The Supreme Court, in *Dobbs v. Jackson Women’s Health Organization*, held that *Roe v. Wade* must be overruled because “the Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision,” including the Fourteenth Amendment.

Justice Harry Blackmun, who wrote the Court’s opinion in *Roe v. Wade* nearly 50 years ago, had been desperate to find some constitutional justification for overturning a Texas law that recognized the right to life from conception. While the *Roe* Court held that women have a constitutional “right” to abortion under the Fourteenth Amendment, it rejected the idea that children in the womb have a right to life under the same Amendment.

In *Roe*, Justice Blackmun and his colleagues made an unsupported and unconstitutional determination that the freedom to have an abortion, which they fabricated in *Roe*, trumps the right to life, which is expressly protected in the Constitution.

Justice Samuel Alito, writing for the Court in *Dobbs*, discussed at length whether abortion is a protected liberty under the Fourteenth Amendment, but was silent on whether unborn children are considered persons who have a right to life under the same Amendment.

Justice Kavanaugh, who thankfully joined the majority in overturning *Roe*, insists that the Constitution is “neither pro-life nor pro-choice.” Kavanaugh argues that while state interests in protecting fetal life are “extraordinarily weighty,” the extent to which children in the womb are protected under the law should be left entirely to the democratic process.

The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws.”

So why are unborn children not protected under the Fourteenth Amendment?

According to constitutional scholars John Finnis and Robert George, they should be. In their amicus brief in *Dobbs v. Jackson Women’s Health Organization*, Finnis and George conclude that *Roe* should
be overturned and Mississippi’s 15-week abortion ban must be upheld “because the unborn are ‘person[s]’ guaranteed equal protection and due process by the Fourteenth Amendment.”

To support their argument, Finnis and George cite numerous laws and treatises that recognized unborn children as persons at the time the Fourteenth Amendment was drafted: “Authoritative treatises—including those deployed specifically to support the Civil Rights Act of 1866, which the Fourteenth Amendment aimed to codify—prominently acknowledged the unborn as persons.”

Finnis and George’s equal protection approach would result in the equal application of existing state laws regarding feticide to all unborn children, without exceptions for elective abortions. Because the mother’s life also is protected under the Fourteenth Amendment, states could be required to allow “urgent or life-saving medical interventions even when these would unavoidably result in fetal death,” such as removing an ectopic pregnancy.

Other scholars, including the late Supreme Court Justice Antonin Scalia and law professor Jonathan Adler, disagree with Finnis and George. They argue that abortion should be left to the states to regulate or restrict—or not. Adler holds that “most questions of life and death, and the extent to which actions that harm or kill others should be criminalized, are left to the states.” He cites as an example the Uniform Determination of Death Act (UDDA), which is model legislation many states have adopted to determine brain death. Leaving aside the inconsistencies in the application of the UDDA, which has resulted in people being declared “dead” who are still walking and talking among us, the function of the UDDA is to distinguish between the living and the dead.

Unborn children belong to the category of the living. Until Roe, children in the womb were widely considered persons with protections under the law.

Abortion jurisprudence has never turned on the question of whether the child in the womb is alive or dead. Rather, courts, both state and federal, have capriciously determined that some living people should have the benefit of legal protection, while others should not.

This is neither constitutionally nor logically defensible.

If unborn children are alive—and they are—they must be treated like other living persons under the law, to the extent practically possible. Equality under the law includes, first and foremost, protection from being deliberately killed. There are no separate categories of human beings based on gestational age or geographical location. It is incoherent that a living human being would be worthy of protection in one state and treated as nothing more than medical waste in another.

Rights inhere in living human persons. They do not accrue to the dead. There is no third category of living human beings who are not persons.

Adler’s argument fails because states may not arbitrarily create categories of living people and afford or deny fundamental rights based on those fictional categories. This is the exact purpose of the Fourteenth Amendment.

Over the last decade, methamphetamine has become among the top three drugs requiring inpatient treatment among women of childbearing age. It is responsible for low BMI (Body Mass Index) in female users. This effect on a woman's body can have profound implications during pregnancy. Methamphetamine is a powerful appetite suppressant. Lower maternal body weight is normally correlated with gestational complications.

Methamphetamine is a powerful vasoconstrictor (narrowing of blood vessels). It can cause a reduction in placental blood flow that will cause fetal hypoxia. The baby’s supply of oxygenated blood comes across the placental membrane. Without it, the development of the baby can be impaired.

To further exacerbate pregnancy issues, the use of methamphetamine usually accompanies abuse of other substances like marijuana, tobacco, alcohol and opioids. Abuse of other addictive substances, such as alcohol, can lead to defects like Fetal Alcohol Syndrome which is an irreversible condition. For example, a recent study of over 1 million pregnant women who were insured through Medicaid found that over one-fifth of the women (21.6%) filled a prescription for an opioid while they were pregnant.

In another study, researchers found that while the hospitalization ratio for cocaine abuse decreased 44% from 1998 to 2004, the hospitalization ratio for amphetamine abuse doubled during that time. Since then, methamphetamine use, including among pregnant women, has surged.

Some of the most common complications among “meth babies” are increased risks for neurodevelopmental problems, low birth weight, and small size for gestational development period. Meth babies can also experience fetal distress syndrome resulting from lack of oxygen that may cause long-term developmental delays and disabilities.

The dangers of using this powerful illicit drug during pregnancy continue through delivery and beyond. Preterm birth rates are significantly higher among meth users. Placental abruption (a condition where the placenta detaches from the uterus) requires immediate medical attention and is common in meth-abusing mothers. There are also several cardiac anomalies that can occur in the children of addicted mothers. For instance, atrial septal defect (a hole in the main wall of the heart that separates the left and right atrium) is a recurring heart defect in babies of addicts. This can put the child at risk for stroke. They can have smaller head circumferences that inhibit proper brain growth.

After the baby is born, he or she often experiences drug withdrawal symptoms from being deprived of regular amounts of the drug passing through the placenta from the mother. Symptoms for the newborn can include trouble eating, insomnia or somnolence, poor muscle control or muscle rigidity, jitters, photosensitivity, and possible breathing issues. Withdrawal symptoms usually go away within a few weeks but can last for months. The baby may need to be admitted to a neonatal intensive care unit.

The effects of these drugs on a fetus are not completely identified because each baby is different. As followers of God, we fall back on what we know to be true. Psalm 139:14 says, “I will praise thee; for I am fearfully and wonderfully made: marvelous are thy works; and that my soul knoweth right well”. We can’t prevent women from using drugs while they’re pregnant, but we can educate them and others about the dangers of this behavior. And we can continue to pray that their babies are under God’s protection. [https://lldf.org/meth-use-and-pregnancy/]
“The abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.”

So wrote Supreme Court Justice Harry Blackmun almost 50 years ago.

Now that Roe v. Wade is a history lesson, not a controlling precedent, it is instructive to examine how the assumptions underlying that decision were discarded, replaced by new dogmas to support an ever-expanding “right” to abortion on demand.

As the quotation above demonstrates, abortion was initially sold to the public as a medical decision—and by implication a medical necessity. No “responsible physician” would perform an abortion without a good reason to do so. As Blackmun saw it, “If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.”

Within months (weeks? days?) of Roe becoming the law of the land, the role of the physician as gatekeeper for “responsible” abortion was fading into insignificance. When the Supreme Court decided Planned Parenthood v. Casey in 1992, the word “physician” was completely absent from the 35 pages of the joint opinion where three justices rationalized their affirmation of the “central holding” of Roe. This supposed “central holding,” that a woman has an unfettered right to abortion prior to viability, lived on for another three decades, until the Court’s decision in Dobbs v. Jackson Women’s Health Organization in June of this year.

As long as there is some advantage to be had from treating abortion as a “decision between a woman and her doctor,” abortion advocates have been the loudest voices asserting the fundamentally medical nature of abortion. Issues involving taxpayer funding and insurance coverage are sure bets to inspire impassioned rhetoric about the cruelty and injustice of denying “health care” to women.

On the other hand, when it comes to the abortion process itself, abortion advocates would rather leave doctors out altogether. Allowing only physicians to perform surgical abortions is unnecessary and hinders access to this oh-so-safe and common procedure, they say. Using a scapula and suction machine to carve up and extract a baby from the womb is not even surgery, they say. As for chemical abortions, which now make up more than half the abortions in the country and continue to expand, COVID-19 provided an excuse to bring abortion all the way home. No clinic visit, no exam, no receiving the deadly drugs in person. It’s tele-med and abortion by mail now.

Abortion advocates understand, with more clarity than many pro-lifers do, that the future of abortion is “self-managed,” more colloquially called do-it-yourself. A search on the internet turns up any number of sites where women can order abortion drugs from around or outside the country. The only reason to involve the health care system is to get the drugs paid for.

To give credit where credit is due, abortion advocates exercise an awesome degree of message discipline. Faster
than you can say “birthing person,” a new term appeared on the scene to expand the reach of pro-death ideology: pregnancy outcome. Suddenly, pro-aborts and their favorite politicians and allies in the mainstream media are all singing this line from the choir book: “No woman should be punished for her pregnancy outcome.”

The intentional killing of an unborn child is just another morally neutral “pregnancy outcome,” like a miscarriage, stillbirth, or perinatal death. Abortion advocates want to use the public’s sympathy for women who unintentionally lose a child, even through their own actions such as drug use, and stretch that to cover the willful destruction of the baby in the womb.

A prime example is a bill now before the California legislature. AB 2223 creates a “right” to any pregnancy outcome, and shields not just women but any person who assists a woman in achieving any pregnancy outcome.

The impetus for the proposed law was the case, recently given a high profile, of a 29-year-old woman, Adora Perez, whose baby died in utero 12-18 hours before she gave birth. The mother had tested positive for methamphetamines multiple times during the pregnancy, as she had in many of her earlier nine pregnancies, and she admitted to using meth just two days before the birth. The county prosecutor charged her with murder and voluntary manslaughter. Represented by a public defender, Perez pled guilty to manslaughter, unaware that California law does not contain the crime of manslaughter of an unborn child. The judge nonetheless sentenced her to the maximum sentence of 11 years.

Four years later, Perez’s conviction was reversed, after her situation came to the attention of a reporter writing a story about another drug-addicted woman, Chelsea Becker, also accused of causing her baby’s death shortly before birth. Becker also had earlier given birth to several children who tested positive for illegal drugs. Her attorneys disputed that the toxic levels of meth the coroner detected in the baby’s system were the cause of death, and the charges were ultimately dismissed because the judge believed prosecutors had not shown that Becker knew the drugs would be lethal.

Even so, Becker’s aunt noted “If they drop these charges and let her out of jail, she’s just going to do this again. She needs mental health care, she needs drug rehabilitation, and she needs jail time.”

From a strictly legal perspective, the murder charges against Perez and Becker were wrong. But so was what they did to their children. Liberal forces, however, are only interested in one of those wrongs. They want to ensure that no woman in California is ever again punished, accused, or even investigated for causing the death of her unborn or newly born child, or as they put it, for a pregnancy loss.

If indeed the drugs Perez and Becker ingested did not cause the deaths of their babies, or if there is some reasonable doubt about that fact, then obviously punishing them for those deaths would be unjust.

But abortion advocates don’t want Perez, Becker or other addicted mothers whose babies are stillborn to receive a fair trial. They don’t want them to be required to receive treatment. They don’t want them even to have to answer questions regarding their babies’ deaths. The pro-aborts are using these tragic, unnecessary deaths to push their agenda a few steps further, and to erect a complete barrier to any protection of the child in the womb from intentional or unintentional harm in which the mother is involved.

AB 2223 declares an affirmative right to “make and effectuate decisions about all matters relating to ... prenatal care, ... postpartum care, ... abortion care ... and infertility management.” The law provides that no one shall be subject to any civil or criminal penalty based on their actions or omissions with respect to any actual or potential “pregnancy outcome,” nor shall anyone be liable for assisting a pregnant woman to achieve her desired or consented-to “pregnancy outcome,” including “miscarriage, stillbirth, abortion, or perinatal death due to causes that occurred in utero.”

Just to make sure no one starts asking uncomfortable questions concerning a particular “pregnancy outcome,” the law enables “any party aggrieved” by an investigation of any “pregnancy outcome” to bring a lawsuit against those participating in the investigation. If that investigation is determined to have interfered with the someone’s rights, the participants will be liable for a minimum of $25,000 and attorney fees.

And if the coroner, in the course of his normal duties, uncovers evidence of illegal or wrongful conduct in the death
HOW ASSISTED SUICIDE EUTHANIZED ROE V. WADE

Wesley J. Smith

Back in the '90s, the assisted-suicide movement tried to convince the Supreme Court to impose a Roe v. Wade-style decision for their cause that would circumvent the democratic process by imposing doctor-hastened death as a constitutional right. (Full disclosure: I wrote and filed an amicus brief in the Supreme Court against that effort as a lawyer for the International Anti-Euthanasia Task Force, now the Patients Rights Council.) The effort failed, with the Supreme Court ruling 9–0 in Glucksberg v. Washington (1997) that there is no right to be found in the United States Constitution to assisted suicide.

Now, in a turn that could not have been anticipated at the time, Glucksberg provided the primary precedent for striking down Roe as bad constitutional law! From Dobbs v. Jackson (my emphasis):

We hold that Roe and Casey must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of Roe and Casey now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be “deeply rooted in this Nation's history and tradition” and “implicit in the concept of ordered liberty.” Washington v. Glucksberg…

More:

In deciding whether a right falls into either of these categories, the Court has long asked whether the right is “deeply rooted in [our] history and tradition” and whether it is essential to our Nation’s “scheme of ordered liberty.” … Glucksberg … And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue….

Thus, in Glucksberg, which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of “Anglo-American common law tradition,” 521 U. S., at 711, and made clear that a fundamental right must be “objectively, deeply rooted in this Nation’s history and tradition.”

Analyzing the history of the unenumerated claim of a right to abortion, the majority found it wholly wanting.
of a late-term unborn child, the law provides that the results of his investigation “shall not be used to establish, bring, or support a criminal prosecution or civil cause of action seeking damages against any person” who is immune under the preceding sections.

One of the ironies of AB 2223 is that the sponsors and supporters of the bill, including the very pro-abortion attorney general of California, acknowledge that there is currently no law against a woman deliberately, recklessly, or negligently killing her own unborn child. But that is no longer enough to “protect reproductive rights.” Full protection requires immunizing from any liability those who help women “self-manage” their abortions and penalizing those who ask questions.

Freezing law enforcement out carries its own risks to women, of course. Those who batter and traffic women and girls will be able to “manage” their victims’ “reproductive choices,” and woe betide the police or protective services officer who butts in. But we’ve always known that abortion advocates were not genuinely interested in enhancing the well-being of women.

As of this writing, AB 2223 is still going through the amendment process, but those amendments are marginal and by the time you read this, the bill will likely have been passed into law. The heart of the bill is the complete de-regulation of abortion, up to birth. Giving absolute immunity to women for their actions and omissions during pregnancy creates an extra layer of protection around abortion, as does extending that immunity to anyone who assists a woman.

Pro-aborts have been successful in systematically deregulating abortion in large part because they bullied legislators into believing that women would otherwise be condemned to dangerous illegal abortions. That was a lie. California is revealing what was the agenda all along: Bring back-alley abortions into the bedroom by making every woman an abortionist who has complete immunity for any “pregnancy outcome,” including the death of a full-term infant during or after birth.

Lest you think this agenda is confined to California, think again. Lawmakers are passing a slew of bills related to AB 2223 that entice women from across the nation to come to California to evade their states’ abortion restrictions. Women will get free travel, child care, and lodging along with immunity for the “pregnancy outcome” of their choice.

As we celebrate the end of Roe v. Wade, we must recognize that we are entering a new phase in the war against abortion. Even though Normandy marked the beginning of the end of World War II, there remained much hard fighting until the final victory would be won.
UPDATE: IOWA COURT CLEARS THE WAY TO PROTECT THE UNBORN

In the last issue of Lifeline, Katie Short wrote about the phenomenon of state courts finding a right to abortion hidden in various clauses of their state constitutions. (See Red State Roes, Winter 2022). One of those courts was the Iowa Supreme Court, which in 2018 uncovered a right to abortion in a very standard due process clause of the Iowa constitution. Planned Parenthood of the Heartland v. Reynolds ("PPH II").

Fortunately, on June 17, the Iowa Supreme Court overruled PPH II. In considering a challenge to a 24-hour pre-abortion reflection period, the court criticized its own relatively recent decision in rather harsh terms, e.g., “Under the fundamental rights/strict scrutiny approach taken in PPH II, there is no effort to balance: Having an abortion without delay is deemed more important than preserving unborn life.” It further disapproved of “PPH II’s legal formulation that insufficiently recognizes that future human lives are at stake.”

The Court remanded the case to the trial court for further proceedings, which proceedings will undoubtedly take place with the benefit of the U.S. Supreme Court’s decision in Dobbs v. JWHO. As the Iowa justices stated, “We expect the opinions in that case will impart a great deal of wisdom we do not have today.”