Constitutional Confusion: Slavery, Abortion, and Substantive Constitutional Analysis

By Justin Buckley Dyer

Abstract. A comparison of two U.S. Supreme Court cases about fundamental rights, one on slavery, the other on abortion, sheds light on constitutional law and the principles undergirding liberal constitutional democracy. The *Dred Scott* case in 1857 denied constitutional rights to enslaved Africans and their descendants living in the United States. The *Roe v. Wade* decision in 1973 created a constitutional right to abortion that denied constitutional personhood to human beings prior to birth. Both cases involved applications of what legal scholars call "substantive due process"—that is, a substantive interpretation of the constitutional requirement that governments provide persons with "due process of law" that moves beyond procedural formalism. Although many constitutional scholars deny the legitimacy of substantive due process as a legal doctrine, this article proposes that the judicial system cannot ultimately avoid substantive moral questions in constitutional interpretation. In both cases examined here, the crucial question was about who counts as part of the people whom the Constitution protects, and that question could not be answered in purely formal terms. Both *Dred Scott* and *Roe v. Wade* erred not by engaging substantive moral questions but rather by denying, in different ways, the natural rights of human persons.

Introduction

Nearly four and half decades after the Supreme Court's decision in *Roe v. Wade* (1973), the issue of abortion remains politically divisive and morally contentious. On one side are those who contend that the rights of an

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American Journal of Economics and Sociology, Vol. 76, No. 1 (January, 2017).
DOI: 10.1111/ajes.12172
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individual person are harmed irreparably when we permit the killing of unborn human beings without due process of law. On the other side are those who insist that a woman carrying a child has a right to terminate her pregnancy at will, and that this right is foundational to women's political and social equality. Many other Americans are somewhere in the middle, seeing legal and moral shades of gray in the abortion debate.

Some light can be shed on the contested issue of abortion by turning to an analogous legal and moral issue about which there seems to be some clarity today: slavery. The case of *Dred Scott v. Sandford* (1857) implicates several strikingly similar questions to those engaged by the Supreme Court in *Roe v. Wade* (1973). Each case brings to the surface important moral and legal questions about personhood, natural rights, and the principles undergirding liberal constitutional democracy.

The Comparison with Slavery

Competing Analogies

Pro-life advocates assert that the U.S. Supreme Court made a terrible error in the decision in *Roe v. Wade* (1973) when it held that the Fourteenth Amendment's Due Process Clause protects a constitutional right to abortion. They frequently compare this mistake to another case, *Dred Scott v. Sandford* (1857), in which the Supreme Court held that the Fifth Amendment's Due Process Clause protected a constitutional right to traffic in slave property in the federal territories. In retrospect, the *Dred Scott* case is viewed almost universally as a flawed decision. Pro-life advocates note that *Roe* was like *Dred Scott* in that each employed the doctrine of substantive due process to remove a contested moral issue from the arena of legislative politics. If the Supreme Court could make an error of that magnitude in 1857, they ask, why should one accept a flawed decision of equal or greater magnitude in 1973? Pro-choice advocates, on the other side, make reference to the terrors of slavery and compare them to the conditions women with unwanted pregnancies faced when most abortions were illegal in the United States. According to this logic, the forced labor of slavery is analogous to the forced motherhood imposed by laws that deny access to abortion.

Although both sets of analogies are tenuous, there is a historical connection between slavery and abortion. Both issues are bound up with

the meaning and legacy of the Fourteenth Amendment, which was ratified in 1868 to protect the rights of freed slaves and that now serves as the main pillar of the Supreme Court's abortion jurisprudence. In the intervening decades between the Civil War and the present, one of the most important changes that took place in legal theory was the rejection of the natural-law tradition, which had provided the theoretical basis for both the Fourteenth Amendment and state anti-abortion laws, many of which were written during the Civil War and Reconstruction eras. It was the rejection of this tradition that enabled the Supreme Court to create abortion rights in the late 20th century.

Substantive Due Process

The legal doctrine of "substantive due process" provides a point of reference that connects the Supreme Court's adjudication of cases involving both slavery and abortion. According to that legal doctrine, the Constitution's Due Process Clauses impose substantive (and not merely procedural) limits on government action. The Fifth Amendment applies to the federal government, and the Fourteenth Amendment, ratified after the U.S. Civil War, applies to state governments. Due process refers, in its focal sense, to the procedures public officials must follow when adopting and enforcing laws and regulations. Courts in the United States often must decide whether laws (on their face or in their application) violate procedural protections for those accused of a crime. For example, the state through statutory enactment or enforcement might deprive an individual of his or her constitutional right to confront witnesses, enjoy trial by jury, access legal counsel, and so on.

A legitimate law, along these lines, is one that has been duly enacted or ratified and that specifies the procedures by which a person may be fined, imprisoned, taxed, or regulated. Substantive due process, however, is different. There are some fundamental individual rights, the Supreme Court has held, that impose limits on government action irrespective of whether procedural norms are followed and regardless of whether these fundamental rights are specifically mentioned in the Constitution. Historically, the Supreme Court has included among these fundamental rights such things as the right to contract for labor and the right to control the education of one's children. There have been a

relatively small number of cases in which the Supreme Court has struck down legislation on substantive rather than procedural grounds. Since crafting public policy on the basis of substantive norms is normally a task reserved to legislatures, many scholars and citizens are troubled when the Supreme Court acts in an ostensibly undemocratic manner by overturning procedurally legitimate enactments.

In the *Dred Scott* case, the Supreme Court overturned a federal law that had effectively prohibited slavery in federal territories. The majority of the Supreme Court ruled in 1857 that African slaves and their descendants were not, and could not become, citizens of the United States. Further, they held that the Constitution protected the right of citizens to own and traffic in slave property. Finally, the Court held that any congressional or territorial law limiting the rights of slaveholders to their human property in the federal territories "could hardly be dignified with the name due process of law." With the virtue of hindsight, the *Dred Scott* case was a terrible miscarriage of justice. By treating enslaved human beings as "property" that "no person" could be deprived of, the Court implicitly dehumanized people of African descent, treating them as nonpersons (despite the Constitution's own repeated references to slaves as "persons"). Claiming African Americans could *never* be citizens of the United States, despite precedents to the contrary, the Court offered a myopic vision of what it means to be part of "the People" for whom the Constitution was written.

Another famous (and in many quarters, infamous) use of substantive due process by the U.S. Supreme Court occurred in *Lochner v. New York* (1905), a case involving a New York statute that imposed maximum hours for bakery workers. The Court majority appealed to a "right of contract," claiming that such a right was implicitly protected by the Due Process Clause of the Fourteenth Amendment. Since there was no reasonable basis for the legislature to limit the hours bakers could work, the Court argued, the New York law denied these individuals the due process of law. As in *Dred Scott*, the Supreme Court appealed to substantive principles not explicitly in the Constitution to overturn duly enacted legislation. In doing so, the Court substituted its judgment for the legislature's own judgment about a substantive political issue.

Progressives at the time criticized *Lochner* and similar decisions for allegedly using judicial power to defend corporate interests by

overturning laws that sought to protect workers and consumers. Princeton political scientist Edward Corwin (1911: 368) attacked *Lochner* for invoking "the idea that due process of law means reasonable law, or, in other words, the court's opinion of reasonable law." Various commentators in the Progressive era argued that when the Court substitutes its opinion of "reasonable law" for the opinion of the legislature, the judicial branch is thereby usurping the role of the citizens who have elected legislative representatives.

Roe v. Wade (1973) is a yet another prominent Supreme Court case that turned upon the use of substantive due process. According to the Supreme Court, Texas' restrictive abortion law—which allowed abortion only to preserve the life of a pregnant woman—violated a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. As in previous cases employing substantive due process, the Court appealed to substantive (rather than procedural) principles.

Each time the Supreme Court has employed substantive due process, it has appealed to fundamental principles of justice that are not explicitly mentioned in the Constitution. In doing so, the Court has claimed authority to override decisions reached by the federal and state legislatures, and these decisions have drawn sharp criticism from large numbers of citizens and scholars.

A Fresh Look at Substantive Due Process

Although the various critiques of the Court's use of substantive due process in judicial review have merit, the polemics against the doctrine of substantive due process sometimes make it seem as though we must choose between pristine Court decisions based on procedural norms, on the one hand, and illegitimate substantive inquiries mired in moral or philosophical reasoning, on the other. Yet a closer analysis shows some sort of moral and philosophical reasoning was unavoidable in *Dred Scott* and *Roe*.

The 19th-Century Setting

Because judicial bodies are confronted with cases involving difficult questions at the heart of social conflict, they are forced to resolve ambiguities of both fact and law. The law as a formal structure cannot

possibly contain or consider all possible contingencies, so it is inevitable that judges must engage in principled inquiry into the "nature and reason of the thing" at issue in each legal dispute (to borrow a phrase from Hamilton in *Federalist* 78).

In the *Dred Scott* case, no justice disputed the necessity of venturing into issues that lay beyond the text of the Constitution. Chief Justice Taney, arguing for the majority, asserted as fact that the U.S. founders believed certain categories of humans could rightfully be treated as property and that the founders' original understanding controlled the outcome of the case. Dissenting Justices Benjamin Curtis and John McLean asserted, to the contrary, that slavery was a violation of natural rights and could only be sanctioned by positive legislative enactment. Importantly, the contemporaneous criticism of Taney's due process argument was based on a substantive disagreement over the nature of property and the meaning of constitutional personhood, not procedural issues (Thomas 2008: 41). This substantive debate revolved around the meaning, relevance, and application of the natural-law tradition to the issue of slavery in the federal territories and the manner in which the Constitution protected individual natural rights.

Privileges and Immunities as Fundamental Natural Rights

Article IV, Section 2 of the U.S. Constitution states, in part: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Many 19th-century commentators understood the phrase "privileges and immunities" to mean natural rights as applied to citizens and protected by a political regime under the rule of law. If this concept had not been corrupted by the Supreme Court in the 19th century, it could have served as a more secure foundation for protection of substantive, unenumerated rights than the Due Process Clause in the Fifth and Fourteenth Amendments. But the vagaries of history and precedent made that largely impossible, and this history helps us understand the development of substantive due process as a legal doctrine.

In 1866, immediately after the Civil War, the U.S. Congress debated legislation that would prevent southern states from denying or violating the civil rights of former slaves. Since there was general agreement that

the "privileges and immunities" clause in the body of the Constitution applied only to issues under *federal* jurisdiction, the protection of individual rights against actions taken by *state* actors required an amendment to the U.S. Constitution. Therefore, Congress adopted, and the states ratified, the Fourteenth Amendment, which states in Section 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The explicit aim of this amendment was to guarantee the same rights at the state level that were protected at the federal level.

The extension of "privileges or immunities" to the state level should have guaranteed the protection of the natural rights of all American citizens against deprivation by state governments, but that was not to be. In a decision known as the *Slaughterhouse Cases* (1873), the U.S. Supreme Court inverted the meaning and purpose of the Fourteenth Amendment. The cases involved a law in Louisiana that granted to a private company monopoly control over slaughtering of cattle, thereby depriving other butchers of part of their property and liberty. If the Privileges and Immunities Clause in Article IV protected citizens against such arbitrary and biased laws at the federal level, the question at issue was whether the Fourteenth Amendment would provide the same protection against state laws that violated basic economic rights.

According to Justice Samuel Miller, who wrote the majority (5–4) opinion in the *Slaughterhouse Cases* (1873: 73), "the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established." Based on that hair-splitting reading, he claimed the intent of the "privileges and immunities" clause in the Fourteenth Amendment was to allow states to set their own rules, but to require those laws to be applied equally to residents and nonresidents of the state. Miller opined (1873: 78) that Congress and the ratifying states could not have intended "so great a departure from the structure and spirit of our institutions" as to give Congress and the U.S. Supreme Court the power to prevent states from adopting the laws they saw fit. By "structure and spirit," Justice Miller had in mind the antebellum sovereignty of states that enabled them to make judgments about the civil rights of their citizens and residents, without federal interference. To him, it was unthinkable "to transfer the security and protection of . . . civil rights . . . from the States to the Federal government," even though

that was the exact intention of the Fourteenth Amendment. It was as if he had not noticed that the deadliest war in U.S. history had recently been fought over precisely this question. For practical purposes, the Privileges or Immunities Clause has been a dead letter since the 1870s.

Although nationally enforceable fundamental rights were read out of the Privileges or Immunities Clause, the Supreme Court did read substantive rights into the Fourteenth Amendment under the Due Process Clause. In the late 19th and early 20th centuries, the Court policed state economic regulations through that instrument. A statute that put unreasonable or arbitrary restrictions on the exercise of inherent rights of contract or other economic liberties, according to the Court, could "not become due process of law, because it is inconsistent with the provision of the constitution of the Union" (*Allgeyer v. Louisiana* 1897: 589). The reference to "the constitution of the Union" might have been more appropriately supported by the Privileges or Immunities Clause, but that avenue had seemingly been foreclosed in *Slaughterhouse*. So the Court gave a substantive interpretation to the Due Process Clause rather than the Privileges or Immunities Clause. This, in turn, is the tradition of jurisprudence out of which *Lochner v. New York (*1905) arose.

The Decline of Natural Rights Theory in the 20th Century

Contrary to the view of many early 20th-century Progressive scholars who hoped to dismiss the *Lochner* (1905) decision as an aberration, the U.S. Supreme Court had been amenable to substantive constitutional analysis under the Due Process Clause in the late 19th century. It might seem, then, upon preliminary analysis, that the Court's decision in *Roe v. Wade* (1973) was actually rooted in an extensive tradition of protecting unenumerated rights as part of substantive due process analysis stretching back to *Lochner* and before. That assumption is, however, mistaken because it ignores the intellectual changes that took place in the decades between *Lochner* and *Roe*, changes that fundamentally changed the Court's method and manner of substantive analysis.

In the 20th century, prominent legal theorists and scholars increasingly denied the validity or existence of natural rights. The ideology that disparaged the natural-law tradition originated in scholarly articles during the Progressive era. The articles attacked Supreme Court decisions

patterned on *Lochner* (1905), which had allegedly sided with business interests and overturned state laws designed to protect workers. The consistent rationale for the decisions of the *Lochner* era was "liberty of contract," a right that never appears explicitly in the Constitution or any of its amendments.

Oliver Wendell Holmes wrote a famous dissent in the *Lochner* case, in which he asserted the right of states to institute whatever economic policy was preferred by the majority. This dissent was based, in part, on the theory of legal realism, which meant for Holmes (1897: 457) that law is nothing more than a prediction of how judges will decide cases in fact. His predictive theory of law entirely undercut the concept of natural rights by eliminating all consideration of moral norms in legal interpretation. Holmes (1897: 464) cynically confessed that he thought it would "be a gain if every word of moral significance could be banished from the law altogether." In this, he diverged not only from the appeal to "liberty of contract" by the majority in the *Lochner* decision, but he also eschewed the idea at the heart of American constitutionalism that there exist certain self-evident truths that provide the moral foundation for, and principled limits of, proper and just government action.

During the first third of the 20th century, a majority of the Supreme Court remained committed to constitutional principles based on natural rights. The Court continued to affirm liberty of contract as the decisive factor in cases involving economic policies. However, the *Lochner* era came to an end in *West Coast Hotel v. Parrish* (1937: 391), a case involving minimum wage legislation for female hotel workers. Charles Evans Hughes wrote the majority decision upholding the law:

> The violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? *The Constitution does not speak of freedom of contract.* It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty.... Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

After this decision, the Court gave wide leeway to state legislatures in determining what is in the best economic interests of society.

Henceforth, the Court would presume the reasonableness and constitutionality of economic regulations rather than making regulation the exception to the rule of economic freedom.

Once the Court had cut loose from the moorings of natural rights, however, it faced severe difficulties in finding a new basis for judicial review. If the Supreme Court had simply accepted every decision a legislature thought was reasonable, it would have had no basis for overturning any legislative enactments in the interest of protecting civil rights. That problem was solved on an interim basis in *U.S. v. Carolene Products* (1938: Footnote 4), where the Court proposed that legislation could be struck down if it impinged upon the Bill of Rights, obstructed access to the political process, or invidiously discriminated against vulnerable or politically powerless groups. Others on the Court advocated reliance on unspecified "fundamental values," but that simply restated the problem rather than solving it. Mid-century Progressives in the judiciary did not want to abandon rights altogether, but they disagreed about the best theoretical framework for grounding them after having jettisoned the natural-law tradition.

Contraceptives and Abortion in the New Judicial Order

Although the Warren Court (1953–1969) was known for judicial activism, most of its decisions dealt with violations of political and economic rights that could reasonably be construed as procedural violations of the Due Process Clause involving, especially, the rights of criminal defendants. There was one decision, however, during this period that was part of a revolution in constitutional theory that created an important precedent for *Roe v. Wade*.

Contraceptives and the "Right to Privacy"

The cornerstone for a new judicial order was *Griswold v. Connecticut* (1965), a case in which Estelle Griswold, director of the Planned Parenthood League of Connecticut, challenged a state law banning the distribution and use of contraceptives. The justices all agreed at a personal level that the law was objectionable or at least "uncommonly silly" (to use Justice Stewart's phrase), but they could not overturn it without a valid basis in constitutional law. In order to find that basis, the majority stretched

the Constitution to its limits, and then, according to the dissenting opinions, quite a bit further. Since there was no explicit constitutional basis for overturning the Connecticut law that prohibited the distribution and use of contraceptives, they were forced to invent a new basis.

Griswold v. Connecticut (1965) was an important forerunner of *Roe v. Wade* (1973) because *Griswold* helped establish the "right to privacy" as a constitutionally protected right. That "right" was a product, not of any previously articulated constitutional principle, but rather of an article by Warren and Brandeis (1890) that subsequently influenced the laws of a few states. But there were no legal precedents that permitted it to be enshrined as a constitutional right, much less as a right that would overturn an anti-contraception statute that had been on the books in Connecticut for a century.

Justice Douglas, writing the majority opinion in *Griswold*, realized how thin the ice was that the Court had stood on. In *Griswold v. Connecticut* (1965: 484), Douglas wrote: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." Yet, that is precisely what the Court did. Having rejected substantive due process and extra-constitutional rights in *Lochner*, it seemed the Court was now restoring them in *Griswold*, but without admitting it. In dissent, Justice Hugo Black argued that catchphrases about state action that "shocks the conscience," or violates "canons of decency and fairness," or interferes with" "fundamental notions of fairness and justice" are not a valid basis for constitutional adjudication:

> If these formulas based on "natural justice," or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is, of course, that of a legislative body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous. (*Griswold* v. *Connecticut* 1965: 511–512)

An even more telling critique of the reasoning involved in *Griswold* was Black's extensive quotation from a dissenting opinion in *Baldwin*

v. Missouri (1930: 595) by Oliver Wendell Holmes, who had set in motion the process of undermining substantive due process:

> I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. . . . [W]e ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass. (cited in *Griswold v. Connecticut* 1965: fn. 16)

If the discretionary power assumed by the Court in 1930 disturbed Holmes, Black suggested, then the Court's direction in the 1960s likely would have caused him even greater alarm.

Abortion and the Elaboration of the Right to Privacy

The reintroduction of substantive due process in *Griswold* laid the groundwork for an expansion of that doctrine in *Roe v. Wade* (1973), which struck down most state laws prohibiting abortion. The entire scope of constitutional theory was transformed by this decision as a result. As Stephen Griffin (1998: 141) explains:

> The doctrine of substantive due process, thought to be discredited by the Progressive critique of the *Lochner* era, was back. The return of substantive due process and the political reaction to *Roe*, posed a series of urgent questions for constitutional scholars. If substantive due process was again part of constitutional law, what was the answer to the Progressive critique of *Lochner*?

Those questions required scholars to reflect anew on the limits of judicial power, the meaning of due process, and the theoretical foundation of constitutional rights — questions that are central to ongoing constitutional debates today.

The case of *Roe v. Wade* (1973) posed huge challenges for the Court. The justices wanted to avoid the substantive due process of *Lochner*, but they felt compelled to offer a constitutional rationale for their decision to strike down the Texas law that prohibited abortions unless a woman's life was in danger. Whereas *Griswold* had dealt with an antiquated, unenforced, and relatively insignificant law regarding the use of contraceptives, *Roe* involved a heavily contested political issue on which emotions ran high on both sides.

Although Justice Blackmun's majority opinion in *Roe* explicitly adopted the "right to privacy," using a very broad construction of the Fourteenth Amendment, he devoted 18 pages of his opinion to historical analysis to support a Ninth Amendment basis for the decision as well (*Roe v. Wade* 1973: 129–147). The Ninth Amendment argument was contingent on the premise that a right to an abortion existed in common law at the time the Constitution was drafted in the 18th century. Justice Blackmun placed only secondary weight on a Ninth Amendment construction, presumably because of the Amendment's structure and purpose. Justice Black dissented in *Griswold v. Connecticut* (1965: 520) against the use of the Ninth Amendment for this reason:

> For a period of a century and a half, no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs.

Since Justice Blackmun was aware of the difficulties associated with any argument based on the Ninth Amendment, he merely noted, without comment, that the district court had relied on it (*Roe v. Wade* 1973: 153). He did not pursue it further.

With a weak basis for overturning state abortion laws using either the Ninth Amendment or the "right to privacy," Justice Blackmun also had another hurdle. If unborn human beings were "persons" under the Fourteenth Amendment, as the state of Texas contended, then it would be absurd to argue that the Amendment secured a private right to contract lethal force against these persons. Justice Blackmun therefore laid out an originalist argument that the term "person" in the Fourteenth Amendment had no application before birth, and he claimed that the

Court, in adjudicating this controversy, was compelled to strike a posture of neutrality regarding the question of "when life begins" (*Roe v. Wade* 1973: 159).

The Nexus of Slavery and Abortion: The Question of Personhood

The question of what constitutes a legal person thus became central to *Roe v. Wade*, in much the same way that the question of the legal personhood of enslaved human beings was central in *Dred Scott*. Consequently, neither case could have been decided on purely procedural grounds. The substantive question had to be addressed before the procedural rules could be applied; in this way substantive moral reasoning (even if implicit) was inescapable.

Efforts to Evade the Question

In both *Dred Scott* and *Roe*, the justices sought to find ways to avoid the central question. In each case, the fundamental question was whether particular human beings would have standing to sue or be recognized by the Court as legal persons. On both occasions, the Court excluded some natural human beings from the community of constitutional persons by treating biological human status as irrelevant to the question of constitutional personhood. This maneuver allowed the Court to construct a legal community of constitutional persons that did not necessarily overlap with the population of natural persons.

In *Dred Scott v. Sandford* (1857: 406–407), Justice Taney argued that the U.S. Constitution protected to all persons a right to own property in slaves. By construing the Constitution in this way, he implicitly denied the constitutional personhood of enslaved African Americans, whom he implicitly treated as a species of property constitutionally guaranteed to all "persons." This also comes out explicitly in his discussion of national citizenship, where he argues that the founders did not intend to recognize persons of African descent among the people for whom the Constitution was written:

> Neither the class of persons who had been imported as slaves nor their descendants, whether they had become free or not, were then acknowledged as part of the people .... They had for more than a century been

> regarded as beings of an inferior order and altogether unfit to associate with the white race, either in social or political relations.

By attributing this intention to the founders, Taney was able to assert his own neutrality in the matter. The implicit claim here was ontological: that Africans were a different species—"beings of an inferior order"—than Europeans. But the explicit claim was simply that the founders held this view, and that the purported original understanding of the founders created one uniform national understanding of personhood that controlled in this case.

In the case of *Roe v. Wade*, the Court was swayed by reasoning similar to that used by Taney in *Dred Scott*. The local (Texas) definition of a "person" included an unborn child. If that definition had been accepted, the case would have been decided in favor of the state, since Texas was protecting a class of persons from harm. Justice Blackmun, however, extensively cited an article in which New York Law School Professor Cyril Means (1991: 404) argued that it was constitutionally irrelevant if the state of Texas considered unborn human beings to be "persons" deserving of legal protection because the "Federal Constitution must . . . have a nationwide uniform federal interpretation." Means, whom we shall discuss further in a later section of this article, even compared this aspect of the *Dred Scott* case to pending abortion cases:

> One of the points decided by the Court in [*Dred Scott*] was that the word "Citizens" in Article III [of the Constitution] had to have a uniform nationwide federal meaning which an individual state could not vary. So no matter what a state could elect to do on the subject [of abortion], by way of declaring a foetus to be a "person" for some state law purposes, it could not bind either federal or state courts in interpreting the word "person" in the Federal Constitution.

Since the Court adopted the logic Means proposed, the *Roe* Court treated the question of personhood in a parallel manner as the Court had treated the question of citizenship in *Dred Scott*—by insisting on a universal definition that was purportedly rooted in the founders' original understanding and was presumed to be value neutral but was not.

Justice Blackmun noted that other references to the word "person" in the Constitution—such as the qualifications for senators and

representatives—had no application to a child before birth. (It is worth pointing out that most of these uses, such as in the qualifications for elected office, also had no application until *decades* after birth.) He also accepted the mistaken claim that abortion was historically a common-law liberty. On that narrow evidence, he concluded that

> in nearly all these instances, the use of the word is such that it has application only post-natally. None indicates, with any assurance, that it has any possible pre-natal application.... The word "person," as used in the Fourteenth Amendment, does not include the unborn. (*Roe v. Wade* 1973: 157–158)

By reducing the meaning of a term to its particular uses and thereby avoiding the question of when life begins, Blackmun sought to evade the larger question of interest to all parties. As John Noonan (1979: 13–14) noted, Blackmun's dismissal of the question of life's origins implicitly assumed a positivist jurisprudence whereby a person is "no natural reality but a construction of juristic thinking." Other members of the *Roe* Court majority concluded that because unborn children were not counted for the purposes of representation by U.S. census takers and because the Fourteenth Amendment confers citizenship on all persons *born* in the United States, a fetus has no constitutional rights.

Inconsistency Across Legal Domains

The denial of personhood in these respective cases involving slavery and abortion undercut or further confused a set of collateral state and federal laws. In the case of slavery, confusion actually began with the Constitution itself, which explicitly affirmed and implicitly denied the humanity of slaves by referring to them only as "persons" but also treating them for some purposes as property.

Writing as "Publius," James Madison observed this inconsistency in *Federalist* 54, where he noted that if slaves are property and not persons, then they should be subject to a property tax:

> Slaves are considered as property, not as persons. They ought therefore to be comprehended in estimates of taxation which are founded on property, ... In being compelled to labor, not for himself, but for a master; in being vendible by one master to another master; and in being

> subject at all times to be restrained in his liberty and chastised in his body, by the capricious will of another, the slave may appear to be degraded from the human rank, and classed with those irrational animals which fall under the legal denomination of property.

Madison went on to argue that slaves, as property, were not considered persons within each state for internal political purposes, which begged the question why they should be included (even at a ratio of 3/5) in the national census to determine political representation in the House of Representatives.

> Slaves are not included in the estimate of representatives in any of the States possessing them. They neither vote themselves nor increase the votes of their masters. Upon what principle, then, ought they to be taken into the federal estimate of representation?

However, Madison further argued that enslaved human beings were treated as moral persons, and not property, for some purposes in state law, including in being punished for criminal offenses:

> In being punishable himself for all violence committed against others, the slave is no less evidently regarded by the law as a member of the society, not as a part of the irrational creation; as a moral person, not as a mere article of property.

The existing laws thus were contradictory, treating slaves either as mere chattel or morally responsible persons, according to which view served the interests of slaveholders in different contexts.

Members of the Constitutional Convention participated in the legal fiction that a slave is a combination of person and property. Madison explained how a southern leader might offer a defense of the Constitution's ambiguous treatment of slavery:

> We subscribe to the doctrine that representation relates more immediately to persons, and taxation more immediately to property, and we join in the application of this distinction to the case of our slaves. But we must deny the fact that slaves are considered merely as property, and in no respect whatever as persons. The true state of the case is, that they partake of both these qualities: being considered by our laws, in some respects, as persons, and in other respects as property.

As in life, so in law, enslaved persons were supposed to be any moment whatever suited the interests of the master. At the Constitutional Convention, it was generally realized, even by its proponents, that the Constitution's provisions about slavery were necessitated by political fact, rather than being grounded in morally defensible principles.

In the case of abortion, Maledon (1971: 349–350) recognized that successful attacks on criminal abortion statutes prior to *Roe* had collateral effects on the status of the unborn child in areas of criminal and civil law that had nothing to do with abortion.

> It seems that the law has put itself in the anomalous position of protecting the legal rights of one who is considered to have no legal right to live . . . . Can [the granting of a right to have an abortion] possibly be reconciled with the many rights that the unborn child enjoys in the other areas of the law?

Maledon (1971: 351–362) then cites numerous civil cases going back to the 18th century that show how English and American courts treated an unborn child as a "living child" in criminal law, cases of inheritance or other property, and tort cases in that permitted recovery for a prenatal injury. Maledon (1971: 369) gives an example of the sort of inconsistency that relaxed state abortion laws had already created in the early 1970s:

> Will the pregnant woman who is hit by a negligent driver while she is on her way to the hospital to have an abortion still have a cause of action for the wrongful death of her unborn child? If so, how is it possible for the law to say that a child can be wrongfully killed only hours before he can be rightfully killed? Absurd as it may seem, this is the present state of the law in some jurisdictions.

The paradox of treating a fetus as a legal person in some contexts persists today in our politics and law, partly as a result of the constraining legal framework imposed by the Court in *Roe v. Wade*.

The Legal Denial of Constitutional Personhood

There is a danger in bringing an issue before the Supreme Court that deals with politically contested issues that have not yet been resolved in

the larger political culture. When the Supreme Court tackles these issues prematurely, it often imposes a legal framework that erases many of the subtleties that have evolved in common law and social practice.

Before *Dred Scott*, the social practice of slavery occasionally permitted some ambiguity in the relationship between master and slave, which included a recognition that slaves were (in some sense) both property and moral persons. The very fact that slaves resisted their servitude was a constant reminder they were persons, with purposes and desires of their own. A constant tension existed within southern society because the institution of slavery was itself morally incoherent. That does not mean that slavery was necessarily on the verge of collapse as an institution, but it does mean that the assignment of slaves to the category of "property" was being contested and undermined on a daily basis in social practice.

In *Dred Scott*, the Supreme Court attempted to cut through this ambiguity and finally settle the cultural and political contest over the institution of slavery. Justice Taney's opinion treated property in slaves as a right secured to all persons by the Constitution, and declared that enslaved Africans and their descendants could never become citizens of the United States. In a part of Taney's opinion in *Dred Scott* that the dissenters wrote off as mere *dicta*, he declared the Missouri Compromise unconstitutional, which would have opened all of the western territories to slavery (and, indeed, perhaps all of the free states also, as Lincoln suggested). Thus, this case not only imposed a permanently inferior civic status on a group of people, it also threatened to impose slavery and a slave culture on the entire nation.

Something similar occurred in *Roe v. Wade*. By 1973, state legislatures were in the process of working in a variety of ways to resolve questions related to the humanity of unborn children and the cultural upheaval of the sexual revolution. The outcome of that process is hard to predict. Instead of resolving the thorny moral issues raised by abortion through the political process, the Supreme Court intervened, as it did in *Dred Scott*, to limit the terms of debate and impose a rigid and unworkable legal framework.

As a result of *Roe v. Wade*, legal personhood was constructed in a way that was seemingly unrelated to natural, biological personhood. Drawing from medical journals and embryology textbooks, attorneys

for the state of Texas noted that "modern science—embryology, fetology, genetics, perinatology, all of biology—establishes the humanity of the unborn child" (Appellee in *Roe v. Wade* ([1972] 2012). But rather than seeking a natural view of humans that relied on scientific evidence, Justice Blackmun chose to adopt a purely legalistic view of the person as a being whose life in law begins at birth:

> In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth, or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth.... Some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that *the fetus, at most, represents only the potentiality of life*. Perfection of the interests involved, again, has generally been contingent upon live birth. In short, *the unborn have never been recognized in the law as persons in the whole sense*. (*Roe v. Wade* 1973: 161–162, emphasis added).

Justice Blackmun left the door open to state regulation of abortion after the first trimester, but even the power of a state to prohibit killing a viable fetus was limited by any showing—satisfactory to an attending physician—that the mother's health or life might be at risk. In a companion case decided the same day, the Court interpreted "health" in this context to include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the wellbeing of the patient" (*Doe v. Bolton*, 1973: 192). The practical effect of *Roe v. Wade*, despite its trimester framework, was to grant women in all 50 states the liberty to obtain an abortion at any stage of pregnancy, provided the abortion was, in the opinion of the attending physician, necessary to protect the mother's life or health, broadly construed.

Almost two decades after *Roe*, in the case of *Planned Parenthood v. Casey* (1992), the Supreme Court upheld *Roe* in almost all respects. The Supreme Court placed no new substantive limits on the constitutional right to abortion. However, the real test of what *Roe* had unleashed was yet to come. In the 1990s a new abortion technique, called "dilation and extraction" (D&X), was introduced to the medical community for use in second and third trimester abortions. The procedure involves the

partial breach birth of a child, so that much of the child's body is visible, followed by the suctioning of the child's brain matter before the procedure is completed. This procedure came to be known popularly as a "partial-birth abortion," and it understandably generated a great deal of political and cultural opposition. Several states adopted laws categorically prohibiting the procedure except in cases where a mother's life (but not health) is threatened. When the Supreme Court took up Nebraska's law banning D&X in *Stenberg v. Carhart* (2000), the Court held that the law prohibiting partial-birth abortions was unconstitutional. A woman's absolute right to an abortion, with very few limitations, was the principle undergirding *Roe* and *Casey*, and now it seemed to protect abortion by any method at any stage of gestation prior to full completion of live birth.

Cyril Means and the Flawed (and Fraudulent) Use of Historical Evidence

Justice Blackmun's majority opinion in *Roe v. Wade* (1973) tried to demonstrate historical continuity between past legal judgments and the decision of the Court in this case. Therefore, he wrote at some length about historical beliefs and attitudes about abortion. Most of the evidence in support of his historical analysis was derived from a single author: Cyril Means, a law professor at New York Law School. In particular, Blackmun relied upon Means's 1971 article on the history of abortion in both law and medicine. There are numerous reasons, however, to question the accuracy of the information that Means provided, not least of which is that he began research on this question while he was counsel to the National Association for the Repeal of Abortion Laws, or NARAL (Faux 1988: 290). To understand how some of the flaws in the *Roe* decision can be traced to this faulty history, we need to examine what Means said in detail.

Samuel Farr and 18th-Century Medicine

Means (1971: 403) claimed that abortion was freely available in the 18th century without any constraints because a fetus was not recognized as a person in the English common law. He offered as the best possible evidence for his position the work of an 18th-century English physician,

Samuel Farr, whose 1787 *Elements of Medical Jurisprudence* asserted that the embryo was "not a human creature" and that "were a child to be born in the shape which it presents in the first stages of pregnancy, it would be a monster indeed, as great as any which was ever brought to light."

What Means (1971) left out of the account, however, was the context that entirely changed the meaning of that quote, suggesting that Means was either deliberately dishonest or grossly negligent in his research. Dr. Farr's ([1787] 1819: 12) reference to the embryo as a "monster" occurred within a technical discussion of deformed and disabled adults (whom he also referred to as "monsters"). When Farr wrote of the "human creature," he was referring specifically to physical form, so that he really meant only that an embryo does not resemble an adult human. Indeed, contrary to Means and the majority opinion in *Roe*, Farr ([1787] 1819: 14–15) stated clearly that human life begins "immediately after conception":

> Hence those seem to err, 1st. Who would persuade us that the foetus acquires life when it is so particularly active, that the mother becomes sensible of its motions. 2d. Those who think that life does not begin till the seventh or fourteenth day, or even till a month after conception. And 3d. Those who suppose that a fetus, as long as it continues in the womb, where it does not breathe, cannot be called a living animal . . . . If that animation be construed to be understood by what is meant by life, then it must certainly begin immediately after conception, and nothing but the arbitrary forms of human institutions can make it otherwise.

When Farr ([1787] 1819: 40) took up the specific topic of abortion, he was far from sympathetic:

> [A]bortions, or the destruction of those unborn embryos which were never brought into the world: and indeed as such beings might live, and become of use to mankind, and as they may be supposed indeed from the time of conception, to be living animated beings, there is no doubt but *the destruction of them ought to be considered a capital crime*. [emphasis added]

Given these views expressed by Farr, it is surprising that Means (1971: 303) would use this text as a basis for defending the idea that the fetus is

a nonperson, even going so far as to assert that there was *no better evidence* of the American founders' own views than Farr's 1787 treatise. Yet, in reality, Farr demonstrated just the opposite, and we have no reason to think Farr's criticism of abortion in 1787 was idiosyncratic.

Common Law on Abortion Before 1860

Another misleading aspect of Means's argument was his suggestion that there were no legal constraints on abortion in the United States in the late 18th and early 19th centuries. Means (1971: 336, 376) asserted:

> English and American women enjoyed a common-law liberty to terminate at will an unwanted pregnancy, from the reign of Edward III to that of George III . . . [This] common-law liberty endured . . . in America, from 1607 to 1830. . . . If every . . . Texas woman before 1859, who desired an abortion was at liberty to undergo, and her abortionist at liberty to perform, such a procedure according to the English and American common law, and if all American women (and their abortionists) enjoyed such liberty on September 25, 1789, when the ninth amendment was proposed by the First Congress (in New York City), and on December 15, 1791, when it was adopted, then there is sound ground for holding that such liberty is preserved by that amendment today (subject to abridgment only to promote a compelling secular state interest).

This is a serious misreading of the facts, as subsequent commentators have shown. Yet, this misreading of history was enough to sway the majority in the *Roe v. Wade* decision to dismiss the common-law background of later statutes. As Justice Blackmun summarized the view that prevailed on the Court:

> It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or *even of common law origin*. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century. (*Roe v. Wade* 1973: 129, emphasis added)

Thus, the historical analysis offered by Means has had an enormous impact. It not only influenced the decision in *Roe*, which asserts a Ninth Amendment basis, among others, for abortion liberty, but it also later

influenced the *Historians Brief* (1989), an amicus brief in *Webster v. Reproductive Health Services*, which, in turn, influenced a number of prominent scholars such as Laurence Tribe and Ronald Dworkin. The entire common-law history of abortion has been badly distorted in American jurisprudence and in much of the academic scholarship that has relied on the (mistaken) history in Means's initial work.

In what is probably the most exhaustive study (in 1,283 pages) of the history of abortion law, Joseph Dellapena (2006: 185–228) provides a detailed examination of cases in England dating back to the reign of Queen Elizabeth I and cases in colonial America, all of which point to one conclusion: abortion was often classified in common law as murder, either as a felony or a misdemeanor (called "misprision" in England). For example, Dellapena (2006: 193) notes regarding the 16th-century case of *Regina v. Webb* (in which Margaret Webb was indicted, presumably convicted, but later pardoned, for self-inducing abortion):

> Its outcome sets to rest the claim that while abortion may have been a crime at common law when imposed on a woman, it was woman's right under the common law as reflected in the long tradition that women were not subject to punishment for abortion. The indictment of Margaret Webb for aborting herself lays to rest any claim that women had a "common law liberty" to abort as claimed by so many advocates of abortional freedom.

In a much later case, *Rex v. Tinckler* ([1781] 1803), a midwife named Margaret Tinckler was found guilty of having supplied Jane Parkinson with devices intended to cause an abortion, which killed not only the child, but the mother as well (Dellapena 2006: 240–242). Tinckler was subsequently executed "for a crime in acting or recommending certain means to destroy an infant, which was effected; and finally with the death of the mother."

Dellapena (2006: 215–224) also provides evidence of cases in the American colonies in which indictments were issued for abortion in violation of common law: in Maryland in 1652, and in Connecticut in 1745. In the 1652 case (*Commonwealth v. Mitchell*), Mitchell was found guilty of "Murtherous intention" for having forced Susan Warren to ingest an abortifacient drug. In the 1745 case (*Rex v. Hallowell*), a physician named John Hallowell was convicted of having tried to endanger

the health of a mother and to destroy the fetus in her, first with an ingested substance and then with an invasive procedure. Dellapena (2006: 220) also mentions other cases that reveal the criminal character of abortion in colonial America:

> At least twice men were charged with murder for inducing an abortion of a pre-quickening fetus only to escape conviction by marrying the woman and thereby disqualifying the principal witness against the accused. Any supposed "common law liberty of abortion" is as mythical on this side of the Atlantic as on the other side.

All of the evidence amassed by Dellapena supports the definite finding that the common law of England and the United States classified abortion as a crime for hundreds of years prior to its codification in U.S. statutes in the middle of the 19th century. That is to say, the criminal nature of abortion was *not* an invention of the 19th century, as Means asserted. Similarly, McKeown (1988: 11) concludes a discussion of common-law cases in England before abortion became a statutory crime in England in 1803:

> The authorities considered above ... lead to the conclusion that the common law prohibited abortion and did so predominantly for the protection of fetal life.

Even though a variety of factors made abortion difficult or impossible to indict in many circumstances, it never amounted to anything akin to a "common-law liberty."

Doctors in the 19th Century: Motives for Opposing Abortion

Third, Cyril Means misrepresented the history of abortion law by claiming that restrictive laws adopted in the United States in the 19th century were intended only to protect the life and health of pregnant women, without regard to the life and welfare of the fetus. He further claimed that concern for the life of the fetus developed only in the mid-20th century. Referring to the abortion statutes that were adopted by American state legislatures in the middle of the 19th century, Means (1971: 335–336) wrote:

> The sole historically demonstrable legislative purpose behind these statutes was the protection of pregnant women from the danger to their

> lives imposed by surgical or potional abortion, under medical conditions then obtaining, that was at times as great as the risk to their lives posed by childbirth at term, and that concern for the life of the conceptus was foreign to the secular thinking of the Protestant legislators who passed these laws.

This claim is preposterous, unless one is willing to ignore or discount the explicit statements made by the physicians who spearheaded the legislative reform movement and who were thus indirectly responsible for most of the laws adopted by state legislatures.

The record clearly demonstrates that physicians led the campaign to end abortion in the United States and that their motive was to prevent the deaths of unborn children out of concern for the welfare of unborn children and a belief that actual—and not just potential—human lives were at stake. As Mohr (1978: 36–37, emphasis added) argues:

> The nation's regular doctors, probably more than any other identifiable group in American society during the nineteenth century, including the clergy, defended the value of *human life per se as an absolute* .... Regular physicians felt very strongly indeed on the issue of protecting human life. And once they had decided that human life was present to some extent in a newly fertilized ovum, however limited that extent might be, they became the fierce opponents of any attack upon it.

In a report by a committee of the American Medical Association (AMA), Horatio Storer et al. (1859: 75–77, emphasis added) published a statement of unwavering opposition to abortion on ethical grounds:

> The heinous guilt of criminal abortion, however viewed by the community, is everywhere acknowledged by medical men.... [T]he statistics of our feotal deaths ... [are one of] the causes of this general demoralization.. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it, and to its life as yet denies all protection .... We are the physical guardians of women; *we, alone, thus far, of their offspring in utero*. The case is here of life and death—the life or death of thousands—and it depends, almost wholly, upon ourselves .... If we have ever been thought negligent of foetal life, the means of correcting the error are before us .... The Committee would advise that [the AMA] ... publicly express its abhorrence of ... the wanton and murderous destruction of [the] child.

The committee report, containing the above language, gained unanimous support at the AMA convention of 1859 (Mohr 1978: 157). This was the beginning of a 20-year crusade by the doctors of the United States to convince state legislatures to adopt stricter laws regarding abortion. There can be no question that protection of unborn children was a primary motive of the AMA.

In addition to direct declarations by doctors or legislators, there are numerous sources of indirect evidence that state legislators were motivated by a desire to stop the killing of unborn children, whom they regarded as "persons." One brief statement, demonstrating that the legislative intent of the Kansas abortion law was the well-being of the unborn child, comes from *Herman v. Turner* (1925: 864, cited by Dellapena 2006: 297, n. 276): "The abortion statute is not designed for the protection of the woman, only of the unborn child and through it society." As Witherspoon (1985: 46) notes, 19th-century state statutes allowed abortion only in cases necessary to preserve the life of the pregnant woman, which is an "unequivocal indication that these legislatures considered the unborn to be persons in the whole sense" and thus worthy of legal protection. In addition, Witherspoon (1985: 56) points out that legislation in the 19th century often included a provision making abortion illegal only if the woman was pregnant, a rule that would have been unnecessary if the purpose was merely to protect the life and health of the woman from a dangerous procedure:

> This requirement is readily understandable if the primary purpose of the legislatures was to protect the life of the unborn child: only if the woman is actually pregnant is there any possibility that the attempted abortion will cause the death of an unborn child.

In a few states, a committee was appointed to investigate changes to abortion law. The Ohio Senate Select Committee (1867), when reporting out a bill to make *all* abortions illegal, from conception to birth, approvingly quoted Horatio Storer, the physician who spearhead the AMA campaign to reform American abortion laws:

> The foetus in utero is alive from the very moment of conception . . . . The willful killing of a human being, at any stage of its existence, is murder.

This is clear evidence that the AMA's campaign to save unborn human beings, at all stages of gestation, had a direct legislative impact. From 1860 to 1880, numerous state legislatures did away with arbitrary legal distinctions based on stages of gestation and adopted laws that prohibited abortion at *any* stage of development, a fact that implicitly reveals a concern with the lives of unborn children and not merely with the lives of their mothers (Mohr 1978: 200, 224). The claim by Means (1971: 335–336) that 19th-century laws were adopted without reference to the interests of the fetus is simply false.

Using Bad History

In an internal memorandum David Tundermann ([1971] 1974: 891–892), a Yale Law School student working with the legal team challenging the Texas abortion law in *Roe v. Wade*, wrote that Means's "own conclusions sometimes strain credibility," but he overlooked this flaw for strategic reasons:

> Where the important thing to do is to win the case no matter how, however, I suppose I agree with Means's technique: begin with a scholarly attempt at historical research; if it doesn't work out, fudge it as necessary; write a piece so long that others will read only your introduction and conclusion; then keep citing it until the courts begin picking it up. This preserves the guise of impartial scholarship while advancing the proper ideological goals.

This acknowledgment reveals that the advocates of abortion reform working on the *Roe* case were more intent on winning a case than on discovering the truth, which is what, in theory, the adversarial system of justice is supposed to achieve. However, if one side in the argument presents as facts things that it knows to be untrue, the system must almost certainly fail.

Sarah Weddington, counsel for the legal team fighting to establish constitutional abortion rights, was aware of the Tundermann memo and of its significance. Nevertheless, she made use of the article by Means in her oral arguments before the Supreme Court, and that article became an integral part of the background information explicitly acknowledged by Justice Blackmun in his majority opinion. The decision in *Roe v. Wade*—buttressed by Means's discredited historical

scholarship—simply left the unborn child out of the moral and legal equation, and introduced a state of confusion that still grips constitutional theory today. The Court created a new constitutional right—a right to an abortion—that has not settled the debate and instead continues to sow legal and political discord.

Conclusion: The Inevitability of Substantive Analysis

The slavery and abortion issues could not be adjudicated—whether under the Due Process Clause or any other—without eventually engaging the moral and philosophical issues at the heart of the disputes. The cases *Dred Scott* and *Roe v. Wade* raise deep questions about personhood, natural rights, republicanism, and self-government. Even if it pretends to be, the Court cannot remain neutral on these substantive constitutional questions.

Over the last 40 years, changes in our understanding of biological facts have reinforced the view that the constitutional questions raised by *Roe* about the personhood of unborn children need reconsideration. By the middle of the 19th century, the medical community was fully aware that a fetus is a full member of the human species, and yet, that simple fact was ignored and even denied a century later in the *Roe* decision. A more extensive engagement and debate about embryology and the history of abortion might have led to a quite different outcome. At a minimum, it would have helped to clarify, rather than confuse, just what was at stake in the outcome of the case.

American society stands at an impasse regarding basic issues of human dignity and democracy. Over 40 years of debate about the ethics and legality of abortion have left us with a seemingly unbridgeable gulf between those who wish to recognize unborn human beings at any stage of development as part of the community of moral persons, and those would exclude some human beings in early stages of development from that status. Today, no serious person disputes whether abortion involves the deliberate destruction of a unique human life. The only question is whether it is a justifiable killing — and that question ultimately is a philosophical and moral question.

Debates about personhood were central to the issue of slavery, as well, and many legal commentators have examined the doctrinal and political parallels between *Dred Scott* and *Roe v. Wade*. Each decision

employed the doctrine of substantive due process, and each engendered political backlash against the judiciary while underscoring the Supreme Court's inability to decisively settle contested political questions. Yet the deeper parallel is not doctrinal or political, but substantive. In the *Dred Scott* case, the Supreme Court interpreted the words "person" and "property" in the Fifth Amendment's Due Process Clause in a way that excluded enslaved Africans from the category of persons and treated them instead as a legitimate species of property that persons could not be deprived of without due process of law. In *Roe v. Wade*, the Supreme Court interpreted the words "person" and "liberty" in the Fourteenth Amendment's Due Process Clause in a way that excluded unborn human beings from the category of moral and constitutional persons, treating them instead as human nonpersons whom others had a constitutional right to destroy.

Many commentators have missed or failed to emphasize the degree to which an engagement with deeper philosophical issues was inevitable in these cases. The Supreme Court could not be neutral with respect to these substantive moral questions. In reality, we rely (implicitly or explicitly) on substantive judgments when we engage in constitutional interpretation. The Due Process Clause is not self-defining or self-executing, and interpretation requires—at a minimum—that we ask what it means to be a person, what counts as a legitimate species of property, what kinds of legislative or judicial acts are lawful, and what process is due. What is striking in these cases is the absence of serious engagement with the substantive issues at stake.

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