FOURTEENTH AMENDMENT UNENUMERATED RIGHTS JURISPRUDENCE: AN ESSAY IN RESPONSE TO *STENBERG V. CARHART*

DAVID M. SMOLIN*

In one of his last opinions before retiring, Chief Justice Warren Burger acknowledged that the soundness of *Roe v. Wade*[1] "must be tested by the decisions that purport to follow [it]."[2] Declaring that the Court "should reexamine *Roe*,"[3] Burger found it astonishing that the Court had rejected a requirement that a second physician be present during the abortion of a viable fetus, given *Roe*'s finding of a compelling governmental interest in the life of a viable fetus. He also objected to the Court's invalidation of informed consent and parental notification regulations. The Chief Justice claimed that that while the *Roe* Court had clearly rejected the right to abortion on demand, post-*Roe* decisions had implemented a policy encouraging abortion as a positive good.[4] Thus, while Burger joined Justice Blackmun's majority opinion in *Roe*,[5] he dissented from Justice Blackmun's majority opinion in *Thornburgh v. American College of Obstetricians and Gynecologists*.[6]

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* Professor of Law, Cumberland Law School, Samford University; Fellow, Southern Center for Law and Ethics. The author was the primary author of Brief of Amici Curiae Ass'n of Am. Physicians and Surgeons et al., Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), *available at* 2000 WL 228448, which was cited by both the majority and dissenting opinions. Some of the material in Part II is adapted from a previously published essay. *See* David M. Smolin, *The Supreme Court 2000: A Symposium*, FIRST THINGS, Oct. 2000, at 27, 27-30. The author wishes to thank Sandy Spallow for her research.

1. 410 U.S. 113 (1973).

2. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 785 (1986) (Burger, C.J., dissenting), *overruled by* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

3. *Id.*

4. *Id.* at 782-85.

5. 410 U.S. at 115; *see also* Doe v. Bolton, 410 U.S. 179, 207-08 (1973) (Burger, C.J., concurring).

6. 476 U.S. 747 (1986), *overruled by* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

Six years later in *Planned Parenthood v. Casey*, the Court, *sans* Burger, was closely divided over the continued soundness of *Roe*.[7] Four Justices explicitly argued that *Roe* should be overruled,[8] while two Justices argued that *Roe* should be reaffirmed and applied in the absolutist manner Burger had found so objectionable.[9] Justices Kennedy, O'Connor, and Souter, who authored the decisive joint opinion, claimed to be reaffirming the essential core of *Roe* while removing from it, and from the post-*Roe* decisions, the absolutist elements.[10] The joint opinion purported to accord respect to the relevant state interests, and thus claimed a willingness to uphold abortion regulations so long as the core right of a woman to decide whether or not to abort a non-viable fetus was not violated.

In *Stenberg v. Carhart*,[11] Justice Kennedy played the role of Chief Justice Burger. Kennedy, like Burger before him, complained that the moderate decision he joined was misapplied by the majority to invalidate minimalist abortion regulations. Somehow, the moderate *Casey* precedent was used to justify the more encompassing *Stenberg* decision.[12] While Justice Kennedy has not yet called for a reexamination of *Roe* or *Casey*, his *Stenberg* dissent forcefully expressed a sense of betrayal and even moral revulsion regarding the majority's interpretation of *Casey*.

Chief Justice Burger's belief that a precedent must be judged—and understood—by the opinions that apply it should be taken seriously. Therefore, it is appropriate to examine why the *Roe* and *Casey* doctrines have been expanded to the point where both relevant state interests and traditional rules of constitutional adjudication are now completely submerged. This pattern has not developed randomly, but instead arose from medical, cultural, and psychological factors inherent in the abortion liberty. Particularly because the joint opinion in

7. *Id.* at 782-85.

8. *Id.* at 944-79 (Rehnquist, C.J., concurring in part and dissenting in part, joined by White, J., Scalia, J., and Thomas, J.); *id.* at 979-1002 (Scalia, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., White, J., and Thomas, J.).

9. *Id.* at 911-22 (Stevens, J., concurring in part and dissenting in part); *id.* at 922-43 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

10. *Id.* at 843-901.

11. 530 U.S. 914 (2000).

12. *Id.* at 930-46.

Casey avoided a reexamination of the abortion liberty by arbitrarily invoking the principle of stare decisis,[13] the Court should engage in a thorough analysis of the nature and structure of abortion liberty in future cases.

The Supreme Court's abortion jurisprudence has developed as a part of the broader doctrines of substantive due process and the right of privacy. The question of unenumerated rights posed by these doctrines goes to the heart of the Court's role within our system of government, and can raise troubling issues as to the legitimacy of the Court's decisions. It is one thing for the Court, following the theory of *Marbury v. Madison*,[14] to invalidate legislation found to be in clear violation of an explicit constitutional command; it is quite another for the Court to claim the authority to invalidate legislation based on rights not mentioned in the Constitution. Unless such unenumerated rights can be firmly grounded in the overall text, structure, history, principles, or jurisprudence of the Constitution, their use to invalidate legislation can appear illegitimate.

I. SLAVERY, EMANCIPATION, AND UNENUMERATED RIGHTS

During the era of economic substantive due process, the Supreme Court in holdings and dicta identified several non-economic rights of association as fundamental constitutional liberties. Thus, the Court during the 1920s repeatedly held that parents possessed a fundamental liberty to direct the education and upbringing of their children.[15] *Meyer v. Nebraska*,[16] one of the key parental rights decisions, contained significant dicta acknowledging as fundamental the rights to marry and establish a family. *Meyer* implicitly found that the Fourteenth Amendment had constitutionalized common law liberties, infusing within the liberty protected by the Due Process Clause a substantive component of liberties previously protected by the common law. The Court stated that Fourteenth

13. *Casey*, 505 U.S. at 854-69.

14. 5 U.S. (1 Cranch) 137 (1803).

15. *See, e.g.*, Farrington v. Tokushige, 273 U.S. 284 (1927); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Bartels v. Iowa, 262 U.S. 404 (1923); Meyer v. Nebraska, 262 U.S. 390 (1923).

16. 262 U.S. 390, 399 (1923).

Amendment liberties included

> the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[17]

The Court has never elaborated or explained *Meyer*'s claim that the Fourteenth Amendment constitutionalized common law liberties. Nor has the Court ever linked the history of the Fourteenth Amendment in any significant way to the doctrines of substantive due process or the right of privacy. Thus, the animating concern of Section One of the Fourteenth Amendment for the rights of the freed slaves (and African-Americans generally), has not been used as an explicit guide in the area of unenumerated rights. Yet perhaps by constitutionalizing the common law liberties of "free men," the Court left an implicit reminder of the connection between emancipation and unenumerated rights.

Furthermore, *Meyer's* list of common law liberties include some of the most important rights that were denied to slaves. Slaves lacked control over their own labor and its fruits, [18] and therefore did not have the right "to engage in any of the common occupations of life." In some states, it was a crime to teach a slave to read. They were also generally denied an education,[19] and were thus denied the common law liberty to "acquire useful knowledge." Their marital and parental roles were controlled by their owners, and they were not permitted to contract legal marriages.[20] Hence, the common law liberty "to marry, establish a home, and bring up children" was denied and distorted. The master's monitoring of the slaves' religion to avoid rebellion, and the prohibitions on their education[21] severely limited their right "to worship God according to the dictates of conscience." Slaves were thus denied most of the essential liberties granted in the English common law.

17. *Id.*
18. *See* EUGENE D. GENOVESE, ROLL, JORDAN, ROLL 3 (Vintage Books 1976).
19. *See id.* at 561-66.
20. *See id.* at 32, 52, 450-58.
21. *See id.* at 161-284.

Therefore, genuinely elevating them to citizen status, which was accomplished by the Thirteenth Amendment and the first sentence of the Fourteenth, also required constitutionalizing basic common law liberties.

Somerset v. Stewart,[22] an English case holding slavery incompatible with common and natural law principles, highlighted the fundamental contradiction between slavery and the common law tradition of ordered liberty. This tradition nourished various forms of anti-slavery constitutionalism in antebellum America and served as a foundation for the framers of the Fourteenth Amendment. It viewed American law, as represented both by the common law and the Constitution, as essentially libertarian in nature. Accordingly, the institution of slavery was an aberrant, local phenomenon, not a normative part of our nation's constitutional tradition. Within this tradition, natural law, the common law, and American constitutionalism flow from the same morally based yet libertarian stream.[23]

The *Meyer* dicta, interpreted in the light of anti-slavery constitutionalism, suggests that a purpose of the Fourteenth Amendment was to provide constitutional guarantees of common law liberties to the freed slaves. Marital, parental, and familial rights are essential to that purpose, given that the nineteenth-century critique of slavery often focused on the failure of slavery to protect those relationships.[24] Furthermore, the framers of the Fourteenth Amendment were particularly disturbed by the content of post-Thirteenth Amendment "apprenticeship" statutes, which violated parental rights by allowing minors to be forced to live with and work for their former masters.[25]

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22. 98 Eng. Rep. 499 (K.B. 1772).

23. *See generally* WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 20-45, 285-86 (1977).

24. *See* GENOVESE, *supra* note 18, at 52-53.

25. *See* CONG. GLOBE, 39th Cong., 1st Sess. 588-89 (1866) (statement of Rep. Donnelly) (examining the "black codes" of the different states and concluding that they simply led to the reestablishment of slavery; as in Tennessee, where a slave's "children may be bound out against his wish to a master by the county court" and in Virginia, where a slave's "children are taken from him and sold into virtual slavery"); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Howard) (arguing that "the absurd construction now forced upon [the Thirteenth Amendment] leaves [a former slave] without family, without property, without the implements of husbandry, and even without the right to acquire or use any instrumentalities of carrying on the industry of which he may be capable . . . .").

The Court's failure to link the history of the Fourteenth Amendment to its development of the doctrine of unenumerated rights has multiple sources. In the *Slaughterhouse Cases*,[26] the Court emptied the Privileges and Immunities Clause of the Fourteenth Amendment of any significance. The "privileges or immunities of citizens of the United States" is a pregnant phrase, adapted from Article IV, Section 2 of the Constitution, which arguably should have served as the locus for debates over the doctrines of the incorporation of the Bill of Rights and unenumerated rights. The privileges and immunities of citizenship concept is an important link between the anti-slavery constitutionalism of antebellum America and the text and intent of the Fourteenth Amendment. It links common law liberties, a natural law tradition of ethically ordered liberties, and unenumerated rights.[27]

Once the Fourteenth Amendment's Privileges Clause was abandoned, it became easier to lose touch with the historical jurisprudence of the Fourteenth Amendment. The transfer of the issue of unenumerated rights to the Due Process Clause de-contextualized the issue. Interpreting the word "liberty" in an expansive manner beyond freedom from restraint, in a context where the Court had virtual amnesia about the animating issues of slavery and freedom, made the Court's discussions overly abstract. Thus, in discussing "liberty's" protection of the family, the Court mentioned ancient Sparta and the speculative proposals of Plato's *Republic* as though America had never known a time or circumstance when parental rights were not protected.[28]

The Supreme Court's interpretive move toward abstraction and away from the particularities of the slavery experience occurred during an era when the country had abandoned any effort to enforce the rights of the freed slaves, but instead had accommodated itself to the white supremacist system. However, even after the Court in *Brown v. Board of Education*[29]

26. 83 U.S. 36 (1872).

27. *See* WIECEK, *supra* note 23, at 123-24, 163-66, 268-69; Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347 (1995).

28. *See* Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923).

29. 347 U.S. 483 (1954).

resurrected the Fourteenth Amendment's original concern with questions of racial equality, it never allowed its discussion of unenumerated fundamental rights to be guided in any way by the memory of the bloody dispute over slavery. Perhaps the Court simply did not want to be reminded of its own attempt, in *Plessy v. Ferguson*,[30] to settle the slavery question. In any event, as to questions of unenumerated fundamental rights, the Court has never really recovered from the abandonment of the Reconstruction context, choosing instead to treat the issue in the abstract, unconnected to the tragic history that brought the Fourteenth Amendment into existence.

The slavery and emancipation experience provides the historical context as to *why* common law liberties had to be nationalized and constitutionalized, rather than merely left to local legislative protection. While the *Meyer* case failed to make this historical context and rationale explicit, it did provide the critical link between common law liberties and unenumerated rights. This link between liberty and the common law provided an initial means of guiding the content of unenumerated rights. Later, some of the Justices replaced this initial reliance on common law liberties with a somewhat more open-ended concern with protecting liberties "deeply rooted in American history and tradition."[31] Thus, even though no Supreme Court Justice has ever invoked the particular history of the Fourteenth Amendment to resolve a question of unenumerated fundamental rights, the Court initially relied on history, in the broader sense of the common law and nineteenth century legislation, to guide its interpretation of unenumerated rights.

The role of history in defining the content of unenumerated Fourteenth Amendment rights has become controversial over the last thirty-five years. While some of the Justices have maintained earlier emphases on history as a guide to the content of such rights, other Justices have specifically argued for the protection of historically disfavored relationships or acts.[32] One irony of this debate is that both sides have failed to

30. 163 U.S. 537 (1896).

31. Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (citing Moore v. East Cleveland, 431 U.S. 494, 503 (1977)); *see also* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

32. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 136-57 (1989) (Brennan, J., dissenting); *Bowers*, 478 U.S. at 218-19 (Stevens, J., dissenting).

even mention, let alone use, the actual history of the Fourteenth Amendment. Therefore, neither side has clearly articulated a rationale for constitutionally protecting unenumerated fundamental rights that is rooted in the history of the Fourteenth Amendment.

Thus, when Justice Brennan stated that "common-law notions no longer . . . circumscribe the 'liberty'" protected by the Fourteenth Amendment,[33] he could do so without having to respond to the argument that the Fourteenth Amendment was intended precisely to guarantee common law liberties to the emancipated slaves. Thus, Justice Brennan was free to portray a common law or historically based Constitution as an archaic hodge-podge of prejudice: "The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past."[34] Similarly, Justice Brennan felt free to argue that a Fourteenth Amendment which merely protects common law or other traditional liberties would be a mere "redundancy" which "mocks those who, with care and purpose, wrote the Fourteenth Amendment."[35]

Justice Brennan's rhetorical hostility toward the common law is only possible in a Court which has forgotten, as an institution, how difficult it has been to effectively guarantee such common law liberties to all Americans. Guaranteeing the large population of freed slaves common law liberties was hardly a mere "redundancy." Indeed, extending our common law heritage of ordered liberty to all Americans, irrespective of race, previous "condition of servitude," social position, or "caste" required reversal of the Supreme Court's holding in *Dred Scott v. Sanford*[36] that the descendants of slaves were perpetually barred from citizenship and the enjoyment of basic liberties.

An important element of an historical understanding of the Fourteenth Amendment is the fact and tragedy of the Civil War. Our national mythology regards that war as the price that

33. *Michael H.*, 491 U.S. at 138 (Brennan, J., dissenting).
34. *Id.* at 141 (Brennan, J., dissenting).
35. *Id.* (Brennan, J., dissenting).
36. 60 U.S. (19 How.) 393 (1857).

America paid for the crime of slavery, and simultaneously as the cost of emancipation.[37] The Fourteenth Amendment was required because mere emancipation without a guarantee of citizenship, equality, and liberty would fail to break the caste system that oppressed African-Americans. Of course, despite the passage of the Fourteenth and Fifteenth Amendments, the promise of equal liberty was delayed for generations. The fact that it took our most costly war to secure traditional liberties for all makes absurd, or even insulting, Justice Brennan's view that a Fourteenth Amendment that *merely* grants historical, traditional, or common law rights is a "redundancy."

The application of this history to modern controversies, such as abortion, homosexuality, and the rights of unmarried or adulterous natural fathers, could be viewed as complex. Historians debate the content and rationale of the common law and nineteenth century legislation. The rationale for constitutionalizing common law liberties does not, in itself, necessarily answer the question of whether liberties beyond that of the common law should be included. Moreover, in an instance such as abortion, both sides rhetorically embrace the metaphor of emancipation for their own benefit: One side claims that women must possess procreative liberty in order to be free, while the other side invokes the rights of the unborn to life, without which liberty itself is meaningless. Recollecting the original context of the Fourteenth Amendment would, however, alter the context of unenumerated rights analysis. First, it would make it impossible to regard the "mere" protection of traditional common law rights as insignificant or inherently insufficient. Second, it would thicken and contextualize claims for new and nontraditional rights by placing such claims alongside a normative narrative. Third, it would invite the Court to reconstruct the underlying jurisprudence of the Fourteenth Amendment, which links natural law, the common law, and the Constitution within an ethically ordered liberty.

The doctrine of unenumerated rights has been part of a broader debate about originalism within constitutional law. Even if one accepts the viewpoint that the Constitution forms a living, developing tradition, there nonetheless can be a

37. *See, e.g.*, Abraham Lincoln, Second Inaugural Address (March 4, 1865).

difference between development and distortion. In biological terms, we can say that a human embryo develops eventually into a human adult, not into an adult frog. Oak trees do not grow from grapefruit seeds. Thus, unless one wants to attribute infinite plasticity to our constitutional tradition, it would be important for the developing case law to remain organically connected to the animating principles of the historic Constitution. The history of the Fourteenth Amendment offers a rationale for unenumerated rights, a normative narrative, and a jurisprudence of ethically ordered liberty which could guide and legitimate the Court's currently wandering, incoherent approach.

Debating unenumerated Fourteenth Amendment rights apart from the drama of civil war and emancipation invites both originalists and non-originalists to lose touch with our constitutional tradition. Originalists are more likely to deny, dismiss, or overly limit unenumerated rights if they remain unconnected to the natural law jurisprudence and interpretative approach of the anti-slavery lawyers, who certainly were not hard edged positivists.[38] Non-originalists, by contrast, are likely to impose the current fashions of their own time or social group upon the Constitution, creating new rights disconnected from, or even in fundamental contradiction to, the foundational principles of the Constitution. The debate between originalists and non-originalists thus has remained overly abstract and theoretical, itself oddly disconnected from the history, text, and animating principles of the Constitution.

II. *STENBERG V. CARHART*

Stenberg centered on various methods of post-fifteen week abortion. The most common method of abortion at this stage, dilation and evacuation (D&E), generally involves the use of surgical instruments to dismember the fetus. Because of a technical question of statutory construction, the majority in *Stenberg* felt obligated to emphasize that D&E involves pulling "a portion of the fetus through the cervix into the birth canal," where the "traction" of the surgical instrument and the cervical

38. *Cf.* Troxel v. Granville, 530 U.S. 57, 91-92 (2000) (Scalia, J., dissenting) (suggesting that unenumerated parental rights are not protected by the Constitution).

opening produces dismemberment.[39] Just in case anyone could miss the meaning of the majority's clinical description, Justice Kennedy's *Stenberg* dissent translated this into lay language:

> The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn from limb to limb. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off. Dr. [Leroy] Carhart [the abortionist who challenged Nebraska's partial-birth ban] has observed fetal heartbeat via ultrasound with "extensive parts of the fetus removed," and testified that mere dismemberment of a limb does not always cause death because he knows of a physician who removed the arm of a fetus only to have the fetus go on to be born "as a living child with one arm." At the conclusion of a D & E abortion . . . the abortionist is left with "a tray full of pieces."[40]

Under *Roe, Planned Parenthood v. Danforth,*[41] and *Casey,* the states are powerless to prohibit D&E, since it is the most common method of abortion after fifteen weeks, and those cases mandate elective abortion until viability and therapeutic abortion until birth. However, when abortion doctors in the early 1990s developed a new method of abortion—denominated variously as dilation and extraction (D&X), intact D&X, or intact D&E—the states and Congress responded with extensive legislative activity prohibiting "partial-birth abortion." The essence of this new method was to use obstetrical-type methods to deliver the fetus into the birth canal, with the exception of the head. The physician would then employ what is clinically known as a "head reduction procedure" on the often still living fetus, and then deliver a relatively intact, but dead, fetus.[42] Once again, Justice Kennedy's *Stenberg* dissent describes the procedure in non-technical language:

> The fetus' arms and legs are delivered outside the uterus

39. Stenberg v. Carhart, 530 U.S. 914, 925 (2000).

40. *Id.* at 958-59 (Kennedy, J., dissenting) (citations omitted).

41. 428 U.S. 52 (1976).

42. *Stenberg,* 530 U.S. at 960 (Kennedy, J., dissenting) (citing MARTIN HASKELL, DILATION AND EXTRACTION FOR LATE SECOND TRIMESTER ABORTION (1992), cited in 139 CONG. REC. 8605 (1993)); *id.* at 1001-02 (citing Statement on Intact Dilation and Extraction, Am. Coll. of Obsts. and Gyns. Exec. Bd. (Jan. 12, 1997)); *id.* at 962-63 (citing Fact Sheet on HR 1122, AMA Bd. of Trs. (June 1997), cited in Brief of Amici Curiae Ass'n of Am. Physicians and Surgeons et al., app. at 1, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), *available at* 2000 WL 228448)).

> while the fetus is alive; witnesses to the procedure report seeing the body of the fetus moving outside the woman's body. At this point, the abortion procedure has the appearance of a live birth. As stated by one group of physicians, "[a]s the physician manually performs breech extraction of the body of a live fetus, excepting the head, she continues in the apparent role of an obstetrician delivering a child." With only the head of the fetus remaining in utero, the abortionist tears open the skull. According to Dr. Martin Haskell, a leading proponent of the procedure, the appropriate instrument to be used at this stage of the abortion is a pair of scissors. Witnesses report observing the portion of the fetus outside the woman react to the skull penetration. The abortionist then inserts a suction tube and vacuums out the developing brain and other matter found within the skull.[43]

None of the Justices questioned the accuracy of Justice Kennedy's horrifying descriptions of D&E or D&X abortion. Indeed, the Justices comprising the *Stenberg* majority appeared keenly aware of the gruesome nature of these abortion procedures. Justice Breyer, writing for the majority, admitted that his descriptions of abortion procedures "may seem clinically cold or callous to some, perhaps horrifying to others."[44] Justice Stevens (joined by Justice Ginsburg) stated:

> Although much ink is spilled today describing the gruesome nature of late-term abortion procedures, that rhetoric does not provide me a *reason* to believe that the procedure Nebraska here claims it seeks to ban is more brutal, more gruesome, or less respectful of "potential life" than the equally gruesome procedure [D&E] Nebraska claims it still allows.[45]

Justice Stevens labeled it "irrational" to ban partial-birth abortion but not D&E, despite the fact that it was the Court's own precedents that made it impossible for Nebraska to ban D&E.[46] Justice Ginsburg (joined by Justice Stevens) noted that "amidst all the emotional uproar caused by an abortion case," it should be remembered that the prohibition of partial-birth abortion "does not save any fetus from destruction" and that

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43. *Id.* at 959-60 (Kennedy, J., dissenting) (alterations in original) (citations omitted).

44. *Id.* at 923.

45. *Id.* at 946 (Stevens, J., concurring).

46. *Id.*

the D&E method "is no less distressing or susceptible to gruesome description."[47] For Justices Stevens and Ginsburg, the admittedly horrifying and gruesome methods of late-term abortion do not provide any *reason* to question the Court's precedents protecting late-term elective abortion, nor any reason to limit the reach of those precedents. Thus, the precedents constitutionally protecting elective dismemberment of late-term human fetuses were used to declare "irrational" and unconstitutional a ban on partially delivering a live human fetus and then killing the fetus through a direct assault upon the undelivered head.

The reactive defensiveness of the abortion-rights Justices to the unsettling facts of late-term abortion presents a fascinating psychological study. For example, when Justice Stevens complained that "much ink is spilled today describing the gruesome nature of late-term abortion," he unconsciously alluded to the underlying ethical issue, the "spilling" of innocent human blood. It was, of course, precisely the role of the "spilled ink" to speak of this spilled blood. Similarly, there is something chilling about labeling opposition to gruesome techniques of late-term abortion as irrational, for it perversely labels the natural human revulsion to such acts as legally irrelevant. Moreover, Justices Stevens and Ginsburg appeared so gripped by the need to respond to the gruesomeness of D&X abortion that they neglected to respond to the apparently rational legislative reasons for prohibiting D&X abortion while permitting D&E abortion. Thus, Justice Kennedy's dissent noted that partial-birth abortion could rationally be viewed as worse than D&E abortion because it was closer to infanticide and subverted obstetrical childbirth techniques to kill the fetus delivered partially outside of the mother, thereby particularly endangering the reputation and ethical integrity of the medical profession.[48] Since Justice Kennedy's rationale for distinguishing D&X abortion from D&E abortion is consistent with the position of the American Medical Association, it seems odd to preemptively label it as irrational.[49] Perhaps the most

47. *Id.* at 951 (Ginsburg, J., concurring).

48. *Id.* at 958-66 (Kennedy, J., dissenting).

49. *See id.* at 963 (citing Fact Sheet on HR 1122, AMA Bd. of Trs. (June 1997), *in* Brief of Amici Curiae Ass'n of Am. Physicians and Surgeons et al. app. at 1, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), *available at* 2000 WL 228448))

obvious legislative reason for banning D&X but not D&E abortion is found in the Court's precedents, which clearly protect the most common form of late-term abortion, while being much more unclear regarding the status of a new, less-used method such as D&X.[50] Is it irrational to attempt to legislate within the Court's precedents? Moreover, isn't it generally accepted that laws need not attack all aspects of an evil in order to be rational?[51] Or does the real irrationality lie in precedents that mandate elective late-term abortion, despite the natural human revulsion to such procedures?

Abortion of a developed fetus bears a troubling resemblance to infanticide precisely because the developed fetus, with a face, trunk, arms, legs, fingers, and toes, bears a physical resemblance to a neonate.[52] There is a powerful human revulsion to infanticide within American society and a horror at acts which constitute a direct physical attack upon the body of the infant. It is therefore predictable that most Americans will react negatively to dismemberment of the developed fetus or killing the developed fetus by stabbing the back of the head with scissors before suctioning out the brain. Indeed, it would be frightening to contemplate a society in which human beings failed to experience a visceral negative reaction to such acts. Such negative reactions are understandably heightened by D&X abortion because the technique brings abortion one step closer to infanticide through the use of quasi-obstetrical techniques and the deliberate placement of most of the body

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(citing also Brief of Amici Curiae Ass'n of Am. Physicians and Surgeons et al. at 27, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), *available at* 2000 WL 228448).

50. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 77-79 (1976).

51. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

52. The physical resemblance between a human neonate and a post-nine-week human fetus is made clear by medical textbooks and modern photography. *See, e.g.*, KEITH L. MOORE & T.V. N. PERSAUD, BEFORE WE ARE BORN: ESSENTIALS OF EMBRYOLOGY AND BIRTH DEFECTS 101-19 (5th ed. 1998); T.W. SADLER, LANGMAN'S MEDICAL EMBRYOLOGY 80, 82-83 (5th ed. 1985); *The First Days of Creation*, LIFE, Aug. 1990, at 26, 40-43 (including photographs by Lennart Nilsson). Medical personnel who encounter abortion are confronted by this unsettling resemblance. *See* CAROLE JOFFE, THE REGULATION OF SEXUALITY: EXPERIENCES OF FAMILY PLANNING WORKERS 115 (1986) (quoting an abortion counselor's comment that "[t]he sophistication of a nine-week-old fetus is frightening"); Nancy B. Kaltreider et al., *The Impact of Midtrimester Abortion Techniques on Patients and Staff*, 135 AM. J. OBSTETRICIANS & GYNECOLOGISTS 235, 236 (1979) (reporting that gynecology floor hospital nurses were upset by induced abortions and "found the physical contact with the fetus particularly difficult; [as] it reminded them of the 'premies' just down the hall....").

within the birth canal prior to inducing fetal death.

When the abortion liberty was created in *Roe* and reaffirmed in *Casey*, the Justices were able to focus primarily upon the liberty of the woman and the burdens created by unwanted pregnancy. The human embryo and fetus were acknowledged as a problem but were treated primarily as abstractions. Thus, in *Roe* the Justices discussed the philosophical question of when life began, making it sound as though the principal concern lay in the realm of ideas.[53] *Casey* avoided the fundamental issue of whether the Constitution protected elective destruction of the developed fetus by invoking stare decisis, which supposedly made it imperative that such fundamental questions of justice never again be reexamined.[54]

In *Stenberg*, however, the life of the fetus was no longer an abstraction because post-fifteen week abortion methods differ largely according to how they approach the question of "fetal demise," or, in other words, how they plan to bring about the death of the fetus. Traditional D&E solves the problem through a direct physical attack on the fetus in utero; dismemberment simultaneously kills and removes the fetus. Physicians, however, have found dismemberment difficult after 20 weeks because of "the toughness of fetal tissues at this stage of development."[55] Thus, as the Court itself noted in *Stenberg*, "[s]ome physicians use intrafetal potassium chloride or digoxin to induce fetal demise prior to a late D&E (after 20 weeks), to facilitate evacuation."[56] Physicians, in other words, intentionally kill the fetus by injecting deadly agents into the fetus or into her environment (the amniotic fluid) because a dead fetus is easier to dismember than a live fetus. D&X abortion offered a new solution to the problem of the toughness of fetal tissues as the physician avoids dismemberment entirely; fetal demise is guaranteed through the head reduction procedure.[57] It appears, moreover, that the head reduction procedure is not always necessary to the

53. Roe v. Wade, 410 U.S. 113, 159-61 (1973).

54. Planned Parenthood v. Casey, 505 U.S. 833, 854-69 (1992).

55. Martin Haskell, *Dilation and Extraction for Late Second Trimester Abortion, in* 139 CONG. REC. 8605 (1993).

56. Stenberg v. Carhart, 530 U.S. 914, 925 (2000) (quoting AMA, *Report of Board of Trustees on Late-Term Abortion*, app. 491-92) (internal quotations omitted).

57. *See* Haskell, *supra* note 55.

delivery of the fetus but is sometimes undertaken specifically to avoid the live birth of the fetus.[58] Under these circumstances, it is no longer possible to treat the life of the fetus as a philosophical question for it is obvious that physicians explicitly plan for how they will bring about the death, as well as the removal, of the developed fetus.

A core instability of the abortion liberty, then, is that it grants near absolute immunity to pregnant women to authorize feticide, even where feticide appears analogous to infanticide. Culturally, it is largely acceptable within our society to grant women, as a matter of legal protection, reproductive freedom. Thus the contraceptive liberty is not seriously debated within America, even by the minority that consider contraception unnatural or immoral. Therefore, *Griswold v. Connecticut*,[59] *Eisenstadt v. Baird*,[60] and *Carey v. Population Service*[61] are basically uncontroversial, even where they extend the contraceptive liberty to single minors and despite arguments that they invent new rights. Where such reproductive freedom includes feticide, however, and particularly where such feticide appears analogous to infanticide, it necessarily becomes culturally aberrant and hence legally unstable. The question of abortion, then, must necessarily remain controversial regardless of whether one retains an originalist or non-originalist constitutional theory, for our society has not developed an acceptance for acts analogous to infanticide. We can anticipate, in other words, that *Roe* will remain culturally controversial, at least in its application to late term abortion, until and unless infanticide becomes culturally acceptable.

III. SLAVERY AND ABORTION

Southern slavery proponents focused debate on certain abstract principles. In a time when the Supreme Court called America a "Christian country" and considered Christianity a

58. *See* 142 CONG. REC. 25,308 (1996) ("When American Medical News asked Dr. Martin Haskell why he could not simply dilate the woman a little more and remove the baby without killing him, Dr. Haskell responded: The point here is you're attempting to do an abortion . . . not to see how do I manipulate the situation so that I get a live birth instead.").

59. 381 U.S. 479 (1965).

60. 405 U.S. 438 (1972).

61. 431 U.S. 678 (1977).

part of the common law,[62] it was credible—even if strained exegetically—to rely on the presence of slavery in the Bible as support for the abstract legitimacy of slavery.[63] When anti-slavery proponents interpreted the Bible differently, slavery proponents responded with a federalist-based, "pro-choice" strategy. Those who found slavery immoral need only choose not to own slaves. Those within the South who believed slavery moral, however, should have their "property" and way of life protected. Since the pro-slavery Biblical argument of that day made it appear fairly debatable whether slavery in itself was always an evil, the federalist and "pro-choice" arguments had credence. If a question is fairly debatable, why not leave it to the states or to individual choice?

Abolitionists often focused debate away from the abstract question of whether slavery was ever, or could ever be, morally permissible, to the actual realities of the American slave system. Under the normative standards of the day, American slavery was seriously deficient in two fundamental ways. First, the slavery system denied any legal standing or protection to slave family relations. The heart-rending stories of spouses separated and children sold away from their parents made slavery seem an anti-Christian institution and belied claims that slavery assisted the spiritual and moral development of the slave.[64] Second, the legal and customary proscriptions against educating slaves were particularly egregious in a Protestant Christian milieu that emphasized individual Bible reading. Slavery therefore seemed to hinder, rather than assist, the religious development of slaves.[65] Against these arguments, pro-slavery advocates could do little except promise "reform" while reiterating that slavery itself was not evil.

Ironically, however, it was an opinion from the North

62. Vidal v. Girard's Executors, 43 U.S. (2 How.) 127, 198 (1844).

63. *See* Thornton Stringfellow, *A Scriptural View of Slavery*, *in* SLAVERY DEFENDED: THE VIEWS OF THE OLD SOUTH (Eric L. McKitrick ed., 1963); WILLIAM SUMNER JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 200 (1960).

64. *See, e.g.*, GEORGE B. CHEEVER, THE FIRE AND HAMMER OF GOD'S WORD AGAINST THE SIN OF SLAVERY 4-7 (New York, Am. Abolition Soc'y 1858); WIECEK, *supra* note 23, at 156, 268-69 (describing the efforts of abolitionists to seek marital and parental rights for slaves); *cf.* GENOVESE, *supra* note 18, at 52-53 (describing pro-slavery attempts to respond to these criticisms of slavery).

65. *See, e.g.*, JAMES G. BIRNEY, THE SINFULNESS OF SLAVEHOLDING IN ALL CIRCUMSTANCES; TESTED BY REASON AND SCRIPTURE 9-10 (Detroit, C. Wilcox 1846).

Carolina Supreme Court that clearly revealed the brutality inherent in the slave relationship. Justice Ruffin's opinion in *State v. Mann*[66] is justly famous:

> The end [of slavery] is the profit of the master, his security and the public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits. What moral considerations shall be addressed to such a being, to convince him what, it is impossible but that the most stupid must feel and know can never be true—that he is thus to labour upon a principle of natural duty, or for the sake of his own personal happiness, such services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect. I most freely confess my sense of the harshness of this proposition, I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things, it must be so. There is no remedy. This discipline belongs to the state of slavery. They cannot be disunited, without abrogating at once the rights of the master, and absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and free portions of our population. But it is inherent in the relation of master and slave.

Despite his clear-eyed understanding of the slave relationship, Justice Ruffin's opinion actually reversed a jury's conviction of the "renter" of a slave for assault and battery upon the slave despite the jury's finding that the force used had been "cruel and unwarrantable" and "disproportionate to the offense committed by the slave."[67] Justice Ruffin therefore did not merely lament that slavery was built upon uncontrolled authority over the slave but instead pushed the law further in that brutal direction.

Stenberg v. Carhart could be viewed as the *State v. Mann* of abortion jurisprudence. *Stenberg* goes beyond the abstraction of "reproductive freedom" and the individualist pro-choice

66. 13 N.C. (2 Dev.) 263 (1829), *reprinted in* PAUL FINKELMAN, THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK 218-19 (1986).

67. *Id.* at 217, 220.

rhetoric to look clear-eyed upon the underlying brutality of abortion. Just as a brutal control over the body of the slave is "inherent in the relation of master and slave" so the brutal destruction of the body and life of the fetus is admitted as being inherent in late-term abortion. Moreover, just as the North Carolina Supreme Court in *State v. Mann* noted the inherent brutality of slavery as justification for extending, rather than limiting, that brutality, so did Justices Ginsburg and Stevens in *Stenberg* note the gruesomeness of D&E abortion in order to extend the Court's precedents to the protection of the admittedly gruesome intact D&X abortion.

Unlike Justice Ruffin's tone of intense moral regret in *Mann*, however, the *Stenberg* majority appear either clinically detached or self-righteously defensive regarding the gruesome nature of abortion. It was left to the *Stenberg* dissenters to sound a tone of profound moral regret at the horrific nature of late-term abortion. Justice Scalia compared *Stenberg* to the infamous *Dred Scott* and *Korematsu* decisions, which had constitutionally validated slavery and the internment of Japanese-Americans.[68] Justice Kennedy argued that *Casey* was being misapplied by the *Stenberg* majority, but also emphasized the horrific nature of *both* D&E and D&X abortion: "Those who oppose abortion would agree, indeed would insist, that both procedures are subject to the most severe moral condemnation, condemnation reserved for the most repulsive human conduct."[69]

As Southern history teaches, it is difficult to sustain a position which couples legal, institutional, and personal support of a practice with serious moral or ethical regret. The kind of publicly expressed moral regret about the nature of slavery expressed by Justice Ruffin in 1829 became extremely rare in the South after 1830, and, in fact, anti-slavery speech in the South was repressed.[70] The South between 1830 and 1860 became increasingly self-righteous about slavery and about its

68. Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

69. *Id.* at 963 (Kennedy, J., dissenting).

70. *See* Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109 (1997); Katherine Hessler, *Early Efforts To Suppress Protest: Unwanted Abolitionist Speech*, 7 B.U. PUB. INT. L.J. 185 (1998).

own moral superiority to the North.[71] The extreme pro-slavery stance of the *Dred Scott* decision in 1856 spoke for a people who had buried their earlier doubts about slavery with a self-righteousness that would brook no criticism. Again, one is reminded of the *Stenberg* concurrences of Justices Ginsburg and Stevens, who, like Justice Blackmun in his later years, discern within even de minimis regulations of abortion, an illicit hostility to *Roe*, a hostility viewed as virtually sufficient, in itself, to invalidate a law.[72] One is also reminded of the failure of the Court to protect the freedom of speech of abortion protesters.[73]

Human beings are capable, for reasons of ideology or self-interest, of justifying virtually any evil. Psychologically, however, most human beings self-protectively avoid confronting the full implications of the evil that such ideology or self-interest drives them to justify. These self-protective devices tend to distort the human capacity to react humanely or to accurately perceive reality. This self-protective defensiveness appears to explain why the Supreme Court's doctrine of abortion liberty appears to constantly expand toward an absolute right and why the hopes of Chief Justice Burger and Justice Kennedy for a more moderate accommodation of state interests have been dashed. Accommodating state interests such as the life of the fetus or the ethical integrity of the medical profession require the Justices to grant credence to, and accommodate, those concerned about the negative aspects of the abortion liberty. It would be rational for an abortion rights advocate to accommodate abortion regulations that prohibit no abortions, such as were involved in *Thornburgh* and *Stenberg*, for such accommodations leave untouched the fundamental abortion liberty while gaining the credibility that comes with an appearance of moderation. Certainly it does the abortion rights cause no good to become identified with the defense of partial-birth abortion, or to define all opposed to partial-birth abortion

71. *See, e.g.*, GENOVESE, *supra* note 18, at 50-53 (noting the standard historical viewpoint that the South became increasingly pro-slavery from 1831 to 1861).

72. *See* Thornburgh v. American Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 759 (1986).

73. *See, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000); Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994).

as "on the other side," as most Americans are repulsed by the procedure. Indeed, the willingness of the abortion rights community to consistently resist prohibitions against partial-birth abortion has allowed the anti-abortion activists to maintain focus on the most unattractive and repulsive form of abortion, despite the fact that the method is, relative to the 1.4 million abortions performed each year, comparatively rare.[74]

It should not be surprising, however, that those responsible for protecting the abortion liberty fail to sustain such rational accommodations, even when to do so could be within the interests of their own movement. Those most involved in defining and protecting the abortion liberty, whether they be Justices of the United States Supreme Court, political activists, or abortion providers, have already made, within themselves, the necessary accommodations to justify elective physical destruction of even late term fetuses. They have adopted various psychological strategies to sustain that commitment over time. Unlike most among the general public, whose lack of involvement in the issue allows them to remain uninformed or vague regarding the details of abortion, Justices, activists, and abortion providers must sustain their commitment in the face of periodic exposure to the raw, unsettling facts of abortion.[75]

One way of sustaining that commitment is analogous to that of Justice Ruffin, who acknowledged the brutality inherent in slavery as a justification for a more absolutist protection of the master's rights. Others may clinically detach themselves from the evil and become immune to the normal negative human response. Some may dismiss the evil in such a way that they can become self-righteous on the subject and dismissive of those who evidence a normal human revulsion. Finally, there is a tendency to be resentful of those who raise the issue and force

74. *See* Tamar Lewin, *Study on a Late Term Abortion Finds Procedure Is Little Used*, N.Y. TIMES, Dec. 11, 1998, at A12 (stating that a study by the Alan Guttmacher Institute reveals that partial birth abortions comprised around 650 of the 1.4 million abortions performed in 1996).

75. For information regarding the psychological difficulties faced by abortion providers, see Nancy B. Kaltreider et al., *The Impact of Midtrimester Abortion Techniques on Patients and Staff*, 135 AM. J. OBSTETRICIANS & GYNECOLOGISTS 235 (1979); Judith Bourne Rooks & Willard Cates, Jr., *Emotional Impact of D&E vs. Instillation*, 9 FAM. PLAN. PERSP. 276 (1977); David M. Smolin, *Cultural and Technological Obstacles to the Mainstreaming of Abortion*, 13 ST. LOUIS U. PUB. L. REV. 261, 267-74 (1993); Diane M. Gianelli, *Abortion Providers Share Inner Conflicts*, AM. MED. NEWS, July 12, 1993, at 3, 36.

the individual to once again confront and justify the evil in question. All of these strategies are evident in the opinions of the abortion right supporting Court, particularly those of Justice Blackmun and the various Justices in the *Stenberg* majority.

Chief Justice Burger in *Thornburgh* and Justice Kennedy in *Stenberg* appear to be seeking to sustain a more rational, yet more precarious, course. Like Justice Ruffin in *State v. Mann*, they would significantly acknowledge the views of states and citizens who find the practice in question inherently inhumane and ethically repulsive. Unlike Justice Ruffin, however, they would seek to accommodate those interests to a limited degree, by allowing significant regulations while retaining a fundamentally pro-choice rule. In terms of Southern history, this combines Justice Ruffin's clear-eyed acknowledgment of the inherent brutality of the practice with a reformist willingness to regulate. The difficulties of this position, for both slavery and abortion, are both pragmatic and psychological. Just as the essence of the slavery relationship lay in the master's control over the body and person of the slave, the essence of the abortion liberty lies in the woman's control over the body and life of the fetus. There is no way to retain the essence of either the property right of slaveholders nor a woman's right to an abortion without preserving the evil inherent in those rights. A slavery that truly protected the family relations, intellectual development, and bodily integrity of the slave would so significantly limit the master's rights as to cease to be slavery. For previability abortion, there is no way to remove the body of the fetus from the woman without killing the fetus, a fetus which, by the ninth week of development, appears distinctively similar to a neonate, with a face, arms, legs, fingers, toes, trunk, and gender.[76] Thus, those committed to the underlying practice can only permit regulations of the practice that are, by their nature, generally ineffective to address the core evils of the practice.

Of course, permitting such "ineffective" regulations is still the most pragmatic response for those committed to the underlying practice of abortion. Allowing such minor regulations of the contested practice can serve as a societal

76. *See* articles cited *supra* note 52.

safety valve by channeling revulsion to the practice into legitimate yet ultimately non-threatening legislative activity, preserve support for the underlying practice through an appearance of moderation, and also serve, in at least a peripheral way, to limit the harm produced by the evil. Thus it would have been more rational for Justice Ruffin to permit some limited regulation—as already existed—of the physical harms that "renters" could cause to slaves, and it would have been more rational if the Supreme Court had, in the interest of the ethical integrity of the medical profession, permitted prohibition of D&X abortion. It was particularly irrational for Justices to belittle the interest in the ethical integrity of the medical profession, given that the American Medical Association, which is fundamentally pro-choice, had identified intact D&X as both medically unnecessary and a threat to the ethical integrity of the profession.[77] Thus, the approach to abortion regulations urged by Chief Justice Burger and Justice Kennedy, which would have permitted abortion regulations which do not remove the fundamental choice from the woman, would most likely bring the greatest degree of stability and support to the abortion liberty. Yet it is psychologically difficult for human beings to acknowledge that a certain practice is

77. *See* Fact Sheet on HR 1122, AMA Bd. of Trs. (June 1997), *cited in* Stenberg v. Carhart, 530 U.S. 914, 962-63 (2000) (Kennedy, J., dissenting). The *Stenberg* majority opinion acknowledged the position of the AMA that there is no circumstance in which the D&X procedure is the only appropriate alternative, as well as the official statement by the American College of Obstetricians and Gynecologists (ACOG) that its panel "could identify no circumstances under which [D&X] would be the only option to save the life or preserve the health of the woman." *Id.* at 932. Yet the majority allowed ACOG to spin its own official statement by crediting its statement, in an *amicus curiae* brief, that D&X "may be" the most appropriate procedure in some instances or "can" be safer for some women. *See id.* at 966 (Kennedy, J., dissenting). The Court, in short, created a situation where a statute could be invalidated based on the willingness of medical authorities to make vague statements in court that contradicted their own official statements or practice. This mirrored what had occurred in the trial court, where abortion practitioners extolled the safety benefits of D&X, despite the fact that they never used the procedure in their own practices. *See id.* at 966-67 (Kennedy, J., dissenting) (noting "courtroom conversion" of the experts). The majority thus created a situation where the mere willingness of medical experts to testify in court, or of interested professional organizations to submit amicus curiae briefs, would be sufficient to overcome a legislative judgment, even where the actual practices or official statements of such experts or organizations belied or contradicted their made-for-litigation positions. Under such circumstances, it is essentially impossible for legislative regulations to prevail. Such an approach to reviewing abortion regulations is a byproduct of the problem addressed in this article: the tendency of the abortion liberty to become a super-right.

inherently brutal or inhumane, nonetheless justify the practice for reasons of ideology or self-interest, and then rationally accommodate, where possible, the views and concerns of those who oppose the practice. Instead, most who defend the underlying practice become self-righteous, overly defensive, or clinically detached from the underlying brutality and irrationally treat even modest proposed regulations as though they were threats to the core practice in question.

IV. CONCLUSION

The core instability of the abortion liberty lies in the similarity between abortion and the culturally aberrant act of infanticide and the consequent irrationality of those placed in the position of defending practices that appear repulsive to most people. Culturally speaking, this instability is likely to remain until and unless our society develops an acceptance of infanticide.

The core instability of the broader right of privacy, as a matter of substantive due process, lies in the failure of the Court to connect the subject of unenumerated rights with the historic drama of emancipation that created the Fourteenth Amendment. Without a link to the history and jurisprudence of the Fourteenth Amendment, claims of unenumerated rights are necessarily of questionable legitimacy, as there seems no principle except the predilections of the Justices to guide their exercise of judicial review. Under these circumstances, both originalists and non-originalists can lose touch with the organic constitutional tradition, as both overlook that tradition's link with historical, common law, natural-law, and ethical traditions. Indeed, most modern originalists and non-originalists are oddly mirror images of each other, for the positivism of the former and the individualism of the latter equally embrace an amoral constitutionalism foreign to the jurisprudence of the Framers.

The instability of an amoral jurisprudence of unenumerated rights disconnected from the historical narrative of emancipation has facilitated a further instability—that of embracing as a fundamental right an act regarded as ethically aberrant by the broader society. The law and the Court have forgotten both the rich heritage of anti-slavery jurisprudence and their connection to the moral sensibilities of the society. A

Supreme Court jurisprudence of unencumbered abstraction in the interest of ideology ill serves this nation and dishonors her history. One hopes that some day the Supreme Court will embrace a jurisprudence worthy of the nation's ideals and the precious lessons taught by its history.