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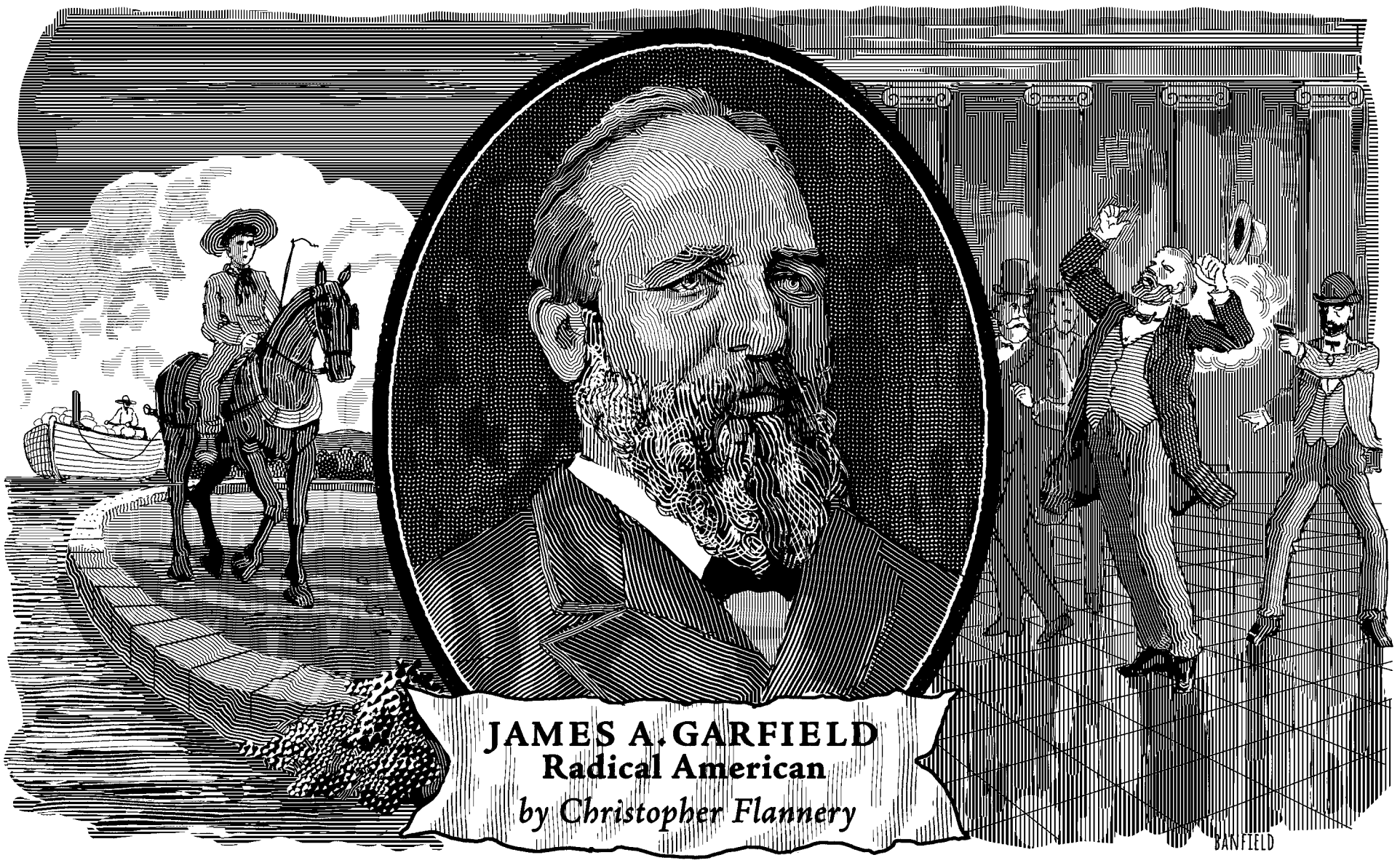

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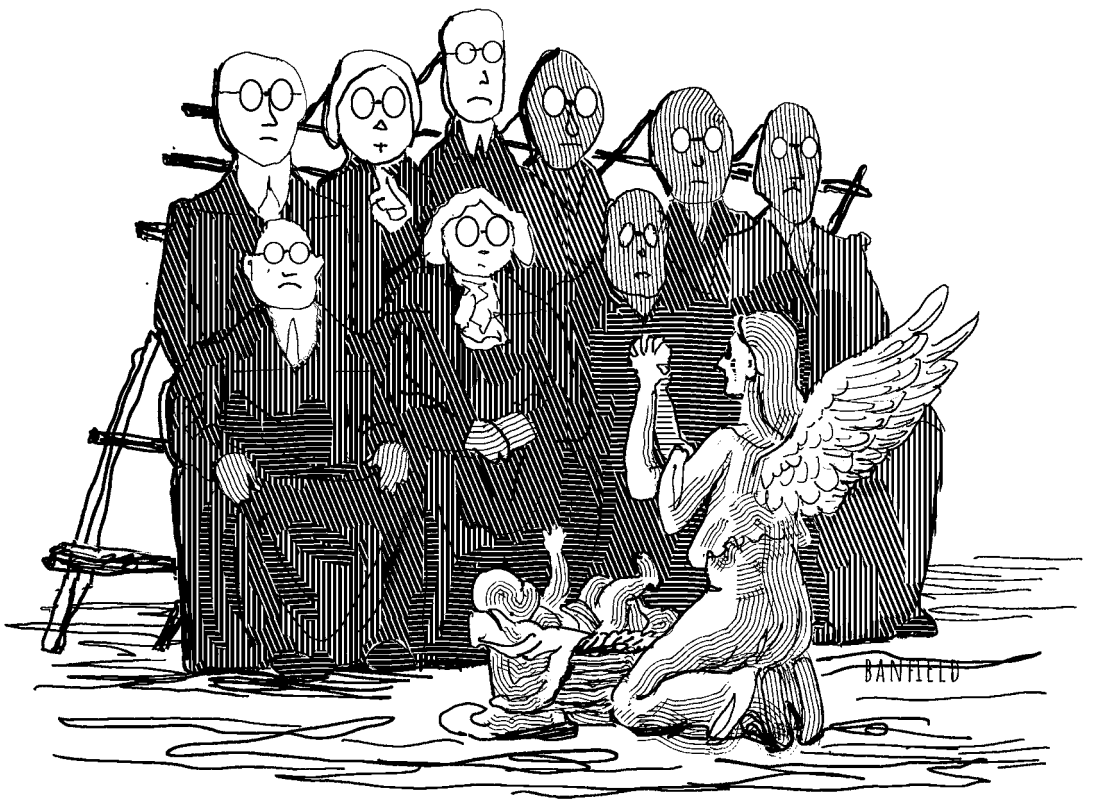
Essay by Hadley Arkes

The Wages of *Dobbs*

And the confusions of conservative jurisprudence.



A year has now passed since the Supreme Court's decision last June in *Dobbs v. Jackson Women's Health Organization*, in which six conservative Justices finally overturned *Roe v. Wade* (1973). True to the code of what has been offered to us over the past 40 years as "conservative jurisprudence," the Justices accomplished that end while deliberately steering around the moral substance of the matter.

Conservatives spent years recoiling from judges with astounding new moral insights, who invented novel "rights" not to be found in the text of the Constitution. But instead of showing what was specious in the moral reasoning that produced those supposed new rights, the conservatives hit upon the strategy of maintaining their integrity as judges through the clever stroke of avoiding moral reasoning altogether. They settled into the glib notion that once a judge departed from the text of the Constitution, he was merely "looking inside himself," with judgments that were wholly "personal"—as though there were indeed no moral truths to be found outside the Constitution, even as vexing moral judgments remain, stubbornly, at the heart of our gravest cases. And in this manner, with the winds of doctrine at their back, five intrepid Justices and one reluctant recruit sailed into the task of slaying the Great White Whale of *Roe v. Wade*.

There was no inadvertence. It took a certain collegial art to craft the long majority opinion while taking care not to say anything decisive on the things that people on either side cared most deeply about: the human standing of the child in the womb and the rightness or wrongness of abortion. *Roe v. Wade* was decisively put away. That had to be regarded as a grand decision, stirring the deepest gratitude and joy in the tents of pro-lifers. And yet, it may be truly said of it what Robert Southey said of the Battle of Blenheim in his legendary poem of that name: "'Twas a famous victory." That line carried a certain edge, as it would now for the *Dobbs* case. Some of us, like our beloved late friends Michael Uhlmann and John Noonan, were writing and working for the pro-life movement before *Roe v. Wade*, but the decision in *Dobbs* did not accomplish what we had all set out so long ago to accomplish. For years pro-lifers would gather in protest in Washington on the anniversary of *Roe*, and from the beginning the animating concern was with the dismembering or poisoning of babies. But that was not the problem of abortion as it was seen through the lens of conservative jurisprudence. And the remedy offered in the *Dobbs* case did not pretend to reach the depth of the wrong that we had worked over the years to overturn. Indeed, the holding actually worked to produce a political landscape now tilted against pro-lifers.

And so, a year later, the pro-life movement finds itself blindsided, encountering unexpected defeats at the ballot box, even in pro-life states like Kansas, Kentucky, and Montana, and not knowing quite what to make of it. The pro-lifers, true to character, blame themselves, sure that something must have gone wrong with their "messaging." The only problem with their messaging was how to counter the bizarre claim, offered shamelessly to a public ever more credulous, that pro-lifers would actually bar a woman from obtaining an abortion when her life may be in danger. But there, of course, was where the pro-lifers could converge decisively with the defenders of abortion, taking as an anchoring point the primacy of the life of the mother. The remarkable political fact is how the proponents of abortion could put pro-lifers on the defensive

to explain something they never thought they would need to explain.

But the deeper mistake for the pro-lifers came with the improvident alliance they made years ago with conservative jurisprudence. The *Dobbs* opinion offers a faithful reflection of the leading themes that have defined that jurisprudence. And its argument works now to withhold the premises that are truly decisive for the pro-lifers in making their case going forward, at the local as well as the federal level. To account for the current distress of the pro-life movement without reading closely the opinion in the *Dobbs* case is rather, as an old saying used to go, "like playing Hamlet without the first grave digger." But ironically, if there is a path of redemption or deliverance, it will likely come through the unsurpassed hand of Justice Samuel Alito, the Justice who had to pay a price to corral at least four conservative colleagues into an opinion that would finally overturn *Roe*.

A Moral Straitjacket

Roe v. Wade had swept away the laws in the land that barred or restricted abortion. But it had done far more than that—it changed the culture: abortion was converted overnight from something to be abhorred, discouraged, forbidden, into something to be approved, celebrated, promoted. The Court was teaching, in effect, that there was something profoundly good and morally right about a woman's freedom to order the killing (or disposal) of her child when she thought she needed or wanted it. It shouldn't have been astonishing that when the Court overruled *Roe*, there were women in the country who were certain that something of profound moral importance was being taken away from them. Something they regarded as an anchoring right of their personal freedom was being stripped from them, if they happened to live in the wrong state. For the conservatives, this moral teaching, embedded in the law, formed no part of their job description. The Justices quite deliberately held back from pronouncing any judgment on the wrongness of abortion. Still less did they have anything to say of the vast moral good that may be done now in saving small, innocent human lives. And indeed, the conservative majority even held back from recognizing that nascent life in the womb is truly a human life, a real human being. And we need to be clear: *none of this was a matter of inadvertence*; it was part of the discipline of conservative jurisprudence that took it as a matter of high design and pride that the Justices would try to avoid any judgment on the moral substance of the issues before them.

Conservatives and ordinary folk looking on this matter for the first time may wonder how conservative jurisprudence had worked itself into this moral straitjacket. The explanation is quite straightforward. As the conservative line went, the Constitution said nothing about abortion. Therefore, federal judges could not possibly be in a position to proclaim any right to abortion emanating from the Constitution. Abortion could form no part of the business of the federal government. But the word "marriage" could be found nowhere in the text of the Constitution when the Court, in *Loving v. Virginia* (1967), struck down the laws that barred interracial marriage. And no conservative jurist has had the temerity to say that the Court should not have taken the case, or that the case should be revisited. What's more, as Notre Dame law professor Gerard Bradley has pointed out, the federal government in the past had found ample reason to make abortion part of its business. There was the question of whether abortions may be performed in military hospitals or in diplomatic outposts abroad—and beyond that, whether they were permitted in the territories of the United States and in the District of Columbia. And indeed, two years before *Roe*, the Court had sustained the laws that barred abortion in the District of Columbia.

In the aftermath of the *Dobbs* case, the conservative political class was still trying to get its bearings. The Court would return the issue of abortion to the "political arena"—but to what political arena? Senator Lindsay Graham of South Carolina, never passive on this issue, introduced a bill in the middle of September, three months after the *Dobbs* decision was handed down, which would simply affirm what the Court held in *Dobbs* when it sustained the original Mississippi statute. Graham would make a start by having the Congress forbid abortion after 15 weeks of gestation. The bill did not have a chance, of course, in a Congress controlled by Democrats. It was an effort to make a point and acknowledge the authority of Congress to act on this subject. But it brought forth in a flash the deep confusions among Republicans, who had picked up all too well the mantras of conservative jurisprudence.

The editorial page of *The Wall Street Journal*, the most important organ of conservative commentary in the country, exploded along the scale from low to high dudgeon. To take that line from P.G. Wodehouse, we wouldn't say that they were "disgruntled," since we don't know that they had even been gruntled in the first place. The editors inveighed against Graham for taking this issue instantly to the national level. They had been quick to make this point emphatically from the moment that the holding in *Dobbs* was released in June:

> Some in the pro-life movement want Congress to ban abortion nationwide. But that will strike many Americans as hypocritical after decades of Republican claims that repealing *Roe* would return the issue to the states.
>
> A national ban may also be an unconstitutional intrusion on state police powers and federalism. Imposing the abortion values of Mississippi or Texas on all 50 states could prove to be as unpopular as New York or California trying to do the same for abortion rights.

To put it mildly, the editors had bought deeply the line of conservative jurisprudence that this issue would be returned to the states, because the Constitution said nothing about a right to abortion. Last fall, some Republican candidates for the Senate, sensing panic in the land, moved to sign on to this new party line and promised their voters that, if elected, they would not use their office to flex any of the authority of the federal government to restrict abortions in the states. Just recently, a friend told me of a conversation with a Republican senator from the Midwest, who told him that, at last, *Dobbs* had now relieved him of the need ever to speak again of abortion. He had regarded the issue as solely the business of the courts. And once *Roe* was struck down, he was more than willing to wash his hands of the whole matter. In the meantime, the Biden Administration has never bought into the fable that the national government has no business in dealing with abortion, and so it has been giddily uninhibited in using every lever of federal power in reach to defend and promote abortion, even in the pro-life states. The White House is moving to firm up the right to perform abortions in military hospitals, in hospitals receiving federal aid, and in the provisions of Obamacare, insisting on the coverage of abortion in medical insurance. The administration will be trying, of course, to ensure that the mail will be unobstructed in shipping mifepristone, for chemical abortions, to women in pro-life states who happen to want it.

The decision in *Dobbs*, then, has imparted a new energy and resolve to the partisans of abortion to use the instruments of federal power as they've never felt confident enough to engage them before. At the same time it has confused and disarmed many Republicans. And in the cruelest irony, it has saddled the pro-life movement with a heavier burden

of justification now in appealing to the Congress at the national level to brake, where it can, the engine seeking to rip through all restraints on abortion.

Facts and Values

But there is a need to step back and consider: what kind of legal genius ever talked educated people into the notion that abortion was a matter that could readily be confined to the states? How was it conceivable that women feeling aggrieved over the decision in *Dobbs* would not appeal to the federal government to weigh in against what they took to be a deprivation of freedom within the states? It was one of those unaccountable triumphs of a positivism lingering from the last century: many conservative writers and lawyers actually talked themselves into the notion that only people in elective office can cite moral reasons or moral truths as the ground of their judgments. As we follow the thread of this argument all the way down, the unborn child is never referred to, even by Justice Alito, as anything more than a "potential" human being. But Alito must have done it with a wink, for as he surely knows, it makes no sense: if there is nothing already *alive and growing*, an abortion would be no more relevant than a tonsillectomy. And if something is growing, it cannot be anything other than a developing, small human being. It may be a potential outfielder, but never a *potential* human being.

The opinion written by Justice Alito was an exacting, disciplined, workmanlike project, but the discipline in question here was the discipline of conservative jurisprudence as it has been defined over the past four decades. The Court deliberately held back from pronouncing any judgment on the rightness or wrongness of abortion. It deliberately held back from drawing on the mountain of empirical evidence, accumulated over many years by embryology, that bore precisely, and conclusively, on this matter. And so, it left that question truly open to the opinions and the free-floating beliefs of voters in the states—undergirded by no truth.

Even 50 years ago, in an exquisite brief offered in *Roe v. Wade*, lawyers from Texas drew on the most up-to-date findings in embryology to offer these critical points to the Court: that this small being in the womb has never been anything but human from its first moments, that the child receives nourishment from the mother but has never been merely a part of her body. And as Princeton ethicist Paul Ramsey pointed out with most telling effect in his essay "Reference Points in Deciding on Abortion," everything that defines us genetically was already with us when we were no larger than the period at the end of this sentence. But neither the dissenters in *Roe* nor the conservative majority in *Dobbs* was ever moved to speak those words. If they did, they would have planted in the law the anchoring truth that the child in the womb is, of course, a human being, and with that premise in place there would be a clear justification for the Congress or for federal judges to act under the 14th Amendment. For in securing a right to abortion, blue states would be withdrawing the protection of the law from a whole class of human beings. Federal judges responding to this state of affairs would be acting much as federal judges and the Congress were moved to act in the 1950s and '60s, when the protections of the law had long been withdrawn from black people in the South.

But again, it was no accident that conservative justices held back from incorporating that inescapable truth in their legal judgments. The telling point here was revealed by one of my own friends, Justice Antonin Scalia, in his dissenting opinion in *Planned Parenthood v. Casey* in 1992, in which he wrote that

> the whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*.... There is of course no way to determine that as a legal matter; it is in fact a value judgment. [Emphasis in the original.]

Many conservative writers and lawyers talked themselves into the notion that only people in elective office can cite moral reasons or moral truths as the ground of their judgments.

A value judgment. In the crisis of his day, Abraham Lincoln said that the question was whether the black man "is not or is a man." If he's not a man, he who is a man may do with him as he pleases. But if he *is* a man, he should have the same right as any other man to govern himself. Harry V. Jaffa would observe later that whether the black man is not or is a man cannot be a value judgment, a term that came into vogue with Friedrich Nietzsche and Max Weber, when people lost their confidence in speaking of moral truths. They would now impute moral worth to things as we "valued" them. Would the human standing of the black man depend, then, on whether people in the states cared enough to "value" him as a member of their race and possibly a fellow citizen?

Now, if it strikes us as utterly implausible to let people in the separate states register their beliefs and value judgments on when they're willing to regard blacks as human beings, it would seem be quite as implausible to invite people to offer their value judgments on when human life begins in the womb. What might they say? Life begins when the child in the womb begins to swallow and squint, at nine to ten weeks? When the fetal heartbeat can be detected by ultrasound at six weeks? But none of these measurements marks the beginning of human life; they simply mark, as we know, different phases in the development of the same small human being, powering and integrating its own growth.

All Process and No Substance

The conservative majority in *Dobbs* would send the issue back to the states, *but on the premise that there was no truth to be known on this matter.* That this was indeed where the issue was left was confirmed in the concurring opinion of Justice Brett Kavanaugh, in which he noted that "many pro-life advocates forcefully argue that a fetus is a human life"—*forcefully argue*, as though there has been no long-settled, empirical truth on this matter, found in all of the textbooks of embryology. In other words, in this mode of conservative jurisprudence *the judges must affect not to know the plainest objective truth that bears on the practical judgment here*. That judgment is to be reserved perhaps to others, in elective office. Which is to say, conservative jurisprudence takes as its beginning point on the matter of abortion its willingness to live affably with a radical falsehood.

As the strands come together, the bleakness of the situation becomes clearer in this respect: that, for conservative jurisprudence right now, the life of the child in the womb does not supply the *ground of the constitutional argument* or the *object of official concern*. The dissenters in *Dobbs* actually nailed this point when they wrote that "the majority *takes pride* in not expressing a view 'about the status of the fetus,'"—that "the state interest in protecting fetal life *plays no part* in the majority's analysis" [emphases added]. The depth of the problem here is revealed again when we consider that

long historical record that Justice Alito unfolded, showing how far back the common law cast its protections on the child in the womb. But that historical record was given radically different meanings by the dissenters as well as by the members of the conservative majority. For the conservative majority, the historical record fit the conservative argument over substantive due process: that the judges may act to create dramatic new rights under the due process clause only when there is a record of a right "long recognized in our tradition." What the historical record established for the conservatives was summed up by Justice Alito: that "we are aware of no common law case or authority…that remotely suggests a positive *right* to procure an abortion at any stage of pregnancy" (emphasis in the original). And so, it was wrong for the Supreme Court in *Roe* to have intervened and snatched this matter from the states.

But for the defenders of abortion, and for the dissenters in *Dobbs*, the historical record revealed something notably different: it revealed what people in the 18th and 19th centuries only *believed* about abortion. For the defenders of abortion this was simply one set of *beliefs* set against others—for, after all, the conservative majority never said that the record revealed a firm understanding on the part of the medical profession about the objective truth of the growing life in the womb. For the defenders of abortion, those 19th-century laws were passed before it was understood how important abortion was to women. The historical record for them was mainly a record of what men were willing to impose on women at a time when women weren't voting.

The key to the problem was a variant of the old question in Plato's *Euthyphro*: Was the old good because it was old, or had it become old because there was something about it enduringly good? Were those earlier laws to be respected because they were old or because they revealed an objective truth about the child in the womb that *is fully as true now as it was then?*

As Justice Kavanaugh's concurring opinion makes plain, the conservative majority didn't interpret the historical record as a recognition of the human standing of the child in the womb from its first moment. Otherwise, Kavanaugh couldn't have written in his concurrence that people in our own day simply have different beliefs about life in the womb. He couldn't have written those words if the majority had said that the historical record revealed a deepening objective truth about the life in the womb. This may be the price that Alito had to pay in order to get that fifth vote to overrule *Roe*.

And yet, it was even worse: in the passion to send the matter into the political arena and disclaim any grounds for the judges to deal with the moral substance of the issue, Kavanaugh declared that the Constitution was utterly "neutral" on the matter of abortion—that the right to abortion could be tenably voted up or down in the states. It apparently slipped his notice that he was offering a chilling echo of the famous encounter between Abraham Lincoln and Stephen Douglas in their 1858 debates. It was Douglas's position that the country could avoid the vexing, divisive issue of slavery simply by leaving it to the settlers in the territories to vote slavery up or down as it suited their interests. In Indiana, he said, there were laws on cranberries, laws on oysters in Virginia, liquor laws in Maine; and some places found it useful to have…slave labor. But Lincoln thought there was something askew in placing slavery on the same plane as such "morally indifferent" things as oysters and cranberries.

For Lincoln, this was the degradation of the democratic dogma: to say that the regime was all process and no substance, that

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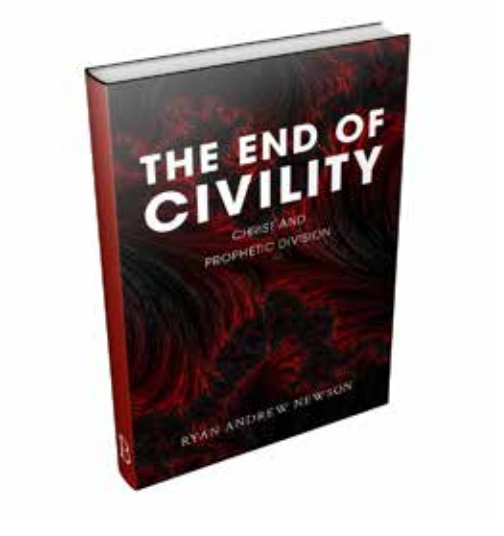

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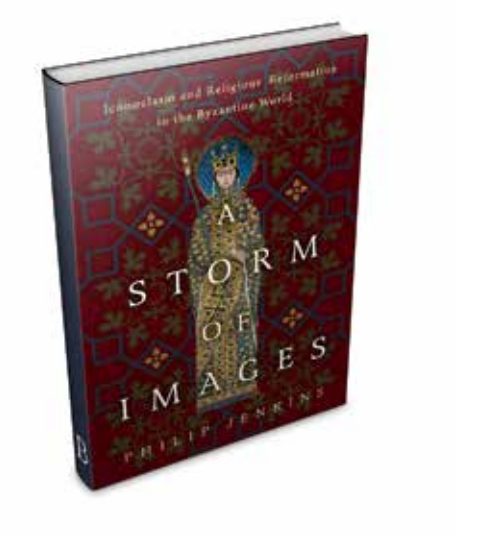

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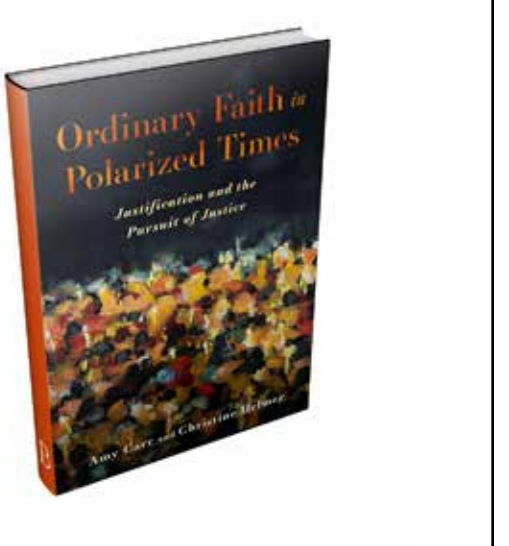

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we were free to choose virtually anything we wished, to choose slavery or genocide, as long as it was done with the trappings of legality and the vote of a majority. Is the American regime, or the U.S. Constitution, truly neutral on the matter of genocide? Does a regime of law not begin by taking seriously the difference between innocence and guilt, that we visit punishment on people only after we show that they are guilty of wrongdoing and deserving of punishment? And that the natural right to life is the right of any ordinary person, innocent of wrongdoing, to be protected from a lawless, unjustified assault? How could anyone understand those moral premises underlying the law and think that those deep principles could possibly be neutral or indifferent on the question of whether the Constitution would license a regime of killing small, innocent human beings?

Taking the Next Step

And so, where does that leave us? We have women who are convinced that something of moral significance will be taken from them if 51% of the people around them happen to believe that the fetus just may be a human being or even a potential human being, for the Court never confirmed that these were real human lives at stake.

But despite an opinion that didn't go to the heart of the matter, there was a saving edge of brilliance provided by Justice Alito. He showed that there was no principled ground for the array of arguments offered so facilely to show that the fetus is not a human life, open to the protection of the law. Yes, after viability, there is a higher chance to sustain the life of the child detached from the mother, but as Alito noted, "[i]f, as *Roe* held, a state's interest in protecting prenatal life is compelling 'after viability,'…why isn't that interest 'equally compelling before viability'?" And when did we ever think that any human being ceases to be human when he cannot live on his own—when he suddenly becomes weak or ill and needing the care of others? Some academics take "consciousness" as a test of personhood, but babies in the womb show purposive behavior, and we don't think anyone around us ceases to be human when he loses consciousness, or finds his mind eroded by gender theory.

Justice Alito didn't draw the conclusions that spring from his penetrating argument. He has brought us to the threshold, he has teed up the matter, and he now leaves it to people in political or judicial office to draw the conclusions and take the next step. But the conservative political class, with rare exceptions, has shown itself befuddled, bereft of any imagination or skill in offering the necessary argument, and quite persistently disinclined even to talk about an issue that makes many of their voters—and donors—uncomfortable. Have we heard any Republican politician express excitement about the new supporters that will be drawn to the polls now that we have the chance to protect more babies in the womb? Or would Republicans rather switch the subject to…inflation?

But then there are the young conservative judges, newly appointed to the federal courts. Any one of them could have a case of a guardian *ad litem*, stepping in, in New York or Chicago, to protect a child from abortion. Taking his lead from Justice Alito, the judge could indeed conclude that a state is withdrawing the protections of the law from a whole class of human beings. And with that, the 14th Amendment comes into play. But from what we know of conservative judges, they are deeply unsure that they could do such a thing, for it involves a moral judgment that they don't think fits into their theory of jurisprudence and what judges can rightly do.

The lawyers from Texas in *Roe v. Wade* were not encumbered by such an ingenious theory, known mainly to people who traffic in theories. They saw the matter, we might say, *naturally*. When a law is passed, the burden falls on those making the law to establish what there is in it that would make it justified and rightful even for people who disagree with it. Following that sense of things, the Texas lawyers amassed the findings of embryology, along with principled reasoning, and invited the Court to sustain the law in question as it has sustained many other laws over the years. And so, the Court could easily have found that a compelling case had been made to show why the laws of Texas were indeed justified in extending their protection to the small human being in the womb. The lawyers were making the case for those laws on a moral ground that ordinary people, unburdened with theories, could easily understand. And as the lawyers bore the burden of showing just why those laws protecting unborn children were justified, they did what a jurisprudence of natural law would require.

In *Dobbs*, then, the Supreme Court could have sent the matter back to the states with the premise that these laws on abortion protect real human beings—and invited the states to consider how the killing of these small human beings will be reconciled with their other laws on homicide. The conservative majority *had to go out of its way* to avoid saying something so simple, so direct, so decisive.

It may fall to Alito himself to take the next step coming out of his own argument, if politicians and judges are too diffident, too uncertain, to make that move. He has become, to my mind, a premier jurist in our time, to be rivaled only by Justices Scalia or Clarence Thomas, or by Robert Jackson in the last century. He has brought us this far; he alone may have the nerve and the skill to take us the rest of the way.

In the meantime, we can look ahead and conjecture. My own hunch—and I dare anyone to take the bet—is that 20 years from now, abortions will still be performed in staggering numbers in New York, Illinois, California, and other places. The devotees of originalism and conservative jurisprudence will be appalled, but they will quickly point out that they had *offered the only remedy they could supply*, and they made it clear over the years that they were never promising to do anything more.

It all brings back Robert Southey's poem from the 1790s on the Battle of Blenheim: "'Twas a famous victory," the old man told the children. "But what they fought each other for I could not well make out." And we'll be saying, 25 years from now, of the overruling of *Roe v. Wade*, that 'twas a famous victory: a notorious, bad case had been overruled. There was something else that was supposed to have been done, but that rather slips from memory. And after all, jurisprudence cannot do everything.

Hadley Arkes is the founding director of the James Wilson Institute on Natural Rights & the American Founding in Washington, D.C. This essay is drawn, in part, from his new book, Mere Natural Law: Originalism and the Anchoring Truths of the Constitution *(Regnery Publishing).*

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