rights they have come to regard as fundamental. We have had the spectacle of late of even people with college degrees apparently seized with the notion that the overruling of *Roe* would make abortion illegal, overnight, throughout the land. Even the *New York Times* has fallen into improvident headlines suggesting that the judges might “outlaw” abortion. In point of fact, a decision to overrule *Roe* would merely return the matter to the arena of legislatures, at the State and federal levels. States like New York, New Jersey, California, and Hawaii are likely to have the most “liberal” or unrestricted rights of abortion. That assurance carries only a minor discount: even the legislatures in these states may not establish a “right to abortion” as thoroughly radical in its sweep, and so utterly wanting in restrictions, as the law that has been shaped now by the Court, as it has drawn out the implications of *Roe*.

In my own judgment, *Roe* deserves to be overruled in time. And that is not because the decision cannot be reduced, modulated, or scaled back to something approaching the state of the law before *Roe*, for that it surely can. That ruling would have to be struck down eventually because of the vast corruption it has worked on all parts of our law—from the freedom of speech (with restrictions bearing on pro-life demonstrators that bear on no one else), to rules governing injunctions, to the premises that now come into play in treating newborns with disabilities, as well as the aged near the ends of their lives. What is engaged here is what Justice O’Connor, in her earlier moments on the Court, referred to as the great “ad hoc nullification” machine: There was no part of our law, no part settled for years in precedents, or in the jurisprudence of the various judges, that could not be unsettled, or entirely overturned, when it threatened even the least countering, or the least challenge, to the premises of *Roe*.⁴

If my reading is accurate, we could be at the “beginning of the end” of the regime of *Roe* if the Court could merely overturn *Stenberg v. Carhart* this year.⁵ And yet, that will not be such an easy thing to do, even with the presence of John Roberts and Samuel Alito. The federal bill on partial-birth abortion had been passed twice by Republican Congresses and twice vetoed by President Clinton. It was passed for a third time in 2003 and this time it was signed by a Republican President. But in the aftermath of *Stenberg*, the drafters of the federal bill understood that if they were going to try their hand at a federal bill for a third time, they had to find some way to get

4. Actually, it was Justice Scalia who added “machine” to make the “ad hoc nullification machine,” in *Madsen v. Women’s Health Center*, 512 U.S. 753, 785 (1994). He added the term in recalling Justice O’Connor’s lament that “no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.” *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O’Connor, J., dissenting).

5. *Stenberg*, 530 U.S. 914.

around the objections of the Court in *Stenberg*. Which is to say, they had to find some way of mollifying Sandra Day O'Connor. That was hardly likely. But the brute fact of the matter was that they had to make some gesture at making this bill different from the bill struck down by the Court in *Stenberg*—while hoping that, in the meantime, Justice O'Connor would depart the scene. The bill would be challenged, of course, at once. The same doctors or abortionists who claimed to be “chilled” in their liberties by the bill in Nebraska would claim to be no less chilled by the federal bill. They would come into the same federal court, before the same, friendly federal judge, and receive precisely the same result: an injunction restraining the enforcement of the Act. And indeed, Dr. Leroy Carhart, of *Stenberg*, came before Judge Richard Kopf once again, and he was blessed once again with the same judgment.⁶ But it would take a couple of years for these cases to work through the federal courts, and by that time, as the old saying went, “the king may die, or the horse may talk.” Happily for the supporters of the bill, Justice O'Connor’s service, as a one-person wrecking crew in the law—smashing, at every turn, the impulse to find a principled ground of judgment, lasting beyond the case and the day at hand—all of that came mercifully to an end in the summer of 2005.

Hence the new situation, or almost new. For the changes in the federal bill could hardly be more than cosmetic. There could be the artful placing of a nuance or a tweaking here or there, but all of the bills on partial-birth abortion have been aimed at proscribing this grisly procedure, by now widely known: late in the pregnancy, near the time of birth, the unborn child is turned about, as though in a breech birth, partially removed from the birth canal. That is to say, the legs of the child are dangling free; the body may be out as far as the navel. The surgeon then presses a sharp instrument into the base of the skull of the child; the cranial contents are removed—or, one might say, the brains are sucked out. With the head collapsed, the child can then be removed, so to speak, intact. The drafters of the federal bill sought to counter the allegations that there was any vagueness in the definition of what they were forbidding.⁷ They sought to draw a difference from the bill struck down in Nebraska by suggesting that the bill in Nebraska could reach the cases of fetuses entirely in the womb. In contrast, as the argument ran, the federal bill would be concentrated, ever more clearly, on abortions at the point when labor is induced and birthing had begun, and when a substantial part of the child’s body was out of the birth canal. The Act addressed then cases in which “the entire fetal head” or “any part of the fetal trunk past the navel is outside the body of the

6. See *Carhart v. Ashcroft*, 287 F. Supp. 2d 1015 (D. Neb. 2003).

7. See Congressional Findings, Pub. L. No. 108-105, §2, 2003 (codified at 18 U.S.C. § 1531).

mother.”⁸

True enough, as lawyers talk. But here the pretenses in a good cause run beyond the common sense of the matter: The supporters of the bill may not be clear on all the sections, but they have never doubted that the bill, in the new form, works toward the same end, of banning partial-birth abortions and planting the precedents for legislating further restrictions on abortion. And if the supporters of the bill are so serene in their own surety, why should they be the least astonished that the federal judges quickly grasp the same sense of things?: namely, that nothing of substance has changed.

As the managers of the bill sought to make some gesture, at least, of getting around the objections of the Court, their main effort was concentrated on these two lines of argument in *Stenberg*: First, they would deal with that charge of “vagueness” in what they were proscribing.⁹ There was nothing, of course, vague about partial-birth abortions, and surgeons did not suffer the least doubt as to when they were doing them. But as Dr. Carhart earnestly pleaded, his daily work involved the dismembering of a child (err, rather, fetus) in the womb, and as he did that, he drew its severed parts through the birth canal. He could be accused then of killing a “living fetus” emerging from the womb. In other words “Dismemberment R Us”—killing live fetuses is exactly what he did for a living. And there was one of those truths that dare not speak its name: Most of the country recoiled from this horrendous procedure when it was described; but in point of fact is was not more horrendous than the butchering that was commonly taking place with the dismembering of live babies, without anesthetic, in the run of the mill practice of abortion, going on every day.

So much for vagueness. The second line of argument dealt with the “health exception.” The Court, and especially Justice O’Connor, insisted that there cannot be a restriction of abortion without such a “health exception” for the pregnant woman.¹⁰ There had been ample testimony in the hearings that the procedure of partial-birth abortion was never “indicated” for the purpose of guarding the health of the pregnant woman. But since *Roe* and its companion case of *Doe v. Bolton*, the Court had defined “health” in a broad, sweeping way, to encompass “mental health.”¹¹ Which is to say, an abortion could be ordered up if a doctor certified that his patient would suffer distress in not having one. No evidence had been presented to Congress or a court, showing any cases in which a partial-birth abortion had been necessary for the health of the mother, or had even been safer as a procedure. Nevertheless Justice Breyer was willing to strike

8. *Id.*

9. *Id.*

10. *Stenberg*, 530 U.S. at 947 (O’Connor, J., concurring).

11. *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

down the bill simply because it was *conceivable* that this procedure, in certain instances, might indeed be safer: no parts of the fetus would be left behind in the body, where they could cause infections.¹² But by this reckoning, the safer procedure by far would be the “live-birth abortion,” as practiced in the Christ Hospital, in Oak Lawn, Illinois and other reputable places listed as hospitals: a child is simply delivered whole and put aside, in another room, to die.¹³ Justice Scalia aptly rejoined, in the *Stenberg* case, that grafting a “health exception” on to this kind of bill was virtually a requirement that extinguished the bill itself:

[T]he Court must know (as most state legislatures banning this procedure have concluded) that demanding a “health exception”—which requires the abortionist to assure himself that, in his expert medical judgment, this method is, in the case at hand, marginally safer than others (how can one prove the contrary beyond a reasonable doubt?)—is to give live-birth abortion free rein.¹⁴

There had been ample testimony in the congressional hearings, from fetologists, and from doctors who performed abortions that no affliction faced by a pregnant woman would be remedied by a partial-birth abortion. Congress sought to revisit those hearings in order to meet the concerns of the Court. Congress then set forth the “findings” or the premises behind its bill, and the managers noted aptly that, in precedents well understood the “Congress is not bound to accept the same factual findings that the Supreme Court was bound to accept in *Stenberg*.”¹⁵ With its own reading then of the record, and its own assessment of the evidence, the Congress declared:

[T]here exists substantial record evidence upon which Congress has reached its conclusion that a ban on partial-birth abortion is not required to contain a “health” exception, because the facts indicate that a partial-birth abortion is never necessary to preserve the health of a woman, [that it] poses serious risks to a woman’s health, and lies outside the standard of medical care.¹⁶

But then, not so fast, or not so easily done. By the time the bill on partial-birth abortion was presented for the third time, the opposition had managed to line up its own array of professionals, ready to affirm the safety, the value, the redeeming goodness of partial-birth abortions. And so, there were statements duly offered in opposition to the Act from the American College of Obstetricians and Gynecologists. ACOG was joined

12. See *Stenberg*, 530 U.S. at 916.

13. The procedure is recalled in HADLEY ARKES, *NATURAL RIGHTS AND THE RIGHT TO CHOOSE* 243, 250-52 (CAMBRIDGE UNIV. PRESS 2002).

14. *Stenberg*, 530 U.S. at 953 (Scalia, J., dissenting).

15. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(8), 117 Stat. 1202.

16. *Id.* at § 2(13).

also by a cluster of other groups with an evident political coloration, allied to governments or to “advocacy groups”: the American Public Health Association, the California Medical Association, the Association of Reproductive Health Professionals. Arrayed against them were only two associations, the Association of American Physicians & Surgeons, and a group of doctors brought together, distinctly, in their support for the Act, the Physicians’ Ad Hoc Coalition for Truth.¹⁷ All of this was taking place, of course, in a setting in which scholars had famously testified falsely in briefs before the courts for the sake of advancing the cause of abortion rights.¹⁸ The spokesmen for the associations conveyed the “opinions” or positions of their groups, but in the case of the American College of Obstetricians and Gynecologists (ACOG), there had been no attempt to canvass the members. There had been no attempt, that is, to draw upon the experience and professional judgment of the people who were gathered in this association.¹⁹ And yet the claim of the association to speak, to offer a judgment, depended entirely on the authority of that professional knowledge attained by its members.

The hard fact of the matter was that every claim made by the proponents of the surgery was effectively rebutted and countered by those professors of obstetric gynecology on the other side. The estimable Judge Richard Conway Casey, in the district court in New York, offered a scrupulous review of the testimonies, and he acknowledged that the defenders of partial-birth abortion were never actually able to bring forth evidence to show that the procedure was necessary because it was demonstrably safer than any alternative form of abortion. As Casey summed up his judgment, in language that was not at all shaded, many of the “purported reasons” offered in support of the medical necessity of the procedure were simply not credible; “rather they [were] theoretical or false.”²⁰ In no case, as Casey said, could the professionals opposing the bill “point to a specific patient or actual circumstances in which D&X [partial-birth abortion, a.k.a., Dilation and Extraction] was necessary to protect a woman’s health.”²¹

And yet the problem, as even Judge Casey understood, was that the Supreme Court had altered the frame of the question: What was engaged now was something regarded as the “fundamental right” of a woman to choose abortion, and against that deep right a legislature had to bear a

17. The list is given by Judge Casey in *Nat’l Abortion Fed’n v. Ashcroft*, 330 F. Supp. 2d 436, 449-52 (S.D.N.Y. 2004).

18. See John Finnis, *Shameless Acts in Colorado: Abuse of Scholarship in Constitutional Cases*, 7 ACADEMIC QUESTIONS 10 (1994).

19. That point was made notably by Judge Casey in his opinion in *Nat’l Abortion Fed’n*, 330 F. Supp. 2d at 449-450.

20. *Id.* at 480.

21. *Id.*

heavy burden of proof. If there was any serious doubt in the medical profession, if it were plausible to believe that this grisly surgery might actually be safer for some women, somewhere, then it was no longer good enough to hold that, in almost all cases, the surgery offered no advantages for the safety and health of women. Judge Casey's sympathies were clear, but he had to be governed by the precedent set down in the *Stenberg* case. In his own judgment, the D&X procedure was "a gruesome, brutal, barbaric and uncivilized medical procedure." But the problem was that, as long as there were doctors testifying in support of that procedure, it would have to be said that there is a "significant body of medical opinion" contending that the procedure might have advantages in safety.²² And under those conditions the decision on the abortion would fall to the pregnant woman, to gauge her own risks.

Judge Casey was constrained by the guidelines of the Court that ruled above him, but he made use of his powers of trial in order to put on the public record one of the most detailed accounts of the facts that describe the procedure of partial-birth abortion and revealed the character of the people who would make this kind of killing their office work. And that is what made all the more telling at the end of the day the reproach he would cast upon Congress: The Congress had sought to counter the Supreme Court by pointing out that a legislative body had far wider, more flexible powers for the finding of facts than a court could command, and especially an appellate court, which had to accept the facts established below. And yet, when it came to the matter of countering the Supreme Court on partial-birth abortion, Casey noted that "the Congress did not hold extensive hearings, nor did it carefully consider the evidence before arriving at its findings."²³ After the decision in *Stenberg*, Congress held only two hearings, with three physicians testifying for about three hours. In the eight years that Congress had held hearings on this measure, the judge noted that it had held, in the aggregate, less than 24 hours of hearings, with the testimony of seven physicians. In contrast, Casey, in this one trial, heard many more witnesses over many more days: "This Court heard more evidence during its trial than Congress heard over the span of eight years."²⁴ The experience belied in an embarrassing way the claims of Congress. For contrary to the claims made for the Congress, it appeared that a judicial officer was able to expend more time and patience in establishing the facts. And what Casey established, with deep regret, is that the Congress simply asserted its facts while mainly ignoring the evidence on the other side. Even the expert witnesses on the side of the government were obliged to acknowledge that there was no consensus in the medical community that the D&X procedure was never

22. *Id.*

23. *Id.* at 482.

24. *Id.*

medically necessary, and that it may never be the safest procedure for some women in some circumstances.²⁵ The procedure was barbaric, but Casey took as controlling the holding in the *Stenberg* case that a “health exception” would be utterly necessary in the presence of a “significant body of medical opinion” contending that the procedure might have advantages in safety. Even with a proper respect for Congress, then, as a finder of facts, Casey was compelled to find the federal bill unconstitutional. It was a state of affairs, he noted, in which his judgment on the constitutionality of the bill would be controlled by the willingness of doctors to offer up opinions, or speculations, in favor of this brutal procedure. It was now clear that those medical opinions were not unalloyed medical judgments, for they were evidently tinged by political persuasion. And so, while Judge Casey was prepared to render his judicial duty, he allowed himself the observation that “medical science and ideology are no more happy companions than *Roe* and its progeny have shown law and ideology to be.”²⁶

At the very beginning of his fastidious opinion—indeed in his very first footnote—Judge Casey took note, in effect, of the dog that was not barking: The opponents of the bill “do not allege that Congress exceeded its authority under the Commerce Clause” of the Constitution.²⁷ But therein must surely lie a story—and the ingredient that promises to complicate this case gravely for the conservative judges. That a State may bar private clinics and doctors from performing surgeries it regards as wrongful is a matter that comes presumptively within the traditional reach of State and local governments under the “police powers”; the traditional authority of the polis to act for the “health, welfare, and morals” of the people within its reach. That reach may extend to private businesses, private clubs, private persons. But for the federal government, a government supposedly of enumerated powers, it has not been so clear as to how that government can reach directly to private clinics, private clubs, private businesses. Since the New Deal that matter has been finessed, though never satisfactorily explained or justified, by using the Commerce Clause. And so, as the argument was cast, the federal government had to be armed with the authority to impose unions on private businesses, for if a business were closed down by a strike, that would interfere with the flow of commerce and ripple outward to affect the livelihoods of many other people in the country. To which Justice James McReynolds responded by wondering why the same reasoning would not justify a power to bar the strikes

25. *Id.* at 489 (citing the reluctant, but circumscribed concession, made by Dr. Watson Bowes in testifying on the side of the government in support of the bill).

26. *Id.* at 493.

27. *Id.* at 439 n.1.

altogether, or to impose lower wages for the sake of keeping a company from going out of business.²⁸

Conservatives bite their lips when they invoke the Commerce Clause, but for the most part they too have had to absorb the precedents that had set in place since the New Deal. And so, when the bill on partial-birth was introduced in 1995, the drafters followed the conventions long established and directed the bill to “any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus.”²⁹ But what seemed to go unnoticed for a long while was that, in the same year, the conservatives on the Court started taking some modest, first steps in placing limits on the expansion of the federal government under the Commerce Clause. In *U.S. v. Lopez*, a bare majority on the Court overturned the federal bill that barred the possession of guns near schools.³⁰ The liberals on the Court were willing to “reason” along with the reigning fictions: in this case, that violence near the schools could impair the learning and performance of students, and render them less able to take their part in a national and global economy. But as Chief Justice Rehnquist observed, the performance of children in the schools was demonstrably likely to be affected by the breakup of their families. Did that mean that the federal government could take over the laws on marriage and the family in the States, or perhaps even take over the local schools altogether?³¹

Perhaps it was a trick-of-the-eye, but as the pro-lifers concentrated on the bill on partial-birth abortion, they seemed to forget that it was still cast in terms of the Commerce Clause. The bill, in that form, could now pose serious problems in commanding the uniform support of the conservative judges. With O’Connor replaced by Samuel Alito, there is now a potential majority in support of the bill on partial-birth abortion—if the question of the Commerce Clause does not prove unsettling. And the loss of one vote would be the loss of the case. I had raised this issue in a meeting of lawyers in Washington a couple of summers ago, and one friend, who had clerked for Justice Scalia, reminded us of how limited the holding in the *Lopez* case had been. As I had heard Scalia myself say, in a meeting at the Court, the conservative judges had sought to disturb no more law than was strictly necessary. For the most part the Court still held on to the broad conception of the Commerce Clause that had come out of the New Deal, and as long as

28. McReynold’s opinion came in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). *Laughlin Steel* and its history in the use of the Commerce Clause is reviewed in HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* 119-58 (Princeton Univ. Press 1994) (*see especially* pp. 143-48).

29. Congressional Findings, Pub. L. No. 108-105, §2, 2003 (codified at 18 U.S.C. § 1531).

30. *United States v. Lopez*, 514 U.S. 549 (1995).

31. *Id.*

the bill involved anything arguably economic or commercial, Rehnquist and Scalia were willing to sustain it. From the perspective of the conservative judges, the problem with the bill on “gun free school zones” is that it purported to regulate the use of guns near schools. If the federal government could do that, it could just as well displace any local government in any of its characteristic functions. The reach of the federal government under the Commerce Clause would be vast, but it has to be confined to “commerce” or to activities that were “economic” in character. In other words, for Scalia and Rehnquist, it would have been an entirely different matter if the federal government had sought to bar the *sale* of guns near schools. That, apparently, they would have felt obliged to sustain.

Scalia’s former clerk pointed out then that the bill on partial-birth abortion would pose no problem for *most* of the conservatives on the Court as long as there was a transaction—as long as someone paid for the service of performing the abortion. This account would be satisfactory for most of the Justices, but not for all—most notably, not for Clarence Thomas. When his conservative colleagues started their cautious scaling down of the Commerce Clause in the *Lopez* case, Thomas thought the change so modest, so pusillanimous, as to be nearly unserious. He wrote an extended, concurring opinion, arguing for a return to the wholesome discipline and constraints that came along with the Commerce Clause as it was traditionally understood, before the New Deal dissolved any plausible sense of boundaries.³² One telling sign of the doctrines endorsed by his conservative colleagues is that Rehnquist and Scalia still accepted the holding in the legendary case of *Wickard v. Filburn*: Roscoe Filburn held back, for the consumption of his own family, some of the wheat produced on his farm. Justice Rehnquist’s mentor, Robert Jackson, “explained” that Filburn’s own private holdings here could be minuscule, but if other farmers were permitted to do the same thing, there would be a vast volume of production outside the regulations of the federal government, throwing the regulatory scheme into disarray.³³ Twenty-three years later the same reasoning was deployed to sustain the Civil Rights Act of 1964, and it played out in this way: If black people suffered discrimination in public inns and restaurants, fewer blacks would travel, inns and restaurants would do far less business, and in that vast depression of commerce, there would be far fewer orders for meat, silverware, linens, as the effects cascaded.³⁴ I suggested once that the same reasoning could be translated in this way: That singular, private abortion may be yours alone, but when it is aggregated with 1.3 million others, every year, it contributes to a trend that has had the most depressing effect on the interstate sales in baby food,

32. *Id.* at 584 (Thomas, J., concurring).

33. *See Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).

34. *See Katzenbach v. McClung*, 379 U.S. 294 (1964).

bassinettes, college tuitions, to say nothing of cohorts of taxpayers coming on line every year to sustain the system of Social Security.

Thomas, to his credit, would no longer take seriously these bizarre constructions, which everyone now accepted, and virtually no one believed. He was alone, though, even among the conservative jurists. And so he would come now under serious, self-generated pressure to show his readers in the profession that he did indeed respect the doctrine of jurisprudence he had put forth—that he was prepared to honor that doctrine even when it prevented him from reaching a decision in the case at hand that he devoutly wished to reach. But for the pro-life cause, the loss of this vote would be momentous: If the federal bill on partial-birth abortion were struck down, no one would expend the political capital to try, for a fourth time, to revise that bill and present it for hearings yet again. That particular measure by itself may not be overly important, but the dramatic loss in the Court could be widely demoralizing for the pro-life side.

For the liberal wing of the Court, the argument over the Commerce Clause made no difference. If the conservatives raised a problem about the Commerce Clause, the liberals would find no strain in affirming that the Clause could of course reach even private hospitals and clinics. They would simply point out that the federal bill suffered from the same vagueness, or the same want of a “health exception,” that made the same law in Nebraska unconstitutional. It was curious that the people who came into the federal courts to oppose the federal bill never even bothered to raise the issue of the Commerce Clause. Evidently, they did not think they had to reach for every tool in sight for the sake of invalidating this Act. Judge Kopf and the other federal judges could apparently be counted on to do the right thing, and so there was no need for the Left to join the project of the Right in scaling back the Commerce Clause.

And so with that sense of the problem, I teamed up with John Eastman, who had clerked for Clarence Thomas—we teamed up to write a brief in the current case, a brief that would support Thomas’s view of the Commerce Clause but offer a different ground in the Constitution to support the bill on partial-birth abortion. There I drew on an argument I had made in framing the Born-Alive Infants’ Protection Act in 2001-2002. That was the bill that sought to protect the child who *survived* an abortion.³⁵ The argument I offered then (and in my book) was an argument grounded in the axioms of the Constitution; and here I had done a slight reworking of an argument offered by Chief Justice Marshall during the founding period of American jurisprudence. Marshall observed, in *Cohens v. Virginia*, that “the judicial power of every well constituted government must be co-extensive with the

35. That experience in the framing and managing of the bill is recounted in ARKES, *supra* note 13, at 234-94.

legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.”³⁶ To put it another way, any issue that arose under the Constitution and laws of the United States had to come within the jurisdiction of the federal courts. And yet, even jurists are persistently taken by surprise by the corollary of that axiom: Any issue that comes within the competence of the judicial branch must come, presumptively at least, within the reach of the legislative and executive branches as well. The argument drew on the logic of the separation of powers, and as it was offered as one of the “findings” for our bill it could be compressed in this way: If the Supreme Court can articulate new rights under the Constitution—if it can find, in the Fourteenth Amendment, the right to an abortion—then the legislative branch must be able to act on the same clause in the Constitution in vindicating those same rights. And in filling them out, it may also mark their limits. (The Congress could plausibly say, for example, that whatever was established in *Roe*, a right to abortion could never be taken to mean a freedom to kill a child at the very point of birth.) What cannot be tenable, under the logic of this Constitution, is that the Court can articulate new rights—and then assign to itself a monopoly of the legislative power in shaping those rights.

I still tend to think that this is the cleanest and clearest argument to make, though it should not surprise anyone to discover, this late in the seasons of experience, that this argument will not summon the support of all lawyers, and even conservative lawyers may find refined reasons for holding back. Those of us who gather under the auspices of the Federalist Society usually show a more cultivated sensitivity to issues of federalism, and so we are inclined to raise some questions even more searching and probing. One challenge that I’ve been able to sketch out from assorted musings may take this form: that we have a telling asymmetry here. The Court, in *Roe*, licensed private persons to order lethal surgeries, for wholly private reasons, but it did that by striking down, or blocking out, the laws of the States. But in the bill on partial-birth abortion, and other bills, the Congress tries to cope with the problem by seeking to protect directly the victims of some of these abortions. The Congress might take the path of trying rather to restore the authority of the States in restricting abortion, though that kind of move seems to be a more direct challenge to the authority of the Court. We might get around that awkwardness, in my approach, by having the Congress say, in effect, that whatever the Court meant in *Roe*, it could not have meant to create a license to kill, or kill in this manner especially cruel, a child at the very point of birth, with most of its body dangling outside the birth canal. And of course, if Congress can

36. *Cohen v. Virginia*, 19 U.S. (6 Wheat.) 264, 384 (1821). The argument offered here, drawing on Marshall, was set forth in ARKES, *supra* note 13, at 200–05.

aply say such a thing, that move would implicitly authorize the States to act in the same way. Congress, in that manner, would take the lead in restoring the authority of the States in small increments.

Still, a constitutional awkwardness may seem to remain: It is one thing for the federal courts to strike at the acts of States (the Fourteenth Amendment is, after all, directed at States, acting through the law); but it is quite another thing for the Congress to reach directly to the acts of private persons carrying out abortions (apart, that is, from the implausible fictions of the Commerce Clause). As far as I can see, the explanation would compress itself in this way—if you will indulge me as I try to offer what I think can be said on this head right now: We have long recognized that, while the Fourteenth Amendment was directed to States, the laws enacted by Congress could be rendered toothless if the laws could not reach those private persons who may be in collusion with the local authorities: the local authorities hold back, and allow someone to be lynched by a private mob, or a suspect to be beaten up and have a confession extracted by private detectives, not operating under legal restraints.³⁷ The early Civil Rights Acts addressed those “persons who go in disguise on the highway” for the sake of intimidating people from the exercise of their civil rights. By that was meant, of course, the Ku Klux Klan. As I say, there was often a connection to people bearing the authority of the State, and yet that connection was not always there. At some point there has to be a recognition that the protections of federal law can be rendered nugatory if the local authorities simply back away from their responsibilities and *leave people unprotected against private thugs*.

In the case of abortion, the governments in the States had been offering the protections of the law to innocent beings, against private persons, taking their lives for wholly private reasons. Those private reasons involved one variant or another of self-interest, and of course, in the motives of at work, that self-interest could readily encompass mere convenience. But now, with the new regime on abortion, the private assaults on private persons would not be authorized by the laws of the States, but by a branch of the federal government. The federal courts, in knocking out the protections of the law, virtually authorized private persons to use lethal violence for private ends, with the result of destroying 1.3 to 1.5 million human beings each year.

From the very beginning, the federal government was understood to

37. Compare *Screws v. United States*, 325 U.S. 91 (1945) (finding Georgia police officers, although violating state and federal law, acted “under color of law” because the violation arose out of the authority granted to them by state law), with *United States v. Williams*, 341 U.S. 70 (1951) (the court reversed the conviction of the same private detective and his employees who participated in beating the suspects on the charge of conspiracy to violate the civil rights of the victims).

have, as part of its mission, protecting the private freedoms of people in the separate States who were at the mercy of local majorities.³⁸ But if that is the case, it surely must be appropriate to raise the question: If the federal government can protect persons from having their lives endangered, their liberties wrongly restricted, by governments in the States, would the federal government be wholly without the authority to protect persons when their lives are endangered by an agency or branch of the federal government itself? But if that is the case, we would be backing into an asymmetry that strikes me as even more deeply untenable, and that is: the federal courts may block out the protections of the law, authorize private violence for wholly private reasons, and the other branches of the government would have no means of protecting, directly, the lives of the people who are endangered—and actually destroyed—in that way. We would be faced then with this point, which strikes me as utterly implausible: that the federal courts can reach, with their decisions, to create licenses for private persons to destroy human lives—that the federal courts, in effect, can reach private persons with their decisions in the way that the Congress cannot. But we know that the move to the Constitution was a move away from a confederacy to a real national government, and the defining mark of a real government was the authority to act directly on persons rather than acting solely upon the States. And yet now we would seem to be backing into this paradox: that the Supreme Court has become the truly supreme legislative chamber in the country, *for it may act more directly to enfranchise persons with lethal permissions, while the Congress can do nothing directly to offset that destruction of personal rights and human lives.* Now that may seem to some people a plausible construction under the formulas of federalism. But if so, I would suggest, that the formulas of federalism would have become detached in that way from the deep principles marking the telos or the purpose of the Constitution. And in that way, the formulas of federalism may have distracted some of our most learned lawyers from their most sober judgments.

But even while we try to sort out this matter of the alternative to the Commerce Clause, Justice Thomas has already given us, I think, some signs of how he is likely to manage the problem, with even less exertion of forensic genius. Just last year, in *Gonzales v. Raich*, the Court dealt with a

38. In the discussion that took place between Roger Sherman and James Madison at the Constitutional Convention, Sherman insisted that the defects of the Union could be treated primarily by strengthening the hand of Congress in a few discrete areas. Madison acknowledged these concerns but was also concerned about the plight of the local minority who would be at the mercy of the local majority. Madison asserted that the problems that the convention needed to address should be expanded to include “the necessity of providing more effectually for the security of private rights, and the steady dispensation of Justice.” James Madison, Notes for June 6, 1787, in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 133-34 (Max Farrand, ed., Yale Univ. Press 1937) (1911).

law in California that permitted the use of marijuana for medical purposes.³⁹ One of the plaintiffs, Diane Monson, cultivated her own marijuana, and so the case might have borne a resemblance to *Wickard v. Filburn*. But the Court was still committed to that case from the New Deal, and with that reasoning, the licensing of people to grow their own marijuana threatened, quite clearly, to undermine a genuinely national policy, which made the regulation of “controlled substances” a matter reserved distinctly to the *federal* authority. For Justice Thomas, it was a no-brainer: the case fell quite clearly outside the reach of the Commerce Clause in the traditional scheme he had sought to restate anew. He distilled the matter in two sentences:

Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.⁴⁰

Fast forward now seven months, to January 2006, and we find a majority of the Court willing to have the federal government recede in its claim to exclusive authority in the regulation of drugs, when it came to assisted suicide. The State of Oregon sought to permit doctors to administer drugs to facilitate the death of a patient.⁴¹ The question was just what counted as a “legitimate medical purpose” for the use of drugs under federal law. But whether it was federal law in the 21st century or the laws of Athens in the 5th century B.C., the rightful end of medicine, or the use of drugs, had never encompassed the end of securing the death of a patient. Justice Thomas would not conceal his own reading that his colleagues had staged a “hasty retreat” from the understanding of federal authority that they had affirmed in the case from California. In that earlier case Thomas had been willing to see the federal authority over drugs scaled back “in a manner consistent with the principles of federalism and our constitutional structure.” But now, he said, that is “water over the dam.”⁴² The Court had been willing to sustain a comprehensive federal authority, and now it made a vast concession under the guise of interpreting a statute. And so he dissented. But what would that dissent mean? If his colleagues were willing to break from their professed principles on the Commerce Clause—if they were willing to suspend or distinguish those principles in order to sustain a policy that they found appealing—they should not be surprised if they now licensed others to do the same thing. Why, then, should he hold

39. *Gonzales v. Raich*, 545 U.S. 1 (2005).

40. *Id.* at 57-58 (Thomas, J. dissenting).

41. *See Gonzales v. Oregon*, 546 U.S. 243, 126 S. Ct. 904 (2006).

42. *Id.* at 941 (Thomas, J., dissenting).

to his reading of the Commerce Clause when that reading summoned no support yet from his other colleagues, and when it would merely convert him, in this case, into an ally of the Left in sustaining a policy of assisted suicide? And in the case before the Court now, he would be recruited mainly for the sake of sinking the law on partial-birth abortion. In other words, *he would not play the role of a useful idiot*. He would not be available as a fifth vote to be recruited by the liberal bloc to put over their own projects, while they offered no serious possibility of acting as allies to install his jurisprudence on the Commerce Clause.

If Thomas were willing to join a majority containing Scalia, Kennedy, Roberts, and Alito, the federal bill could be sustained; the decision in *Stenberg* could be flipped; and that, I think, would signal the end of the regime of *Roe* even if the Court does not pronounce that “super-duper precedent” overruled. And yet, a Court containing jurists of the temperament of Roberts and Alito may choose to decide in this case in a manner even more delicate and restrained, even more in keeping with the discipline of judging that conservatives keep touting. At the same time, this approach even more delicate would not require Clarence Thomas to reach any decision yet on the Commerce Clause. The key to the problem may go back to that other dog that was not barking, the dog that remained silent during the oral argument six years ago in the *Stenberg* case.

I was at the Court that day for the oral argument, and I was listening to see if certain themes might be sounded by Justice O’Connor; themes that might suggest a rather narrow, conservative ground for resolving the case. The aim of the law was to protect children from a hideous procedure, puncturing their skulls, at the point of birth. Dr. Carhart professed to fear that the law could be used against him for abortions performed much earlier. But on the face of things, it made no sense to presume that the people who framed the law, or those who enforced it, would forego the advantages of concentrating on cases of viable fetuses near the point of birth. Instead of accusing the authorities in Nebraska of acting in such an incontinent way, the truly conservative reflex would have been to withhold judgment and *wait for a real case*: Let us gauge the intentions and understanding of the authorities by waiting to see just how in fact they choose to enforce the law. O’Connor could have written for a conservative majority in declining to decide the case and strike down the law in a facial challenge. And the result would have been that 31 laws on partial-birth abortion would have been firmly established, where they could be built upon in the States.

But in the course of the oral argument, that concern was never sounded by Justice O’Connor, and I took that as the telling sign of how that case would come out. In declining to take that conservative path, O’Connor and her colleagues were, in effect, rendering an advisory opinion, and they were

abandoning the rule contained in their own precedent of *United States v. Salerno*.⁴³ The Court had acknowledged in that case that “facial challenges” must be accepted only rarely, because they involve the risk of exceeding those boundaries that confine the power of the judges. The understanding in that case was that a law may be struck down on its face only when there was no conceivable or imaginable set of circumstances in which the law could be constitutional. But with cases on abortion, the situation has now been inverted: The Court seems to begin with the premise that any law restricting abortion is presumptively invalid, and the legislation could be declared unconstitutional on its face if there were any *conceivable* circumstances in which it *might be unconstitutional*.

It may be a refined point, but it touches the way in which the law of the Constitution has been reframed on the issue of abortion. It may also show the way in which the issue of abortion has altered the scheme of the Constitution itself. This argument was raised earnestly, in the federal court of appeals for the Second Circuit, by the Chief Judge, John Mercer Walker, Jr., an experienced lawyer, the most sober of jurists, who was not given to bantering or falling into hyperbole.⁴⁴ And what Walker was suggesting was that the Supreme Court was itself violating the Constitution as it took a rather casual view of facial challenges. For the Court was then evading that critical discipline marked in the Constitution—that the judicial Power “shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties,” along with certain “Controversies” that the Court would be authorized to hear. That is an allocation of power containing its built-in restraints and limitations. It has been understood from the beginning that the Supreme Court is not to render “advisory” opinions. It is to wait until a real case emerges, with two real litigants, bearing real injuries, and offering a rather concrete demonstration of the way a law framed in impersonal, abstract terms, may actually bear on real persons. If the judges were not waiting for a case to arise—if they were simply invited to pronounce on any law in the abstract, whenever it was passed—the Court would be functioning, in effect, as a third branch of the legislature. Or it would be acting as a kind of second Executive, charged with administering the law, but with this notable exception: that its members are not elected and bear no direct responsibility to the people who will be expected to obey. But in the meantime, as the judges stay their hands and wait for a case, power is left in other hands, the hands of men and women who are indeed elected in a government based on the consent of the governed.

43. *United States v. Salerno*, 481 U.S. 739 (1987).

44. *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, 292-95 (2d Cir. 2006) (Walker, C.J. concurring) (Mr. Gonzales had replaced Mr. Ashcroft in the case by the time it had reached the Court of Appeals).

Over the years we have seen this critical limitation eroded as the Court has become less demanding in testing questions about the “standing” of people to sue—i.e., whether the litigants are faced with real or substantial injuries, which give them a claim to the attention of the Court. That limitation has been eroded also by a willingness to accept “class action suits,” with larger ensembles of putative victims, claiming to share the same general grievance. All of that may simply push the Court further and further away from gauging the application of the law as it produces discernible injuries for discrete persons.

In Judge Walker’s reading, the Court has now marked off an enclave in which the traditional restraints on the courts will be dissolved. When it comes to cases on abortion, the courts will no longer be governed by the rules that govern all other domains of the law when it comes to facial challenges and the freedom of the judges to strike down laws without bothering to wait for a real case. As Walker reported, seven circuits in the federal courts have concluded that *Salerno* does not govern the facial challenges posed to regulations of abortion. Judge Frank Easterbrook, in the Seventh Circuit expressed the perplexity of the judges, in trying to discern the law they are expected to follow:

When the Justices themselves disregard rather than overrule a decision—as the majority did in *Stenberg*, and the plurality did in *Casey*—they put courts of appeals in a pickle. We cannot follow *Salerno* without departing from the approach taken in both *Stenberg* and *Casey*; yet we cannot disregard *Salerno* without departing from the principle that only an express overruling relieves an inferior court of the duty to follow decisions on the books.⁴⁵

What has happened to that vaunted “respect for precedent,” of which we heard so much in the hearings on Roberts and Alito? The fact of the matter, as Judge Walker observed, was that even if Congress barred that grisly procedure known as partial-birth abortion, there would be a safe, alternative procedure available for any woman who wanted an abortion.⁴⁶ And yet, under the *Stenberg* case, the lower courts were obliged to strike down any bill on partial-birth abortion out of a *speculation* that the procedure might, just *might* be useful to someone. This was a needless perplexity, which sprung from the fact that the elementary restraints of the Constitution were not being honored by the Supreme Court.

Where would the corrective lie? In the past, it was assumed that other branches may correct a branch that has strayed from its constitutional powers. The Congress could pass a measure explicitly stating the rule contained in the *Salerno* case and setting down that rule as a guide to the

45. *A Woman’s Choice – E. Side Women’s Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003).

46. *See Nat’l Abortion Fed’n*, 437 F.3d at 292 (Walker, C.J. concurring).

Court in taking facial challenges. But the judges themselves could decide simply to bring their cases on abortion into alignment with the rest of their jurisprudence. They could merely bring those cases under same rule, in *Salerno*, that guides the Court in all other cases. And that may indeed be the move that the Court makes now in the cases on partial-birth abortion. For my own part, I would prefer that the judges flip the decision in *Stenberg*. Apart from the outcome I regard as more defensible, that kind of decision would be altogether clearer. But Chief Judge Walker now sets in place a path that may be even more seductive to judges of a conservative temper; judges who would prefer to give examples of uncommon restraint, in moving uncommonly slowly, with decisions even more excruciatingly limited. A Court headed by Chief Justice Roberts may simply install the rule from the *Salerno* case, and send all of the pending cases back to be tried again. Under that rule, the law on partial-birth abortion may be harder to strike down. But the judges in the lower courts, ever resourceful, ever willing to contrive new arguments, will find other reasons for striking it down. The matter will come back again, and again. All of that quite suits the temper of conservative judges, who may be disinclined to take any step that is not strictly necessary.

And after taking in the oral argument, my own hunch is that things may indeed be heading in that direction, for the narrowest of rulings. The person we are all watching is Mr. Justice Kennedy. He had been in dissent in the *Stenberg* case, with an impassioned argument against this ghastly form of surgery, and ready to sustain the bills on partial-birth abortion in the States. But now he has replaced Justice O'Connor as the swing judge, and in that position certain other temptations come into play. And so the oral argument found him seeming to agonize now with wonder, trying to reckon just how likely were the cases in which a partial-birth abortion could conceivably be safer for the pregnant woman: Might it be the procedure indicated for pregnant women in cases where the uterine wall might be "compromised by cancer or by some forms of preeclampsia [a condition marked by an alarming rise in blood pressure] and it's very thin, there's a risk of being punctured."⁴⁷ In those cases there might more of a danger in introducing instruments into the body of the woman. But as the oral argument drew on, Kennedy seemed to be reckoning the odds as too slight to override the judgment of Congress. And yet there was a path out of the problem for him. As the argument drew on, Kennedy was quite drawn by the suggestion of the Solicitor General, Paul Clement, that the Court refuse to strike down the law on a facial challenge, but that it hold out the possibility of a "preenforcement challenge": A pregnant woman with cancer, say,

47. Transcript of Oral Argument at 7, *Gonzales v. Planned Parenthood*, 126 S. Ct. 2901 (No. 05-1382).

could then challenge the law, and the issue could be delivered then from the haze of guessing and conjecture. The condition of the woman could be described, in exacting terms, and the judges could gauge then, in a concrete case, whether it would be justified to withhold the partial-birth abortion.

To what, then, was all of this pointing? What I would wish to see, of course, is an opinion written by the Chief Justice setting forth, in resounding terms, the deep justification for the law on partial-birth abortion. An opinion of that kind could convey to the judges in the lower courts that their superiors, on the highest court, want this case, on this law, to be resolved and *settled*. But I don't think that is what we are likely to see. My own guess is that the Chief will invite Justice Kennedy to write the opinion, refusing to strike down the law on its face, and sending it back to await a real case in controversy, where the claim is made that a woman truly needs this surgery. That would be a hard claim to make, and it may take quite a long while. In the meantime, the federal law on partial-birth abortion will have been sustained. It will be part of the law of the land, and on that basis, it may have its effect. Doctors now doing the procedure—and there are many—would be cautioned to back away. But the means will be found, and a test will be contrived. The opponents of the law have been rather casual in the past in bringing forth women who have claimed to have had partial-birth abortions, only to have their accounts challenged by doctors who perform abortions.⁴⁸ The people testing the law are not likely to try their luck again in the courtroom of Judge Casey in New York, for he has shown himself to be quite rigorous in testing severely the claims of evidence brought before him. Other federal judges have been notably looser in their testing of the evidence. Or altogether credulous in their willingness to accept any account offered them by Planned Parenthood and the defenders of abortion. One way or another, a case will be sent up to the Supreme Court, and matters will hinge then on the willingness of Justice Kennedy and his colleagues to be as tough-minded as Judge Casey in testing the evidence. Or Kennedy may simply take the case as an occasion to take the final step and strike down the law—and with that stroke, making himself the new, preeminent hero of liberal America, the fitting successor to Harry Blackmun and Sandra Day O'Connor as the premier jurist in the nation.

But my own guess is that there will be no such wait for a case testing the medical necessity of the procedure. If the argument over the “health exception” did not work, Judge Kopf in Nebraska would suffer no hesitation in returning to the argument that these bills on partial-birth abortion are just fatally “vague”—that doctors may find themselves backing

48. For an account of one such confrontation, before the Committee on the Judiciary in the House of Representatives, see ARKES, *supra* note 13, at 127–30.

into this procedure without quite intending it, and without being quite aware that they are crossing a line. If the argument over “vagueness” does not work, the judges will try something else (perhaps even invoking the clause on “Letters of Marque and Reprisal”). The important point is to keep the bill tied up, to make it clear to those pro-lifers animated by religious zeal that the federal courts will simply not brook any of this. The class that forms now the federal judiciary has come to see itself as forming the regime. If they are adamant that they will have none of this, they will get their way.

We can see how John Roberts, and perhaps Samuel Alito, would be drawn, as conservative judges, to the narrowest ruling. They act, in that style, as good conservative jurists. But in that path, I think, lies debility; it promises only that the pro-life cause will be ground down. And with the Republican majority ousted in the Congress, the main engine in the pro-life cause will be gone. But to mark in this way the strains of the conservative judges is to come to the edge of a melancholy truth that may finally speak its name: By their temperament and style, by the doctrines that have shaped their character—in short, by the way they are constituted, the conservative judges are incapable of dealing with the political crisis shaped by *Roe*. The persistent failures and frustrations have been virtually foretold by the decision, confirmed many times by the directors of the Republican party, to leave entirely with the judges the burden of undoing that political crisis. The closest parallel to *Roe* was the decision in the *Dred Scott* case, and it is worth reminding ourselves that Lincoln did not seek to cope with that crisis in the regime by waiting for retirements from the Court.⁴⁹ He forced the argument in public; he led a national movement to counter and overturn that decision; and he moved with his Congress to roll back that decision in an act of ordinary legislation. In striking contrast, Karl Rove spoke to a gathering of Republican apparatchiks in Florida in January 2006, on the anniversary of George W. Bush’s inaugurations. He moved in a masterful way across the full range of issues, but when it came to those vexing moral questions of abortion and same-sex marriage, he thought it sufficient to note that the Administration was seeking to appoint the right judges. Judges like John Roberts and Samuel Alito. At every turn the Administration confirmed what Mr. Bush intimated a long while ago: that he would not lead on these questions. And indeed he has not. He has been willing to sign the bills that a Republican Congress passes on the life issues, but he will not help or do any of the heavy lifting, or even the lightest lifting. (He did nothing, for example, to argue for the Born-Alive Infants’ Protection Act, or to help with the promotion of that bill in Congress.) The President would speak on the life issues mainly in pro-life enclaves of Catholics and

49. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

Evangelicals. And the media have treated his speeches there as talk not meant for anyone else to hear, certainly not worth reporting to a broader public. By this stage of our experience, it is time to speak a plain and painful truth: The disappointments unending in the courts cannot be laid entirely on the conservative judges, for they do what conservative judges ever do. They try to work under a stern discipline, with decisions precisely and narrowly framed, without deciding more than they need to decide, without grasping more power than they need, and leaving power in hands other than their own. The heartbreak of the courts is a reflection, rather, of a political class that has backed away from the work distinctly its own. It has left that work to be done by someone else, in decisions strung out, in painful increments, never reaching a resolution. And as we keep meeting in these summoning occasions, under the banner of the Federalist Society, as we keep celebrating judges who work with a constitutional discipline, we will find ourselves lamenting together for years a problem that does not seem to yield to our pleadings and even to the appointment of our people to the courts. For we may simply be dealing with the wreckage left to us after the political leadership has backed away from its own responsibilities and handed over, to conservative judges, a burden they have shown themselves to be quite incapable of bearing.