

# **Abortion and a Constitutional Showdown**

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## **INTRODUCTION**

America's political landscape is changing and things are now happening in our legislative process that would have been unthinkable in the past. For example, some states are passing legislation that allows for the production, possession, use, and sale of marijuana despite the fact that, under federal law, it is a Schedule One illegal drug.

Another example is the "sanctuary cities and states" phenomenon. Just a few years ago, no one would have predicted that the mayors of major cities and the governors of our most populous states would not only be refusing to enforce the nation's immigration laws, but also threatening to put federal law enforcement officers in jail if they tried to enforce them. Nor would anybody have suggested that candidates would be running for political office on an "open borders" platform and demanding that people in the country illegally be given free college tuition, free healthcare, government housing, a guaranteed minimum income, and the right to vote in American elections. The "conventional wisdom" would have been that neither the government nor the public would tolerate these things. Of course, "conventional wisdom" would have been wrong.

The question is: does the emergence of this willingness by political leaders to openly defy the federal government provide a blueprint for protecting the unborn?

## **GROUND ZERO**

Since the *Roe vs. Wade* decision was issued in January of 1973, two groups of justices have dominated the Supreme Court.

The first group consists of people who are hardcore pro-abortion and live in fear that the decision is doomed if it is ever reconsidered. Their concern is reinforced when law review articles written by even pro-abortion legal experts concede that the rationale upon which *Roe* was built is Constitutionally flawed, with former Supreme Court Justice, Sandra Day O'Connor, saying that *Roe* is “*clearly on a collision course with itself.*”

Technology is also a major concern for abortion apologists. In 1973, the argument that the unborn are living human beings may have been easy to dismiss as just a religious-based opinion; but since then scientific breakthroughs like ultrasound and advances in fetal medicine have transformed it into an observable and undeniable fact. The reality is, one hundred percent of the technology that has come along since *Roe* has reinforced the pro-life position and that is a pattern the abortion lobby is powerless to reverse.

The second group of justices are those who might pay lip service to the pro-life position but seem comfortable with the concept that the right to abortion is “settled law” and not open to reconsideration.

What these two groups have in common is that neither one wants to see a case brought before the Court that would force them to re-examine the convoluted rationalization for legal abortion that was manufactured in *Roe*. As a result, both have spent almost 50 years carefully hopscotching around any case that would put them in that position and only rendering decisions that allow for a bare minimum level of abortion regulation.

## **DISPELLING A MISCONCEPTION**

It is common for people to think that overturning *Roe* would end legalized abortion, but that is not necessarily so. The issue is not overturning *Roe*, but *how* it is overturned. On one hand, the Constitution acknowledges a right-to-life for all “persons” so if the Supreme Court were to reverse *Roe* on the basis that the unborn are persons, their Constitutional right-to-life would be affirmed and the battle would be over. This was

even stated by the author of *Roe*, Harry Blackmun, who wrote into the decision that if the personhood of the unborn is ever established the right to abortion collapses.

On the other hand, the Court could overturn *Roe* by ruling that the Constitution is silent on abortion and that it is, therefore, a “states’ rights” matter. And over the years, most legal experts on both sides of the issue have consistently predicted that if the Court overturns *Roe* this is the basis upon which it will do so.

For the Supreme Court, this would be the easy way out of the abortion quagmire. It would allow them to dodge the “*can-a-living-human-being-be-a-nonperson*” argument altogether, and by punting the issue back to the states they get to wash their hands of it.

The problem is, such a ruling would be as Constitutionally flawed as *Roe* itself. As pointed out above, science and technology have permanently settled the question of whether the unborn are human beings and only through mind-numbing stupidity can it be argued that a living human being can be a non-person. In light of that, and since there is no disagreement that the Constitution establishes a right-to-life for all persons, no rational argument can be made that the right-to-life of the unborn is something that should be negotiated within the state legislatures.

Beyond this Constitutional defect, the pragmatic effect of a states’ rights ruling on abortion would be disastrous for the unborn. In a short time, the United States would become a patchwork quilt of laws in which a few states prohibit all abortions, a few others allow them without limits or restrictions, and the vast majority stake out some sort of middle ground approach.

From a pro-life perspective, this may seem like progress, but in reality it is a mirage even in those states that make abortion totally illegal. Remember, state lines are freely crossed and nothing would prevent a woman living in a state where the unborn are protected by law from going to a pro-abortion state to have her baby executed. We can also anticipate that some states would become “destination sites” for abortion or set up cottage industries

in abortion – especially those that border states that severely restrict or prohibit abortion. In fact, many abortion advocates are already saying that this will indeed be their strategy should *Roe* fall and some recently passed state laws show that the foundation for this is already being laid.

The bottom line is, since a states' rights approach cannot protect every baby in every state, it cannot protect any baby in any state. Such a ruling would leave every unborn child in America just as vulnerable to abortion as they are right now.

### **A LINE IN THE SAND**

Today, the abortion issue is like a chicken bone that's stuck in the throats of the American people. They can't ignore it, they can't pull it out, and they can't swallow it. This has created what I describe as "abortion fatigue." At this point, it is entirely possible that the public is so sick of hearing about this issue that they have started to tune it out and don't really care who wins or loses as long as it just goes away.

Abortion fatigue also exists among the justices on the Supreme Court – perhaps even more so than in the general public. That means if they were to render a decision that sends the issue to the states, it is highly unlikely they would ever again agree to hear a case that might drop it back into their laps. In effect, a states' rights ruling by the Supreme Court could insulate them against having to hear any future abortion-related cases including those that might result in personhood for the unborn. That would make the patchwork quilt described earlier the permanent and defining element of American abortion policy.

This is a bomb that has been ticking in the shadows of the pro-life effort for decades, and every day it goes unaddressed we get closer to the moment when it blows up in our faces. The undeniable truth is that, since 1973, the pro-life movement has nibbled around the edges of the abortion issue because that's all we thought was possible. During that time, the abortion industry has butchered over 60 million babies and they continue to toss

thousands of tiny corpses onto the pile every week. At some point the pro-life movement has to decide that enough is enough.

The concept proposed here is one that would force a case to the Supreme Court using the state's rights argument to advance the personhood argument. It does not require any new legislation to be passed and it does not rely on the Republican Party that, for almost five decades, has consistently betrayed both the pro-life movement and the unborn. With those things in mind, imagine that the governor or attorney general of a state calls a press conference and announces the following:

**Governor/AG:**

*“Given modern technology, it can no longer be reasonably denied that the unborn are living human beings. It is also true that no material distinction exists between a human being and a person and this is reflected in the fact that the English language does not have a word for a human being who is not a person. For those and other reasons, it is clear that the unborn are entitled to equal protection of the law under our state’s homicide statutes. Therefore, I am ordering every official within the state who has authority to bring criminal charges to prosecute anyone who intentionally causes the death of another human being – including those who are not yet born.”*

**Reporter:**

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

**Governor/AG:**

*“The issue here is homicide, and homicide statutes fall within the purview of the states. Abortion is simply one method used to commit a homicide against a particular class of human beings. If there is credible evidence that someone in our state intentionally took the life of another individual, whether by abortion or any other means, we have a duty to prosecute them for that homicide and that’s*

*what we will do. I will also point out that, in the case of abortion, there may actually be a heightened exposure to criminal prosecution. Given that someone accepts financial compensation for committing this type of homicide, it may be that abortions would be prosecuted as contract killings.”*

**Reporter:**

*“Would you prosecute a doctor who performed an abortion on a woman whose life was threatened by her pregnancy?”*

**Governor/AG:**

*“The issue in that situation is intent. A physician should be legally allowed to perform any medical procedure that is necessary to save a woman’s life. But if she is pregnant, every legitimate effort must be made to also save the baby. If during that process either life is lost, the physician’s actions would be legal if the death was both unintended and not reasonably preventable.”*

**Reporter:**

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

**Governor/AG:**

*“The federal courts have no authority to order a state to single out and exclude any class of human beings from the protection of its homicide statutes. Those courts are free to accept the illogical distinction that was invented in Roe between human beings and persons, but they have no Constitutional authority to compel a state to do so regarding its homicide statutes. Again, homicide statutes are a state matter and it is my duty to see that ours are enforced whenever any human being in this state – whether born or waiting to be born – has his or her life intentionally taken.”*

**Reporter:**

*“If the Supreme Court ruled that you cannot enforce the state’s homicide statutes against those who perform abortions, would you comply at that point?”*

**Governor/AG:**

*“Once more, homicide statutes are a state matter and the federal courts – including the Supreme Court – have no authority to force a state to discriminate against a particular category of victims due to their birth status or because they have been arbitrarily classified as non-persons.”*

**Reporter:**

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

**Governor/AG:**

*“We will exercise our prosecutorial discretion in that matter. Because of the way abortion has been portrayed and marketed over the years, many people have been deceived into thinking that it is simply the removal of an inert mass of cells and are not aware that it actually ends the life of a living and developing human being. We also know that a certain number of women who have abortions are forced, threatened or coerced to do so by others. Given those realities, convicting a woman who had an abortion of homicide would require us to prove in court that she knew she was taking a human life and that she was doing so of her own free will. If either of those things could not be proven, prosecuting her would be an irresponsible waste of the state’s time and resources.*

**Reporter:**

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

**Governor/AG:**

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

**Reporter:**

*“Why would this sort of prosecutorial discretion not also be applied in the case of the abortion provider?”*

**Governor/AG:**

*“Because of the advanced level of education and medical training these people receive, there can be no reasonable doubt that they are aware that abortion takes a human life. In fact, some of them have even publically stated this. In addition, they are not being compelled by others to participate in these procedures. For these reasons, it is entirely appropriate for them to face criminal prosecution.”*

**Reporter:**

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

**Governor/AG:**

*“We will treat anyone within our jurisdiction who knowingly facilitates the intentional taking of a human life as an accessory to homicide, and there is no legal justification for exempting those who do so by way of abortion.”*

**Reporter:**

*“Would this mean that school counselors or others who refer for abortions, or those who make arrangements for abortions, or the clinic receptionist who schedules abortions could be exposed to prosecution?”*

**Governor/AG:**

*“If someone was a willing participant in the chain of events that resulted in the intentional taking of a human life – whether born or unborn – and if we can show that they either knew or should have reasonably known that this was a foreseeable outcome of their actions, criminal charges are entirely possible.”*

**NOTE:** In the hypothetical press conference above, I refer to a governor or attorney general as the person who sets this campaign in motion, but it could be anyone in the state who has the authority to bring criminal charges.

## **BLOWBACK**

When this campaign is launched, the Left will go into a feeding frenzy of lawsuits and court injunctions, accompanied by various forms of saber rattling, bullying, and street theater. Meanwhile, their media flunkies will characterize our efforts as “anti-choice extremism” and breathlessly warn the public that if we are successful it could signal the end of western civilization.

This dog and pony show is as predictable as it is pointless. From the pro-life movement’s perspective, the only thing that matters is that the nature of this case effectively prevents the Supreme Court from refusing to hear it. For the first time in history, these people will be forced to deal with the core issue in the debate over abortion: is the unborn child a living person?

For the Supreme Court, this is a classic rock versus hard spot scenario. The pro-abortion camp, and those who see abortion as settled law, certainly don’t want to rule in favor of the unborn. But by the time they get this case, the governor or attorney general involved will have already made it clear that he or she will not back down no matter how much pressure is applied, what kind of pressure is applied, or where the pressure comes from. The message will have been sent that (a) homicide statutes are a state matter over which the federal courts have no authority, (b) those statutes will be enforced regardless of the victim’s birth status, and (c) this principle is not open to compromise or negotiation.

So would the justices be willing to rule against the unborn and risk creating an intractable Constitutional crisis? What actions they would they contemplate against a state that refuses to comply with one of their rulings? Would they call for the National Guard to

take control of this state? If an abortionist has already been indicted and is in jail on a million dollar bond, would they be willing to see federal troops sent in to break him out?

This is uncharted territory for the kind of person who ends up on the Supreme Court. For decades, the Court has been transitioning from a judicial body into a political body and one consequence of this is that Supreme Court justices are now politicians. The problem is, they are politicians with no real-world experience in the rough and tumble world of politics. To the contrary, they are academicians who were appointed to this elitist enclave, given lifetime tenure, told that they are the unquestioned authority on every aspect of American culture, and assured that their god-like status means they never have to explain or defend their actions to anyone.

In the case of abortion, the babies sentenced to death within the mahogany lined chambers and rarified air of the Supreme Court aren't real – they only exist as part of some abstract legal theory. What the initiative proposed in this document would do is drag the members of the Court out of that ivory tower comfort zone and into the streets.

Of course, I am aware that when the Supreme Court stopped deferring to the Constitution as its controlling authority, predicting its behavior became a fool's errand. That was perfectly illustrated in the opposition to ObamaCare. It was challenged on the basis that it gave the federal government the power to force citizens to purchase a product whether they wanted it or not. Since no such power is delegated to the government in the Constitution, it was an argument the Court couldn't get around. So their solution was to label ObamaCare a tax and rely on the commonly accepted principle that the government has a right to compel the payment of taxes. And with that, George Orwell was again proven correct when he said, *"There are some ideas so absurd that only an intellectual could believe them."*

So yes, the Court is unpredictable, but as I suggested earlier, this proposal would seem to leave them with only two options. Either they rule that the governor or attorney general

is justified in including the unborn in the state's homicide statutes, or they rule that the governor or attorney general is not justified in doing so.

On the surface, the latter would seem to be the safer decision, but by this point the justices will be aware that such a ruling could lead to a physical confrontation between this state and the federal government. Given that the Court is made up of people in black robes and not black leather jackets, they may not be eager to become responsible for that sort of potential outcome. Naturally, this sentiment would be even more compelling if they were totally convinced that this governor or attorney general is not going to blink.

The crucial thing for us to understand is that, if the Supreme Court takes a case that allows them to issue a purely states' rights decision, the personhood issue goes up in smoke. That may be the underlying reason why the abortion lobby is accelerating its efforts to codify *Roe* into the laws of several states. The most high profile examples of this occurred in New York and Virginia, but it is happening across the country. This could indicate that they have figured out that allowing *Roe* to be overturned on a states' rights basis, and then falling back on the patchwork quilt phenomenon, may be in their best long-term interest.

## **WILL IT WORK**

Those who introduce new or innovative ideas are often described as people with a vision. But there can be a fine line between a vision and a hallucination and we won't know which one this idea is until it's tried. In the mean time, I fully expect that the pro-life movement's oracles, gurus, wizards and pundits will shoot it full of holes. I'm also sure that some of their criticisms will have merit. What we need to remember, however, is that the most effective way to guarantee failure is to wait around for a plan that all the "experts" agree cannot fail.

To keep from stumbling into that trap, we would be well served to recall how the *Roe vs. Wade* decision came about in the first place.

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

Given that environment, there can be little doubt that if the abortion lobby's own oracles, gurus, wizards and pundits were consulted about *Roe vs. Wade* before it was filed, they sneered at it. Weddington and Coffee were almost certainly told more than once that this was not the right case; this was not the right client; this was not the right venue; this was not the right time; they were not the right attorneys; their legal theory was fatally flawed; and when they failed they were going to set the abortion-rights movement back years if not destroy it altogether. But they went forward anyway, and when the dust settled America had what is still to this day the most liberal abortion policy in the world.

The point is, the American holocaust started because two morally bankrupt lawyers were not smart enough to know that what they wanted to do was impossible, so they just went out and did it. And there may be is a message in that for us.