NEW YORK LAW SCHOOL

NYLS Law Review

Volume 40
Issue 4 *Volume XL, Number 4, 1996*

Article 14

January 1996

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In *The Center Holds*,[1] Professor James Simon has demonstrated that much of the Warren and Burger Courts' jurisprudence still survives despite the Reagan and Bush administrations' appointment of several supposedly conservative Justices. If that were all Professor Simon meant to show, there would be little point in us commenting on the book or his speech, other than to say that we agree, for the most part, that the Rehnquist Court has disappointed conservative Court observers. Certainly, the Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[2] not to overrule *Roe v. Wade*'s[3] decision that women have a constitutional *right* to abortion dumbfounded those, who like us, find no warrant for any such right in the Constitution's text or history, and supposed that at least five Justices of an allegedly "conservative" Court would be sensible enough to reach the same conclusion. Moreover, as Professor Simon's book illustrates, *Casey* is not the only case in which the Rehnquist Court has disheartened conservatives.

But there is more for us to comment on because Professor Simon believes, as the title *The Center Holds* makes clear, that the failure to overturn cases like *Roe* is a victory for the jurisprudential center; or, in other words, a victory for jurisprudential *moderation*. Another way of stating Professor Simon's thesis is that the Rehnquist Court, despite conservatives' expectations, has turned out to be a centrist or moderate Court. Whatever the accuracy of this observation when applied to the Rehnquist Court's entire corpus of decisions, our interest here is not to consider every decision Professor Simon treats in his speech and book. Rather, as lawyers whose practice revolves primarily around religious liberty and pro-life causes, we will limit our analysis to examining whether Professor Simon's thesis fits the Court's recent religious speech cases (*Capitol Square Review & Advisory Board v. Pinette*[4] and *Rosenberger v. Rectors & Visitors of the University of Virginia*[5]) and the

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1. JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT (1995) [hereinafter SIMON, THE CENTER HOLDS].

2. 112 S. Ct. 2791 (1992).

3. 410 U.S. 113 (1973).

4. 115 S. Ct. 2440 (1995).

5. 115 S. Ct. 2510 (1995).

Court's abortion jurisprudence (focusing on *Casey, Roe,* and *Doe v. Bolton*[6], *Roe*'s companion case). For reasons we will explain shortly, we believe that *Pinette* and *Rosenberger* arguably can be called centrist or moderate decisions without stretching too much the reasonable meanings of "centrist" or "moderate." But the Court's abortion cases are anything but centrist or moderate, unless one, in Alice in Wonderland-like fashion, defines "center" to mean anything one wants it to mean. Moreover, the Court's tenacious clinging to the "right" to abortion has created an "abortion distortion" that has infected both the Court's jurisprudence in other areas (in particular, the free speech rights of anti-abortion protestors)[7] and scholarship in general.

First, the religious speech cases. In a series of cases in the 1980s and early 1990s, the Supreme Court firmly established the broad general principle that religious speakers have essentially the same free speech rights and the same access to government-owned forums as any other speakers. For example, in *Widmar v. Vincent*,[8] the Court held that when a state university created an open forum for student groups to meet, the university could not deny use of that forum to students who wanted to meet for religious discussion or worship.[9] In *Westside Community Schools v. Mergens*,[10] the Court upheld the constitutionality of the Equal Access Act,[11] a law that generally prohibits public secondary schools from denying student groups equal access to school facilities based on the religious, political, or philosophical content of the students' speech.[12] And in *Lamb's Chapel v. Center Moriches Union Free School District*,[13]

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6. 410 U.S. 179 (1973).

7. *See, e.g.*, Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994).

8. 454 U.S. 263 (1981).

9. *Id.* at 267-77.

10. 496 U.S. 226 (1990).

11. 20 U.S.C. §§ 4071-74 (1988).

12. Specifically, the Equal Access Act makes it

> unlawful for any public secondary school which receives Federal financial assistance and has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of religious, political, philosophical, or other content of the speech at such meetings.

Id. § 4071 (a). For a recent detailed analysis of the Act and the case law construing the Act, see Jay A. Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1043-55 (1995). For an analysis of the Act written shortly after the Act's passage, see Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1 (1986).

13. 113 S. Ct. 2141, 2146-48 (1993).

the Court held that discriminating against religious speakers who seek access even to public facilities that are not generally open violates the free speech clause.

In *Widmar, Mergens,* and *Lamb's Chapel,* the government actors seeking to deny religious speakers access to public facilities argued that the Establishment Clause required discrimination against religious speakers. This argument proceeded from two bases. First, allowing religious speakers to use public facilities provided a benefit to those speakers. This benefit allegedly violated the Establishment Clause, which was said to generally prohibit the government from aiding religion.[14] Second, allowing religious speakers to use public facilities was said to be endorsing the religious speaker's viewpoint. This endorsement also allegedly violated the Establishment Clause.[15]

The Court had no trouble rebuffing these arguments in *Widmar, Mergens,* and *Lamb's Chapel.* Promoting equal access to facilities for all speakers is a secular purpose sufficient to meet the secular purpose prong of the Establishment Clause test established in *Lemon v. Kurtzman.*[16] Any incidental benefit the religious speaker receives from using a government facility does not violate the Establishment Clause; if providing such a generally available benefit was illegal, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair."[17] And providing equal access to public facilities for religious speakers does not by itself "confer any imprimatur of state approval on religious sects or practices."[18] As the plurality in *Mergens* noted, there is a "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[19]

The Court's plurality decisions last term in *Pinette* and *Rosenberger* follow naturally from *Widmar, Mergens,* and *Lamb's Chapel.* In *Pinette,* the Ku Klux Klan sought to erect a cross on Capitol Square in Columbus, Ohio. Capitol Square is a public forum which for many years has been available for speech and expressive activity, including the erection of free-standing displays by many groups.[20] Government may exclude speech[21]

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14. *See Widmar,* 454 U.S. at 273-74.

15. *See id.* at 271-75 & 274 n.14; *Mergens,* 496 U.S. at 249-50.

16. 403 U.S. 602, 612-13 (1971).

17. *Widmar,* 454 U.S. at 274-75 (citation omitted); *see also Mergens,* 496 U.S. at 248.

18. *Widmar,* 454 U.S. at 274.

19. *Mergens,* 496 U.S. at 250.

20. *See Pinette,* 115 S. Ct. at 2444-45.

from a public forum only if the exclusion is necessary to serve a compelling state interest.[22] Despite this, the state refused to allow the Klan to erect its cross because the cross's message was religious.[23]

The state asserted in *Pinette* that the Establishment Clause required censoring the Klan's cross. This is a puzzling argument because the Establishment Clause restricts only government action, and the state was not erecting the cross, paying to erect the cross, or endorsing, assisting, or sponsoring the Klan's action. How then, given the "crucial difference" between government and private speech, could there be an Establishment Clause violation? The state argued that because of the forum's proximity to the Ohio Statehouse, a reasonable observer could *perceive* that the state was endorsing religion by allowing a cross on the square; this risk of perceived endorsement, according to the state, violated the Establishment Clause.[24]

The plurality, in an opinion written by Justice Scalia, rejected this "perceived endorsement" (or, in the plurality's words "transferred endorsement"[25]) test out of hand. Because "endorsement" connotes some expression of approval or support, the plurality equated "endorsement" with "promotion" or "favoritism." Because neutral treatment of private religious expression is not promotion or favoritism, allowing the Klan to erect its cross would not violate the Establishment Clause no matter what an observer might perceive.[26]

Justice O'Connor's and Souter's concurring opinions unfortunately did not dismiss the perceived endorsement test out of hand. Instead, the concurring Justices argued that even private religious expression in a government-owned public forum can violate the Establishment Clause if

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21. By speech, we mean both speech and activity designed to express a message, which the Court generally treats as speech for purposes of the Free Speech Clause. *See, e.g.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2541-42 (1992).

22. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2705 (1992); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

23. *Pinette*, 115 S. Ct. at 2445.

24. *See id.* at 2447.

25. *Id.* at 2447-48.

26. *Id.* This analysis is consistent with the two other cases in which the Court used an endorsement analysis to determine whether religious displays violated the Establishment Clause. In Lynch v. Donnelly, 465 U.S. 668, 685-87 (1984), the Supreme Court upheld a *city-sponsored* creche display on the grounds that the display, in the context of surrounding secular Christmas symbols, did not endorse Christianity. In Allegheny County v. ACLU, 492 U.S. 573, 601 (1989), the Court applied the endorsement test to hold unconstitutional a private creche display on government property that was not generally open to private displays.

a reasonable observer would perceive that the state is endorsing religion.[27] However, the concurring Justices' "reasonable observer" is one who is aware of a forum's history and context. Where private expression occurs in a public forum, a reasonable observer would understand that the government does not support speech merely by allowing that speech in a place traditionally open to all speakers.[28] Moreover, the state has means less draconian than outright censorship to avoid the appearance of endorsement.[29] Thus, the concurring Justices in *Pinette* found no Establishment Clause violation.

In *Rosenberger*, an independent student religious newspaper, *Wide Awake*, published by University of Virginia students, applied to have its printing costs paid from the University's general Student Activities Fund. That fund was financed by mandatory activities fees imposed on students. Although the Fund paid costs incurred by other student publications, the University prohibited the fund from paying the religious newspaper's printing costs.[30]

The Court majority, in an opinion by Justice Kennedy, held that refusing to pay *Wide Awake*'s printing costs from the Student Activities Fund constituted illegal viewpoint discrimination.[31] The Court likened participation in the fund to access to a limited forum. In such a forum, a state may sometimes restrict speech based on content. But the state may not restrict speech based on its viewpoint.[32] *Wide Awake* sought to address subjects from a Christian perspective—for example, racism and crisis pregnancy—that were within the approved category of subjects eligible for funding. The University denied funding because of *Wide Awake*'s religious perspective. Therefore, the University violated the Free Speech Clause by discriminating against *Wide Awake* on the basis of its religious viewpoint.[33]

The Court also held that the Establishment Clause did not excuse the University's viewpoint discrimination. Foremost in the majority's reasoning was that the state may extend general benefits to its citizens

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27. *See Pinette*, 115 S. Ct. at 2454 (O'Connor, J., concurring).

28. *See id.* at 2455-56. As the court noted in *Mergens*, the proposition that the government does not endorse all it fails to censor, a proposition that strikes at the heart of any perceived endorsement argument, "is not complicated." 496 U.S. at 250.

29. *See Pinette*, 115 S. Ct. at 2461-62 (Souter, J., concurring). These means include, among other things, a written disclaimer of state sponsorship. *Id.*

30. *See Rosenberger*, 115 S. Ct. at 2514-15.

31. *See id.* at 2516-20.

32. *Id.* at 2516-17.

33. *See id.* at 2517-19.

regardless of their religious belief.[34] *Widmar, Mergens,* and *Lamb's Chapel* established that the state must allow religious speakers equal access to facilities maintained by public funds.[35] Thus, for example, the University could not prohibit *Wide Awake* from using University-owned computers or copy machines to compose or print religious newspapers.[36] There is no difference between using University funds to operate a printing center and using those funds to pay third parties to provide printing services. In either case, "any benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis."[37]

How far *Rosenberger*'s Establishment Clause holding will extend is an open question. The Court stressed that the Student Activities Fund was not a general fund, but a fund made up from student payments and dedicated to specific purposes. Thus, the Court noted that its decision did not address "an expenditure from a general fund" such as general tax revenues.[38] The Court also stressed that because the payments would go to outside printers, the "special dangers" that other cases had recognized in direct payments to sectarian institutions did not exist.[39]

Justice O'Connor joined the majority in *Rosenberger* but added in her concurring opinion that she would examine similar cases one by one. Justice O'Connor found it significant in *Rosenberger* that the student organizations were strictly and publicly independent from the University and that fifteen other student magazines with widely divergent views were eligible for assistance. Thus, she found "illogical" any perception that the University endorsed any one viewpoint.[40] Justice O'Connor also noted the possibility that a student may have a free speech right to a proportional refund of fees if the student does not approve of particular speech the fees are funding.[41]

While the scope of *Rosenberger*'s Establishment Clause holding may not be clear, there should be no question after *Rosenberger* that

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34. *Id.* at 2521.

35. *Id.* at 2523 (citing Widmar v. Vincent, 454 U.S. 263, 269 (1981); Westside Community Sch. v. Mergens, 496 U.S. 226, 252 (1990)).

36. *Rosenberger*, 115 S. Ct. at 2523-24.

37. *Id.* at 2524.

38. *Id.* at 2522. But if religious speakers may use public facilities paid for from general tax revenues (for instance, school auditoriums or student copy centers), it is arguable that *Rosenberger*'s logic would lead to the conclusion that payments to third parties for providing those facilities or services are constitutional.

39. *See id.* at 2523.

40. *Id.* at 2526-27.

41. *Id.* at 2527-28.

government may not discriminate against speech simply because the speech addresses an issue from a religious perspective. *Rosenberger,* like *Pinette, Widmar, Mergens,* and *Lamb's Chapel,* stands for the general proposition that religious speakers have the same free speech rights as other speakers, even on public property. This is a proposition to which the senior author has been dedicated throughout his career litigating free speech issues, not just for Christians (as some may mistakenly believe), but for people of all faiths.[42] It is also, we believe, a proposition that enjoys broad support from across the political spectrum. For example, we and several colleagues filed an amicus brief in *Pinette* supporting the Klan's position.[43] But a local ACLU chapter actually represented the Klan in *Pinette.* Moreover, this past year, President Clinton instructed the Secretary of Education to inform school officials that the Establishment Clause "does not convert our [public] schools into religion-free zones . . . [or] require students to leave their religion at the schoolhouse door."[44] The President's directive specifically stated, among other things, that students "have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity,"[45] and that "[s]tudents may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages."[46]

Given this agreement on religious speech rights, it is fair to say that *Pinette* and *Rosenberger* are centrist decisions, at least in the sense that the

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42. *See, e.g.,* International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992).

43. As we made clear in our brief, we filed to support the Klan's right to free speech, and not to support the Klan or its aims. The district court in *Pinette* best summed up our feelings about both the Klan and about the Klan's free speech rights (and free speech in general):

> It is ironic and in the most literal sense diabolical that a group bearing this name would seek to publicly display the symbol of Jesus of Nazareth known to Christians and non-Christians alike as the Prince of [P]eace. It should be obvious, however, that the constitutional right of freedom of speech would be meaningless if it did not apply equally to all groups, popular and unpopular alike.

Pinette v. Capitol Square Review & Advisory Bd., 844 F. Supp. 1182, 1188 (S.D. Ohio 1993), *aff'd* 30 F.3d 675 (6th Cir. 1994), *aff'd* 115 S. Ct. 2440 (1995).

44. UNITED STATES DEP'T OF EDUC., STATEMENT OF PRINCIPLES REGARDING RELIGIOUS EXPRESSION IN OUR NATION'S PUBLIC SCHOOLS 3 (Aug. 10, 1995) [hereinafter STATEMENT OF PRINCIPLES] (citing President Bill Clinton, Religious Liberty in America, Remarks at James Madison High School (July 12, 1995), *available at* http://www.ed.gov/news.html).

45. *Id.*

46. *Id.* at 5.

main proposition those cases stand for (that religious speakers have the same speech rights as other speakers) enjoys broad public support. This is not to say that we are completely comfortable with those decisions. For example, the perceived endorsement test that Justices O'Connor, Souter, and Breyer applied in *Pinette* is antithetical to the Free Speech Clause. The test breeds confusion, leaving speakers to guess about their free speech rights. How, for instance, can public officials determine whether a "reasonable observer" will perceive endorsement where none actually exists?[47] And how can a speaker determine what a public official will determine?

The perceived endorsement test also raises doctrinal problems. The test makes free speech rights depend on other people's (hypothetical) perceptions, thus reintroducing a variant of the heckler's veto back into First Amendment law. Moreover, only the state can violate the Establishment Clause. Under the Court's state action precedents, which hold generally that the state is not responsible for private action unless it encourages or coerces that action,[48] it is questionable that merely allowing religious expression in a public forum without actually aiding or endorsing that expression is sufficient state action to implicate the Establishment Clause.[49] This is not just a technical quibble without real consequence to free speech rights, for the state action doctrine exists in large part to "preserve[] an area of individual freedom by limiting the

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47. Justice Scalia's opinion raises this and several other practical objections to the concurring Justices' approach. *See* Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2449-50 (1995).

48. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 13, 19 (1948) (noting that private adherence to a racially-restrictive covenant does not violate the Clause); Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978) ("[t]his Court . . . has never held that a state's mere acquiescence in a private action converts that action into that of the state's."); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 546 (1987) (A state "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the [state].") (citation omitted); *see also* Lebron v. National R.R. Passenger, 115 S. Ct. 961, 979 (1995) (O'Connor, J., dissenting) ("[T]he conduct of a private actor is not subject to constitutional challenge if such conduct is 'fundamentally a matter of private choice.'" (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991))).

49. The general rule distinguishing private initiative from public compulsion developed for the most part in cases involving racial discrimination, an action the Constitution does not protect. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972). It is perverse to hold the state responsible for allowing action, such as free speech, that the Constitution does protect. The whole point of the Free Speech Clause is to prevent government from interfering with the right to free speech. If the state is not responsible for allowing private action the state could proscribe, it cannot be responsible for allowing private action it has no right to proscribe.

reach of federal law."[50] By blurring the line between state and private action, the perceived endorsement test targets religious speakers for potential disabilities not imposed on other speakers.

As a practical matter, however, these doctrinal deficiencies may turn out not to be terribly important. For example, as we read *Pinette*, even the concurring Justices would approve most public religious displays so long as the display's sponsor makes clear the state is not funding or otherwise endorsing the display. And it is unlikely that the perceived endorsement test will have any force if applied to actual speakers as opposed to free-standing displays. Thus, despite any doctrinal problems we might have with the concurring opinions, *Pinette*, for the most part, represents a real victory for religious speech rights, which enjoy broad public support. We believe the same is true of *Rosenberger*. In that sense, then, we think it is fair to call *Pinette* and *Rosenberger* "centrist" or "moderate" opinions, at least by a measure that gauges "centrism" or "moderation" on a scale of public acceptance of core doctrine.

We would not, however, presume to place *Pinette* and *Rosenberger* on any abstract ideological scale that we confidently could assert enjoys universal acceptance. To us, the core doctrine underlying *Pinette* and *Rosenberger* is perfectly sensible doctrine that not only commands broad support but is perfectly consistent with the Constitution and *ought to* command broad support. Thus, to us, *Pinette* and *Rosenberger* are moderate decisions. But we realize that those who oppose the dreaded "radical religious right" would see things differently, and may not think *Pinette* and *Rosenberger* belong in the "moderate center" of the ideological scale. The point is that "moderation" is in the eye of the beholder; anybody can define any case (or line of cases) as in or out of the center if that person defines where the center is.

That is the only way that anybody could claim the label of "moderate" for the Court's abortion decisions. In an act of "raw judicial power,"[51] the Court in *Roe v. Wade* overturned the abortion laws of all fifty states,[52] finding in the Constitution a "right" to abortion throughout nine months of pregnancy despite the fact that nothing in the Constitution's text or history, or our country's legal history, supports any such right. This is not simply the opinion of pro-life "extremists." Pro-choice constitutional scholar John Hart Ely, writing shortly after the Court

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50. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991) (citation omitted).

51. Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting).

52. *See* Paul B. Linton, *Enforcement of State Abortion Statutes After* Roe*: A State-by-State Analysis,* 67 U. DET. L. REV. 157, 161-62 (1990); Paul B. Linton, Planned Parenthood v. Casey: *The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 23-27 (1993) [hereinafter Linton, Planned Parenthood].

decided *Roe*, concluded that *Roe* is "bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[53] The same criticism applies fairly to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which upheld the right to abortion *Roe* created. Far from being moderate, *Roe* and *Casey* are radical (that is, revolutionary) in every important sense—not just jurisprudentially, but also historically, philosophically, and culturally.

To understand why this is so, one needs first to understand what *Roe*, taken together with *Doe v. Bolton*, actually held. We can summarize what we consider to be *Roe* and *Doe's* essential holdings as follows: First, *Roe* held that the Constitution contains a right to privacy broad enough to include a woman's right to have an abortion. Second, *Roe* and *Doe* together held that the abortion right exists, practically on demand, throughout pregnancy (though the Court obfuscated this second holding by adopting a trimester analysis that purports to allow regulation in the second trimester and prohibition in the third trimester). Third, to enable the Court to reach the first two holdings, *Roe* held that even if the unborn child is a human being, that child is not a person entitled to constitutional protection.

Since nobody disputes that *Roe* stands for the right to abortion, we will move directly to the scope of the right to abortion. There has been much misunderstanding (or perhaps more accurately, disinformation) concerning the scope of the abortion right *Roe* created. Some believe, or purport to believe, that *Roe* represents a grand compromise between extreme positions. *Roe* in this view stands only for a limited "'fair chance' to abort."[54] For example, Ronald Dworkin, in his recent book, *Life's Dominion*,[55] wrote that states may prohibit abortion "before the third trimester . . . in those rare cases when it would jeopardize the *mother's* health"[56] and that states "may outlaw abortion altogether when the fetus has become a viable being, that is, in the third trimester of pregnancy."[57]

Dworkin's assertions are so off base that one is led to suspect, as one scholar noted, that Dworkin either never has read *Roe* or that Dworkin is

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53. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973).

54. Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 335 (1993). Bradley's article is a masterful and pointed critique of Ronald Dworkin's defense of the Court's abortion jurisprudence and abortion rights in general.

55. RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993).

56. *Id.* at 103.

57. *Id.* at 168.

"not being candid" with his readers.[58] *Roe* actually held that before viability, which the Court said marked the beginning of the third trimester, the state may not prohibit abortion (although in the second trimester, the state may impose regulations reasonably related to maternal health).[59] After viability, according to *Roe*, the state may prohibit abortions except when "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[60] This looks like a significant restriction (though it still directly contradicts Dworkin's assertion that *Roe* allows states to prohibit post-viability abortions "altogether"). But *Doe v. Bolton* defined maternal health elastically to include "all factors—physical, emotional, psychological, familial, and the [patient's] age—relevant to the well-being of the patient."[61]

Given this infinitely expandable definition of "health," "the truth of the matter about *Roe* is that something very much like the abortion-on-demand mandated for the first two trimesters persists until birth."[62] As two commentators have noted,

> [e]ven after her unborn baby is viable, a woman who wants to abort that baby need only convince a doctor (or perhaps two doctors) that her "emotional, psychological, or familial" well-being would suffer if she could not have an abortion. While "abortion on demand" for all nine months of pregnancy technically may not be the law in this country, "abortion effectively on demand" probably is a fair description of the law.[63]

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58. Bradley, *supra* note 54, at 335.

59. Roe v. Wade, 410 U.S. 113, 163-65 (1973).

60. *Id.* at 165.

61. 410 U.S. 179, 192 (1973).

62. Bradley, *supra* note 54, at 335 (footnote omitted); *see also* Ely, *supra* note 53, at 921 n.19 ("*[H]ealth* . . . presumably is to be defined very broadly indeed, so as to include what many might regard as the mother's convenience . . . ." (citation omitted)); Linton, Planned Parenthood, *supra* note 52, at 23 n.45 ("Given [*Doe's*] expansive definition of health, it may be questioned whether *any* statute attempting to limit post-viability abortions would be constitutional."); *id.* at 27 (*Roe* effectively "allowed unrestricted abortion throughout pregnancy"); Charles E. Rice & John P. Tuskey, *The Legality and Morality of Using Deadly Force to Protect Unborn Children from Abortionists*, 5 REGENT U. L. REV. 83, 85 (1995) ("it is fair to say that in *Roe* and *Doe* the Court established . . . a 'fundamental right' to abortion throughout all nine months of pregnancy." (citation omitted)).

63. Rice & Tuskey, *supra* note 62, at 120.

That this has proven to be so in practice is borne out by the recent debates over whether to ban so-called partial-birth abortions (a ban recently passed by Congress but vetoed by President Clinton). Partial-birth abortion is a technique used to kill unborn children from nineteen weeks (mid-second trimester) to full term.[64] In a partial-birth abortion, the abortionist partially breech delivers a baby, keeping the baby's head inside the womb. Then the abortionist thrusts scissors into the baby's skull (which usually accomplishes the goal of killing the baby)[65] and removes the baby's brains with a suction curette inserted into the hole created by the scissors.[66]

Those who oppose the ban on partial-birth abortions generally assert that these abortions are necessary emergency procedures. But the partial-birth abortion procedure takes three days to complete, which hardly makes the procedure suitable for an emergency.[67] Moreover, Dr. Martin Haskell, a practitioner who specializes in partial-birth abortions, has stated that approximately eighty percent of all such abortions performed on twenty to twenty-four week-old fetuses are "'purely elective.'"[68]

Those who oppose the partial-birth abortion ban on constitutional grounds have a dilemma. Abortion rights activists rarely like to admit *Roe*'s sweeping scope. Yet, by opposing the partial-birth abortion ban on constitutional grounds, those abortion rights activists implicitly maintain that *Roe* protects the right to abortion, essentially on demand, even up to the moment of birth.

We have no idea what Professor Simon thinks about partial-birth abortions, and we do not mean to imply that he opposes the partial-birth abortion ban if he does not. We do know, however, that any decision that provides a basis for arguing that the Constitution's due process clauses prohibit Congress or the states from outlawing barbarities such as partial-birth abortions is hardly the victory for moderation that Professor Simon claims *Roe* is. But we ought not fixate on partial-birth abortions. Even on the off chance Congress overrides President Clinton's veto of the partial-birth abortion ban, other means of late term abortions (and early abortions) will remain legal, and the right to use those means protected by *Roe* and its progeny. Every abortion takes a human life, a fact that even

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64. *See Partial-Birth Abortion Ban Act of 1995: Hearings on H.R. 1844 Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 104th Cong., 1st Sess. 5 (1995) (statement of Pamela Smith, M.D.).

65. *See id.* at 8.

66. *See id.* at 7.

67. *See id.* at 9.

68. *Id.* at 8 (statement of Sen. Orin Hatch) (quoting an interview with Dr. Martin Haskell, *Amer. Med. News,* July 5, 1995).

honest abortion advocates long have admitted.[69] This fact brings us to what we have stated to be *Roe*'s third essential holding–that unborn children, even if human beings, are not persons.

The Court in *Roe* thought the personhood question significant, going so far to say that if the unborn child were a person, the case for a right to abortion would collapse.[70] Not surprisingly, the Court went on to hold that the unborn child is not a person for purposes of the Fourteenth Amendment.[71] But the Court did not hold that the unborn child is not a human being. Instead, the Court held only that it "need not resolve the difficult question of when life begins."[72] In other words, the Court punted the question of the unborn child's humanity. In effect, then, the Court held that humanity really was irrelevant to personhood; even if the unborn child is a human being, it is not a "person" for constitutional purposes.[73]

A more forthright statement of the same reasoning is found in *Byrn v. New York City Health & Hospital Corp.*[74] *Byrn* involved a suit asking the New York courts to declare New York's 1970 liberalized abortion law unconstitutional because the law deprived unborn children of their Fourteenth Amendment rights. The trial court granted an injunction,

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69. *See infra* note 85 and accompanying text.

70. Roe v. Wade, 410 U.S. 113, 156-57 (1973); *see also id.* at 157 n.54. Of course, it is a non-sequitur to insist that women must have the right to abortion if the unborn child is not a Fourteenth Amendment "person." As Ely notes, "Dogs are not 'persons in the whole sense' nor have they constitutional rights, but that does not mean the state cannot prohibit killing them . . . ." Ely, *supra* note 53, at 926 (footnote omitted). The same is true of fetuses: "the argument that fetuses lack constitutional rights is simply irrelevant" to the state's authority to protect the unborn. *Id.* Nothing in the Constitution suggests any limit on the state's right to ban abortion. For the record, fetuses are *not* dogs. They are human beings and should be considered persons for Due Process and Equal Protection purposes. *See infra* notes 93-94 and accompanying text.

71. *Roe*, 410 U.S. at 158.

72. *Id.* at 159. As Dr. Bernard Nathanson notes, this assertion by the Court takes us back to the days when biologists believed in the theory of spontaneous generation, a theory debunked in the mid-eighteenth century when Lazzaro Spallanzoni showed that animal life could not occur unless sperm and ovum united. "Spallanzoni's work had thereafter not been seriously challenged until Roe v. Wade, when the Magnificent Seven seemed to disavow it." BERNARD N. NATHANSON, M.D., THE ABORTION PAPERS: INSIDE THE ABORTION MENTALITY 158 (1983).

73. *See* Rice & Tuskey, *supra* note 62, at 85-86.

74. 286 N.E.2d 887 (N.Y. 1972), *appeal dismissed*, 410 U.S. 949 (1973). For a description of the *Byrn* case by the plaintiff, a law professor at Fordham University, see Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORD. L. REV. 807, 840-42 (1973) [hereinafter Byrn, *An American Tragedy*].

finding as a matter of fact that the unborn child is a human being.[75] The New York Court of Appeals did not disturb this finding. In fact, the court of appeals conceded that the unborn child "has an autonomy of development . . . is human . . . and . . . is unquestionably alive."[76] But the court held that the legislature could define this living human being as a nonperson, and allow this being to be aborted. According to the court of appeals, "what is . . . a legal person is for the law . . . to say . . . . [I]t is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence."[77] In other words, a "person" is what the lawmaker says is a person;[78] IBM may be a person, but the unborn living offspring of human parents may not. The plaintiff appealed this decision to the Supreme Court. The Court dismissed the appeal for want of a substantial federal question in light of *Roe*,[79] thus confirming that *Roe* stands for the proposition that humanity does not necessarily mean personhood, while allowing the Court to avoid the sticky problem of having to state that conclusion directly.

Roe's personhood holding is a stark departure from the traditional Western ethic that all human life is sacred and that government has the responsibility to protect innocent human life. This has been the traditional teaching of our Judeo-Christian religious tradition.[80] The Hippocratic Oath, which Justice Blackmun so agonized over (according to Professor Simon)[81] and then rather cavalierly dismissed in *Roe*,[82] reflects the

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75. Byrn v. New York City Health & Hosp. Corp., No. 13113171 (N.Y. Sup. Ct., Jan. 4, 1972); *see* Byrn, *An American Tragedy*, *supra* note 74, at 841.

76. *Byrn*, 286 N.E.2d at 888.

77. *Id.* at 889.

78. Sanford A. Shane, *The Corporation Is A Person: The Language Of A Legal Fiction*, 61 TUL. L. REV. 563 (1987) (discussing the background and controversies of treating the corporation as a person).

79. *See* Byrn v. New York City Health & Hosp. Corp., 410 U.S. 949 (1973).

80. The Catholic Church's recent catechism sums up this traditional Judeo-Christian teaching when it states that "[h]uman life is sacred because from its beginning it involves the creative action of God . . . ." LIBRERIA EDITRICE VATICANA, CATECHISM OF THE CATHOLIC CHURCH, no. 2258 (U.S. Catholic Conf. trans. 1994). As the Fifth Commandment plainly puts it, "You shall not kill." *Deut.* 5:17.

81. *See generally* SIMON, THE CENTER HOLDS, *supra* note 1, at 106. Professor Simon states that the Oath "had been interpreted to forbid performing abortion." *Id.* Actually, a doctor taking the Oath, as quoted in *Roe*, states that "I will not give to a woman an abortive remedy." Roe v. Wade, 410 U.S. 113, 131 (1973) (footnote omitted). This statement seems not to leave much room for any alternative interpretation.

traditional ethic. Our own Declaration of Independence declares as "self-evident" that humans are "endowed by their Creator with certain unalienable rights, that among these are Life," and that government exists "to secure these rights." And this traditional ethic spurred state legislatures to pass strict anti-abortion statutes in the mid-nineteenth century, largely at the prompting of a medical profession that understood that unborn children are human beings from the moment of conception and that government has an obligation to protect that innocent human life.[83]

This is not to say that America always has lived up to this ideal. The history of slavery in this country proves that. *Roe* fits well with that history. The Court's holding that human beings are not necessarily persons, that it is for the lawmaker to decide which human beings are worthy of basic legal protection, is the same proposition that underlay an earlier Court's declaration in *Dred Scott v. Sanford*[84] that slaves were property rather than persons. Just as *Dred Scott* deprived the states of the power to protect escaped slaves' fundamental rights, so *Roe* deprived the states of the power to protect unborn children's most fundamental right.

Roe's personhood holding is the judicial application of a utilitarian ethic that places relative rather than absolute value on human life. Where the traditional ethic held that human life is sacred and had absolute value (though we did not always live up to that ethic), the new utilitarian ethic values human life only to the extent that life is useful or otherwise wanted. That ethic, and the means for implementing it, was perhaps best expressed in a 1970 editorial, written in support of legal abortion, in the California Medical Association's official journal:

> It will become necessary and acceptable to place relative rather than absolute values on things such as human lives . . . . This is quite distinctly at variance with the Judeo-Christian ethic . . . . The process of eroding the old ethic and substituting the new has

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82. Ely rather acidly states that, the Court in *Roe* "explain[ed] away the Hippocratic Oath's prohibition of abortion on the grounds that Hippocrates was Pythagorean, and Pythagoreans were a minority." Ely, *supra* note 53, at 925 n.42 (citation omitted). As Ely further notes, it is difficult to see how the Court's discussion of the Oath was even relevant to its legal argument. *Id.* This is one indication of how little *Roe* really had to do with constitutional law. At all events, Blackmun's dismissal misses the point: while Hippocrates' view may have been a minority position in Hippocrates' time, Western culture, influenced to a large extent by Judeo-Christian teaching, came to regard the Oath as the proper statement of medical ethics.

83. For a thorough discussion of the Anglo-American legal tradition of protecting the unborn by prohibiting abortion, see Linton, Planned Parenthood, *supra* note 52, at 103-19 (app. A). *See also* Rice & Tuskey, *supra* note 62, at 126-27; Byrn, *An American Tragedy*, *supra* note 74, at 815-39; Bradley, *supra* note 54, at 347-50.

84. 60 U.S. (19 How.) 393, 405-06 (1856).

> already begun. It may be seen most clearly in changing attitudes toward human abortion . . . . Since the old ethic has not been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been the curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices.[85]

There you have *Roe* in a nutshell. Avoid the "scientific fact" that "life begins at conception" and that abortion takes a human life. Engage in "semantic gymnastics" by talking about "potential life" (as if fetuses between six to nine month old can be called merely "potential life"), while sneaking into our law the ethic that not all human life is worthy of legal protection without candidly coming out and saying so. And use this ethic to help create a right to abortion, virtually on demand, throughout nine months of pregnancy. *This* is moderation?

Planned Parenthood of Southeastern Pennsylvania v. Casey,[86] the 1992 decision in which the Court reaffirmed the abortion right *Roe* and *Doe* created, is no more a "moderate" decision than *Roe* and *Doe*. True, *Casey* did uphold several abortion regulations that probably were unconstitutional under *Roe*.[87] But *Casey* upheld the proposition that the Constitution contains a right to abortion (although the *Casey* Court found this right located in the Fourteenth Amendment's guarantee of liberty rather than in any unenumerated right of privacy).[88] The Court reaffirmed *Roe*'s holding that states may not prohibit post-viability abortions that are necessary to preserve the mother's life or health,[89] and also reaffirmed *Doe*'s broad definition of "health."[90] Moreover, nothing

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85. Editorial, *A New Ethic for Medicine and Society,* 113 CAL. MED. 67, 67-68 (Sept. 1970) [hereinafter *A New Ethic for Medicine*].

86. 112 S. Ct. 2791 (1992).

87. *See id.* at 2881-82 (Scalia, J., concurring in part and dissenting in part).

88. 112 S. Ct. at 2804-08.

89. *Id.* at 2821 (joint opinion of Justices O'Connor, Kennedy, & Souter).

90. *Id.*

in *Casey* casts doubt on *Roe's* holding that the unborn are not persons whether or not they are human beings.[91]

Tragically, it is apparent after *Casey* that no Justice would accept an argument that unborn children are persons.[92] But it is not difficult to reconcile fetal personhood with the original meaning of the word "person" in the Equal Protection Clause. The argument would go essentially as follows: Nothing in the Equal Protection Clause's text or history indicates that the clause's drafters or ratifiers understood "person" to have anything other than its common meaning, which is "human being." Unborn children are human beings, and nothing in text or history indicates the framers understood the Equal Protection Clause specifically to exclude unborn children.[93] Therefore, "judges should recognize the unborn as persons."[94] The argument is more sophisticated than this synopsis allows us to indicate, but the primary point is still apparent: the word "person" in the Equal Protection clause includes *all* living human beings; it is not a legal term of art.

Be that as it may, *Casey,* along with upholding *Roe's* broad abortion right, has reaffirmed *Roe's* separation of personhood from humanity. Given the attitudes of the present Justices, that is unlikely to change in the foreseeable future. Beyond that, two other features of *Casey* are worth commenting on. First, for an opinion that purported to rely as heavily on *stare decisis* as the joint opinion did, *Casey* is remarkable for its '"selective disdain for precedent.'"[95] Aside from reaffirming what we believe to be *Roe's* most important holdings, the joint opinion showed little respect for its predecessor. *Casey* actually rejected "major portions of *Roe*" and overruled parts of two cases that relied on *Roe.*[96] Justice

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91. *See id.* at 2839 (Stevens, J., concurring in part and dissenting in part) (stating that the Court's analysis implicitly reaffirmed *Roe's* rejection of the argument that the "fetus is a 'person'").

92. *See id.* (Stevens, J., concurring in part and dissenting in part) ("[N]o member of the Court has ever questioned [the] fundamental proposition" that "an abortion is not 'the termination of life entitled to Fourteenth Amendment protection.'" (quoting Roe v. Wade, 410 U.S. 113, 159 (1973)).

93. Bradley, *supra* note 54, at 342-44.

94. *Id.; see also* Joseph P. Witherspoon, *Impact of the Abortion Decisions Upon the Father's Role,* 35 THE JURIST 32, 42 (1975) (concluding that the overriding concern animating the Thirteenth and Fourteenth Amendments was equating personhood with humanity); Byrn, *An American Tragedy, supra* note 74, at 837-39 (reaching the same conclusion as Witherspoon).

95. Linton, Planned Parenthood, *supra* note 52, at 37 (citation omitted).

96. *Id.* at 36. Linton lists and details the points on which *Casey* differs from *Roe. Id.* at 34-37. He also presents a cogent and detailed critique of the joint opinion's *stare decisis* analysis. *See id.* at 40-77; *see also Casey,* 112 S. Ct. at 2860 (Rehnquist, C. J.,

Scalia correctly called the joint opinion's analysis a "keep-what-you-want-and-throw-away-the-rest-version" of *stare decisis*, an application of *stare decisis* without precedent.[97] Moreover, the "undue burden" standard that the joint opinion minted as the proper standard under which to analyze abortion restrictions is significantly different from the "undue burden" standard Justice O'Connor articulated in previous opinions, and upon which the joint opinion purported to rely.[98] Given the joint opinion's cavalier treatment of prior cases, the joint opinion authors' reliance on "institutional integrity" as an additional ground for upholding the right to abortion was perverse.[99]

Second, *Casey* grounded the abortion right in an extreme notion of individual liberty that is, to be blunt, nihilistic. To the joint opinion's authors, the "heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[100]

The joint opinion's conception of liberty is literally breathtaking. Gone is any vestige of the traditional notion that liberty is the freedom to find and do what one ought to do. Rather, if we take the joint opinion at its word, the Supreme Court has recognized a constitutional right to "creat[e] one's own moral universe."[101] As one scholar has noted, the joint opinion's conception of liberty "is really the constitutionalization of

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concurring in part and dissenting in part); *id.* at 2881 (Scalia, J., concurring in part and dissenting in part). The two cases *Casey* partially overruled are Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986), and City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983). *See Casey*, 112 S. Ct. at 2823-24.

97. *Casey*, 112 S. Ct. at 2881 (Scalia, J., concurring in part and dissenting in part).

98. For a detailed discussion of these differences, see Linton, Planned Parenthood, *supra* note 52, at 37.

99. *See Casey*, 112 S. Ct. at 2814-16. For a thorough debunking of the joint opinion's reliance on institutional integrity as a grounds for upholding the abortion right, see *id.* at 2862-66 (Rehnquist, C. J., concurring in part and dissenting in part). Linton, Planned Parenthood, *supra* note 52, at 72-77.

100. *Casey*, 112 S. Ct. at 2807.

101. Gerard V. Bradley, *The Enduring Revolution: Law and Theology in the Secular State*, 39 EMORY L. J. 217, 227 (1990). The joint opinion's conception of liberty would, of course, lead to anarchy if applied generally in the law. For instance, I threw a rock through a neighbor's window? I had sex with a twelve-year old girl? I robbed a bank? Tough. *My* concept of "existence, of meaning, of the universe" allows me to do those things, and government's attempt to compel me to believe and act otherwise deprives me of the right to allow my beliefs "to define the attributes of my personhood." How would *that* defense hold up in a trial for malicious trespass, statutory rape, or bank robbery?

the metaphysics of John-Paul Sartre and the Existentialists, who taught that the human person makes himself through his own choices. It follows that choosing is more important than being, and freedom is 'a constantly renewed obligation to remake the *Self*. . . . "[102]

Note also the relationship between the joint opinion's concept of liberty and the notion of personhood discussed earlier. The joint opinion ties the "attributes of personhood" to the ability to "define one's own concept of existence, of meaning, of the universe."[103] It follows that the *inability* to make this self-definition must be the antithesis of personhood. In other words, those unable to define their own concept of existence, that is, those without sufficient cognition to make themselves through their own choices, are not really persons.

If personhood depends on cognition sufficient to allow a person to define his own concept of existence, then infants, small children, the mentally retarded, and the mentally incompetent risk joining the unborn as nonpersons. This is not just baseless scare-mongering. The joint opinion's notion of personhood as the ability for self-definition echoes the writings of ethicists who have defined personhood to exclude living humans who are not capable of what those ethicists judge to be sufficient rationality and self-consciousness.[104]

The notion of personhood suggested by the joint opinion raises a host of questions. What is "sufficient" cognition? Who decides what is sufficient? Does lack of sufficient cognition need to be permanent, or does temporary loss of cognition deprive one of personhood? Once we sever the connection between humanity and personhood, it becomes difficult, if not impossible, to draw the line objectively between persons and nonpersons.

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102. David Wagner, *The Family and American Constitutional Law*, 1 LIBERTY, LIFE & FAM. 145, 163 (1994) (citing David J. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQUETTE L. REV. 875 (1992), and JEAN-PAUL SARTRE, BEING AND NOTHINGNESS 34-35 (Hazel E. Barnes trans., 1956)).

103. *Casey*, 112 S. Ct. at 2807.

104. *See, e.g.*, Joseph Fletcher, *Indicators of Humanhood: A Tentative Profile of Man*, 2 HASTINGS CENTER REP. (Nov. 1972) (adapting, among other criteria for humanity, self-awareness, ability to communicate, and a minimum IQ of 20, and questioning the humanity of anyone with an IQ less than 40); PETER SINGER, PRACTICAL ETHICS 76, 97 (1979) (proposing that a person is a rational and self-conscious being: "So it seems that killing, say a chimpanzee is worse than the killing of a gravely defective human who is not a person."). *See generally* WILLIAM BRENNAN, DEHUMANIZING THE VULNERABLE 152-56 (1995) (collecting the similar views of other ethicists). *See also* Bradley, *supra* note 54, at 374-80 (summarizing and critiquing Ronald Dworkin's view of personhood and the morality of killing).

These observations make it apparent that jurisprudentially and philosophically, *Casey*, like *Roe*, is hardly the moderate "tour de force"[105] that Professor Simon insists it is. That being said, perhaps *Roe* and *Casey* are "moderate" or "centrist" in the limited sense we claimed for *Pinette* and *Rosenberger*. That is, perhaps there is broad public support for the core doctrinal principles that underlie *Roe* and *Casey*. But while we have not seen any polls on the subject, we doubt that there is broad public support for the existentialist notion of liberty that *Casey* posited, or any desire to see that notion of liberty applied in the law generally. (If there is, this country is in bigger trouble than anyone suspects.) Public opinion polls do indicate that most Americans would not favor the type of abortion regime imposed by *Roe* and *Casey*—abortion practically on demand throughout pregnancy—as a matter of first principles. For example, a recent *USA Today*/CNN/Gallup Poll concluded that fifty-six percent of respondents favor making abortion "legal in only a few circumstances (generally read as rape, incest or to save the life of the mother) or illegal altogether."[106] A 1989 poll conducted by Gallup for Americans United for Life (AUL)[107] made similar findings: roughly twenty-five percent of respondents would allow abortion only to save the mother's life, fifty percent favored abortion in "hard cases" (mother's life or health, rape, incest, or serious fetal deformity); and twenty-five percent would not legally restrict abortion.[108] Moreover, the AUL poll revealed that "only seven percent of us think a woman's right to choose outweighed a child's right to be born up to birth. Only an additional sixteen percent thought a woman's right to choose prevailed until viability."[109]

We believe that a just legal regime would not expressly allow abortions in any circumstances, regardless of poll numbers. (If that makes us "extreme," so be it.) We point out polling numbers only to show that the Court's abortion cases are neither centrist nor moderate even by the measure of public opinion. In fact, far from being any popular compromise, *Roe* and *Casey* have preempted any political compromise on the issue that might garner the approval of a majority of Americans, and

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105. SIMON, THE CENTER HOLDS, *supra* note 1, at 165.

106. Richard Benedetto, *Public's Views on Abortion Surprisingly Murky, available in* WESTLAW, GANNETTNS Database, 1995 WL 2887773 (Gannett News Service, Mar. 10, 1995).

107. *See* Linda Greenhouse, *Battle on Abortion Turns to Rights of Teen-Agers*, N.Y. TIMES, July 15, 1989, at A1 (stating that Americans United for Life is a Chicago based pro-life organization).

108. *See* Bradley, *supra* note 54, at 380-81.

109. *Id.* at 384-85.

by doing so those cases "merely prolong[] and intensif[y] the anguish" caused by the abortion controversy.[110]

Casey's determination to uphold the abortion right prevented the Court from asking or answering the key first question in any case in which the Court must decide whether to overrule a previous constitutional decision: Was the case correctly decided?[111] Instead, the Court in *Casey* upheld the abortion right created in *Roe* not so much because the Constitution, or respect for precedent (which *Casey* treated whimsically), or institutional integrity, or even public sentiment demanded that result, but "because the Supreme Court simply could not imagine an America without legalized abortion."[112]

Casey is an example of the "abortion distortion" that has infected American law. As Justice O'Connor herself wrote in her dissenting opinion in *Thornburgh v. American College of Obstetricians and Gynecologists*,[113] the Court's "abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. . . . [N]o 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."[114] But the abortion distortion is not limited to cases involving state regulation of abortion. In *Madsen v. Women's Health Center, Inc.*,[115] the Supreme Court incredibly found that an injunction restricting expressive conduct was not a prior restraint on speech[116] and that an injunction restricting only pro-life demonstrators (but not pro-choice demonstrators) was viewpoint neutral, even though the state court issuing the injunction applied it to people who had no connection with the persons or organizations that the injunction named, except a shared opposition to abortion.[117] To reach these conclusions, the Court created a brand-new standard of review and ignored, misapplied, distorted, or violated several key free speech precedents, most notably *NAACP v. Claiborne Hardware Co.*[118]

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110. *Casey*, 112 S. Ct. at 2885 (Scalia, J. concurring in part and dissenting in part).

111. *See* Litton, Planned Parenthood, *supra* note 52, at 102.

112. *Id.*

113. 476 U.S. 747 (1986).

114. *Id.* at 814.

115. 114 S. Ct. 2516 (1994).

116. *Id.* at 2524 n.2; *see id.* at 2541 (Scalia, J., dissenting).

117. *Id.* at 2524; *see id.* at 2539-40 (Scalia, J., dissenting).

118. 458 U.S. 886 (1982). Justice Scalia's dissent in *Madsen* analyzes in detail the Court's treatment of precedent. *See* 114 S. Ct. at 2541-49. Whether *Madsen* will amount to, as Justice Scalia wrote, the "ad hoc nullification" of the First Amendment, *id.* at 2535 (Scalia, J., dissenting), even for abortion protesters, remains to be seen.

The abortion distortion also is apparent in areas outside the law. One of these areas is language. The notion that those who believe all persons (that is, all human beings) are entitled to equal protection of the law are "extremists,"[119] while those who believe it is a mother's right to decide, for any reason, to have her unborn child destroyed, is bizarre. And as a writer *supporting* legal abortion pointed out long ago, the "semantic gymnastics required to rationalize abortion as anything but taking a human life would be ludicrous" if not put forth under what abortion rights advocates believe to be "socially impeccable auspices."[120]

Another victim of the abortion distortion has been historical scholarship concerning abortion and abortion laws in this country. *Roe* itself relied extensively on history. According to Justice Blackmun, this history showed, among other things, that until the middle to late nineteenth century, women enjoyed a limited common law "right" to abortion; that abortion laws were far freer during most of the nineteenth century than in 1973; and that states prohibited abortion by statute in the middle-to-late-nineteenth century chiefly out of concern for maternal health.[121] Several scholars have demonstrated that these claims were largely false and that the Court's historical analysis, and the primary source on which it was based, were deeply flawed.[122]

The abortion distortion also has affected professional historians, as the sad story of the *Historians' Brief* filed in 1989 in *Webster v. Reproductive*

Despite its dubious construction and application of precedent, *Madsen* did not purport to overrule any precedents and left open several arguments to contest injunctions that unduly restrict free expression. For example, *Madsen* left open the possibility that a facially neutral injunction as applied could be viewpoint or content-based. *Madsen* also left open the argument that a particular injunction could qualify as a prior restraint if it affects expression directly, restricts several different forms of expression, or is content-based. *See id.* at 2524 n.2. *Madsen* also struck down several provisions of the injunction it considered. *See id.* at 2528-30. The Court has an opportunity next term to reconsider *Madsen*, or at least define the scope of *Madsen*'s holding. *See* Schenck v. Pro-Choice Network of Western New York, 116 S. Ct. 1260 (1996) (granting petition for certiorari).

119. While there is nothing "extreme" about opposing the killing of innocent human beings, there are methods of opposing that killing that are immoral. Killing abortionists is wrong. It is not pro-life. For an analysis of the legal and moral issues surrounding the misguided attempts of very few anti-abortionists to oppose abortion by violence, see generally Rice & Tuskey, *supra* note 62.

120. *See A New Ethic for Medicine* supra note 85, at 68; *see also* text accompanying *supra* note 86. For detailed discussion of how language is misused to support abortion and other assaults on innocent human life, see generally BRENNAN, *supra* note 104.

121. *See* Roe v. Wade, 410 U.S. 113, 132-42, 151-52 (1973).

122. *See, e.g.*, Litton, Planned Parenthood, *supra* note 52, at 103-19; Byrn, *An American Tragedy*, *supra* note 74, at 814-39; Bradley, *supra* note 54, at 347-50.

Health Services,[123] and again in *Casey*, illustrates. The primary claims in the brief are false.[124] Worse, one of the primary sources the brief relied on, a book by Professor James Mohr,[125] actually contradicted important claims in the brief.[126] Despite this, Mohr had signed the brief in *Webster*.

Mohr admitted in a conversation with Professor Gerard Bradley that inconsistencies existed between the brief and the book, and stated that where inconsistencies existed, he stood by the book. But amazingly, Mohr defended signing the brief because the brief was a "'political document'" he had signed as a "'citizen,'" not as a "'scholar.'"[127] According to Mohr, a citizen–even a citizen whose scholarly *bona fides* lend weight to a document–has a different obligation to tell the truth than a scholar.[128] As Bradley concluded, the *Historians' Brief* episode demonstrates that "when it comes to politics, some scholars perceive a truncated obligation to the truth, if they perceive any obligation at all."[129] The *Historian's Brief* shows this is especially true when the politics involve abortion.

To be fair, not all abortion rights advocates mince words or distort the truth to serve their cause. Some forthrightly declare that the unborn child is indeed human, but that good reason exists to demand that the law leave that child's life at another's mercy.[130] This honesty is refreshing, but chilling. But this is what *Roe* and *Casey* have brought us, despite the Court's own lack of candor: the right to kill not just "potential life," but

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123. *See* Brief for 281 American Historians, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (No. 88-605), *reprinted in* 183 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 330 (Philip B. Kurland & Gerhard Casper eds. 1990).

124. *See* Gerard V. Bradley, *Academic Integrity Betrayed*, FIRST THINGS Aug.-Sept. 1990, at 10-12; *see also supra* note 123.

125. James Mohr, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900 (1978).

126. *See* Bradley, *supra* note 124, at 11 (pointing out that the central claims of the *Webster* brief that abortion was legal at common law and that the moral value of the fetus only became an issue in the late twentieth century, were contradicted by claims in Mohr's book that abortion was illegal after pregnancy was confirmed and that the immorality of abortion was a driving factor in the nineteenth century campaign for statutory prohibition of abortion); Bradley, *supra* note 54, at 348-49.

127. Bradley, *supra* note 124, at 11.

128. *Id.* at 12.

129. *Id.* Bradley's call to Mohr perhaps had some effect. Mohr did not sign the Historians' Brief when it was refiled in *Casey*. *See* Bradley, *supra* note 54, at 348 & n.84.

130. *See, e.g.*, *supra* text accompanying note 85.

a living human being, because that human being, like the slaves *Dred Scott* considered, are not constitutional persons. That right, which has no grounding in constitutional text or history, exists practically on demand throughout pregnancy. The abortion cases have stripped the states of the ability to protect the unborn, and have foreclosed any political compromise that may more accurately reflect public sentiment about abortion. The Court's determination to uphold the abortion right has led it to distort the principle of *stare decisis* in *Casey* and to uphold a viewpoint-based prior restraint on speech in *Madsen*. All this the Court has done to serve a nihilistic conception of individual liberty that would lead to anarchy if applied generally in the law.

If *this* is moderate, then what is radical? The Court's failure to overturn the abortion cases does not represent a victory for moderation or demonstrate that the center has held on the Rehnquist Court. That Professor Simon has relied on the abortion cases to support that thesis shows only that the "center" lies in the eye of the beholder.