SLAVERY, ABORTION, *and the* POLITICS *of* CONSTITUTIONAL MEANING

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Slavery, Abortion, and the Politics of Constitutional Meaning

For the past forty years, prominent pro-life activists, judges, and politicians have invoked the history and legacy of American slavery to elucidate aspects of contemporary abortion politics. As is often the case, many of these popular analogies have been imprecise, underdeveloped, and historically simplistic. In *Slavery, Abortion, and the Politics of Constitutional Meaning*, Justin Buckley Dyer provides the first book-length scholarly treatment of the parallels between slavery and abortion in American constitutional development. In this fascinating and wide-ranging study, Dyer demonstrates that slavery and abortion really are historically, philosophically, and legally intertwined in America. The nexus, however, is subtler and more nuanced than is often suggested, and the parallels involve deep principles of constitutionalism.

Justin Buckley Dyer is an assistant professor in the department of political science at the University of Missouri–Columbia. He received a BA in political science and an MPA from the University of Oklahoma, and an MA and PhD in government from the University of Texas at Austin. Dyer's research has been published in *Polity*, *Journal of Politics*, *PS: Political Science and Politics*, *Politics & Religion*, and *Perspectives on Political Science*. He is the author of *Natural Law and the Antislavery Constitutional Tradition* (Cambridge University Press, 2012) and the editor of *American Soul: The Contested Legacy of the Declaration of Independence* (2012).

For Bennett and Pierce

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Preface

There is a pervasive feeling among many conscientious citizens that the battle over the institution of slavery in the nineteenth century somehow sheds light on the contours of contemporary American politics. The Supreme Court's landmark decision in *Roe* v. *Wade* (1973), which established a constitutional right to abortion, is repeatedly mentioned in the same breath as the Court's notorious pro-slavery ruling in *Dred Scott* v. *Sandford* (1857). Prominent pro-life politicians and judges routinely accuse opponents of engaging in *Dred Scott*–like legal reasoning, and activists of various stripes proclaim their commitment to a standard of lawfulness that transcends any mere Supreme Court opinion. Meanwhile, many participants in the anti-abortion movement claim to be following in the footsteps of the Great Emancipator, Abraham Lincoln, even as those who resort to violence see themselves as the progeny of the radical abolitionist and domestic terrorist John Brown. For many Americans, the abortion controversy touches a deep nerve, and the search for historical analogs continually leads back to the memory of slavery and abolition.

Similar, perhaps, to the ways in which the legacies of Nazism and Fascism are haphazardly thrown around in our political discourse, many of the contemporary invocations of slavery are, no doubt, sloppy attempts to score

partisan points over ideological rivals. Still, slavery and abortion do have a historical, philosophical, and legal nexus in American history. That nexus, however, is subtler and more nuanced than is often suggested, and it is bound up with the meaning and legacy of the Constitution's Fourteenth Amendment, which has become the primary vehicle for the Supreme Court's modern abortion jurisprudence. The story of how an amendment to the Constitution designed to protect the civil rights of newly freed slaves led to the overturning of state abortion laws nearly a century later is complex, to say the least, but one of the key intellectual developments was the rejection of the natural law tradition by influential thinkers in the early twentieth century. For it was the natural law tradition – diverse as it was – that provided the intellectual scaffolding for both the Fourteenth Amendment and state anti-abortion laws (many of which were written during the era of Reconstruction), and it was the rejection of this tradition by the intellectual class that preceded the embrace of abortion rights during the latter half of the twentieth century. The following chapters chronicle the processes of constitutional thought and development that led from the ratification of the Fourteenth Amendment in 1868 to the line of Supreme Court cases inaugurated, a century later, in *Roe* v. *Wade*. The story, however, begins at the end, so to speak, with the complicated life of Norma McCorvey and the ubiquitous sense among many that the current controversies over abortion are somehow illuminated by the history and legacy of American slavery.

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The Conscience of a Nation

On an otherwise ordinary morning in the summer of 1970, a divorced and abandoned woman named Pixie went into labor in a Dallas hospital. A self-described "rough woman, born into pain and anger and raised mostly by [herself],"[1] Pixie had spent the last few years as a barker "running the freak show at the Bluegrass Carnival."[2] Though she was young, Pixie had already lived a tough and troubled life, and now, at age twenty-one, she was the mother of three girls born to three different fathers. Her oldest daughter, Missy, was conceived in an abusive and failed marriage she had entered into at age sixteen. Her second daughter, the fruit of a short-lived fling with a young orderly at Baylor University Hospital, was placed for adoption before she woke from the anesthesia. And the child born that morning, she claimed, was the result of a brutal rape.

Young, scared, and alone, Pixie had initially decided after the rape and resulting pregnancy that she didn't "want this *thing* growing inside [her] body" any longer, and, not knowing what the procedure for an abortion was or even what it

[1] Norma McCorvey, *I Am Roe: My Life*, Roe *v.* Wade, *and Freedom of Choice* (New York: HarperCollins, 1994), 2.

[2] Ibid., 98.

was called, asked her obstetrician simply to make her "not pregnant."[3] To Pixie's dismay, she was told that in Texas it was illegal to perform an abortion that was unnecessary to save her life, and, admittedly, her life was not in danger.[4] Through a series of events that began with a referral to a Dallas adoption attorney, she then ended up at Columbo's Pizza Parlor seated across from two young, idealistic attorneys searching for a lead plaintiff for a class-action lawsuit challenging the constitutionality of Texas's restrictive abortion law.

In a decision that changed her life, Pixie – whose legal name is Norma McCorvey – agreed to participate. The pregnant, twenty-one-year-old carnival worker assumed the pseudonym Jane Roe in a lawsuit filed against Dallas District Attorney Henry Wade, and nearly three years later – long after McCorvey had given her third daughter up for adoption – the case of *Roe* v. *Wade* was decided in her favor. On January 22, 1973, the Supreme Court of the United States announced in a 7–2 decision that the Constitution protected the right of Jane Roe to terminate her pregnancy, and the Texas law banning elective abortions, along with similar state laws across the country, was deemed unconstitutional.[5]

Yet this landmark decision was fraught with historical ironies. The Jane Roe of *Roe* v. *Wade* never actually had an abortion, and, in fact, she later admitted to fabricating the story about being raped in an attempt to help her case. Perhaps even more confounding, McCorvey now runs a pro-life crisis pregnancy center in Dallas called "Roe No More," and she routinely travels as an anti-abortion activist, even engaging in acts of civil disobedience that led to her recent arrests at Supreme Court Justice Sonia Sotomayor's nomination hearings in Washington, DC, as

[3] Ibid., 119.
[4] Texas Penal Code, Articles 1191–1194 and 1196 (1961).
[5] *Roe* v. *Wade* 410 U.S. 113 (1973).

well as at President Barack Obama's 2009 commencement address at the University of Notre Dame.[6] Today, her opposition to abortion runs deep. When called to testify in front of the Senate Judiciary Committee about the consequences of *Roe* v. *Wade*, McCorvey condemned the Court's decision in the strongest possible language. We must ask "Almighty God to forgive us for what we have done," she told the assembled senators. "We must repent for our actions as a Nation for allowing this holocaust."[7] In a turn of phrase that has become common among anti-abortion activists, McCorvey also analogized abortion to slavery in antebellum America. "When slavery was constitutional," she asserted in a statement submitted for the official Senate record, "we treated one class of humans as property. We are treating the humans in the mother's womb as property and less than human when we say it is OK to kill them."[8]

SLAVERY AND ABORTION

Such alleged parallels between slavery and abortion have been a mainstay of American public discourse since 1973, and these analogies have often been drawn at the level of ethics or constitutional interpretation. During his own testimony at the 2005 Judiciary Committee hearings, for example, Ethics and Public Policy Center President Ed Whelan told the senators that the Supreme Court's notorious pro-slavery decision in *Dred Scott* v. *Sandford* (1857) – which, among other things, found a Fifth Amendment constitutional right to traffic in slaves in the federal territories – was the most appropriate historical analog to *Roe*.[9] The landmark

[6] Paul Kane, "'Jane Roe' Arrested at Supreme Court Hearing," *The Washington Post* (July 13, 2009); Michael D. Shear, "Cheers, Protests at Notre Dame," *The Washington Post* (May 18, 2009).

[7] Senate Judiciary Committee, *The Consequences of Roe v. Wade and Doe v. Bolton: Hearing before the Subcommittee on the Constitution, Civil Rights, and Property Rights*, 109th Cong., 1st Sess. (June 23, 2005), S-HRG 109-1039, 9.

[8] Ibid., 127.

[9] *Roe* v. *Wade* (invalidating a criminal abortion statute in the state of Texas).

abortion rights case, Whelan insisted, was only "the second time in American history that the Supreme Court has blatantly distorted the Constitution to deny American citizens the authority to protect the basic rights of an entire class of human beings. The first time, of course, was the Court's infamous 1857 decision in *Dred Scott*."[10] In response, Professors R. Alta Charo and Karen O'Connor turned the tables on these appeals to the history of slavery. A judicial decision "overturning *Roe* v. *Wade* would invite states to treat women just as slaves were treated during the pre–Civil War period," Charo submitted[11] before O'Conner expressed her own "worry that the next U.S. Supreme Court case may produce a *Dred Scott*–like case denying women across America their basic constitutional rights to privacy and bodily integrity."[12]

As William Voegeli noted less than a decade after *Roe*, the point of these various analogies "has usually been that the wrong position on abortion treats fetuses – or, conversely, pregnant women – in the same malicious and dehumanizing way as slaves."[13] On one side, advocates of abortion rights argue that the criminalization of abortion is tantamount to legal slavery. "A woman who is forced to bear a child she does not want because she cannot have an early and safe abortion," Ronald Dworkin wrote in his ambitious 1993 book *Life's Dominion*, "is no longer in charge of her own body: the law has imposed a kind of slavery on her."[14] According to this line of reasoning, an unwanted pregnancy is viewed as a kind of forced labor, and opponents of abortion rights are unavoidably depicted as standing on the same moral plane as those who once defended the practice of

[10] Senate Judiciary Committee, *The Consequences of Roe v. Wade and Doe v. Bolton*, 25.

[11] Ibid., 28.

[12] Ibid., 43–44.

[13] William Voegeli, "A Critique of the Pro-Choice Argument," *Review of Politics* 43, no. 4 (1981), 563.

[14] Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A. Knopf, 1993), 103.

slavery.[15] Others, such as Northwestern University Law Professor Andrew Koppelman, have gone so far as to argue that the denial of abortion rights is a form of involuntary servitude prohibited by the Thirteenth Amendment.[16] In the rhetoric of abortion rights supporters, *Roe* therefore represents the polar opposite of *Dred Scott*. For critics of constitutional abortion rights, however, the reverse is true. Abortion is depicted as an "evil parallel to that of slavery"[17] – or worse.[18] *Roe*, accordingly, is characterized

[15] In a thought experiment, Mark Graber imagines what a society would be like if it truly viewed abortion as a "fundamental human right." In part, Graber suggests that "the pro-life movement" would "be discussed in the same way as *Dred Scott* v. *Sandford* and the pro-slavery movement." See Mark Graber, *Rethinking Abortion: Equal Choice, the Constitution, and Reproductive Politics* (Princeton, NJ: Princeton University Press, 1996), 135. Bruce Ackerman similarly depicts a hypothetical situation in which "extreme pro-lifers" are forced to take a loyalty oath to both the Constitution and *Roe* in the same way Confederates after the Civil War were required to swear fidelity to both the Constitution and "the laws and proclamations" regarding slavery. Bruce Ackerman, *We the People: Transformations* (Cambridge, MA: Harvard University Press, 1998), 139. Implicit in each hypothetical is a moral comparison between pro-slavery and pro-life political movements.

[16] Andrew Koppelman, "Forced Labor: A Thirteenth Amendment Defense of Abortion," *Northwestern University Law Review* 84 (1990), 480. See also Andrew Koppelman, "Forced Labor, Revisited: The Thirteenth Amendment and Abortion," in Alexander Tsesis, ed., *The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment* (New York: Columbia University Press, 2010), 226–244. For similar arguments submitted in *amicus curiae* briefs, see "Brief for California Committee to Legalize Abortion, et al, as Amici Curiae for Appellants," *Roe* v. *Wade* (*U.S. Supreme Court Records and Briefs, 1832–1978*, Gale/Cengage Learning Document Number: DW108945996) and Brief for Seventy-Seven Organizations Committed to Women's Equality as Amici Curiae in Support of Appellees, *Webster* v. *Reproductive Health Services* 492 U.S. 490 (1989) (1989 U.S. S. Ct. Briefs LEXIS 1511).

[17] Robert P. George, "Law, Democracy, and Moral Disagreement," in Stephen Macedo, ed. *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford: Oxford University Press, 1999), 193.

[18] When asked to write a judicial opinion as though he were on the Court when *Roe* v. *Wade* was decided, Michael Stokes Paulsen asserted: "This [i.e., abortion] is worse than *Dred Scott* and slavery as fire is worse than a frying pan. Slavery is a horrible human wrong. But as bad as it is, murder is worse." See Jack Balkin, ed. *What* Roe *v.* Wade *Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision* (New Haven, CT: Yale University Press, 2005), 212.

as the "*Dred Scott* of our age,"[19] a decision that threatens the very legitimacy of the American regime because it is a "gross usurpation of the people's authority to act through their democratic institutions to prohibit, or at least, contain" a practice that is fundamentally unjust.[20]

It is within this tense ideological climate that President George W. Bush asserted, in an unscripted moment during the 2004 presidential campaign, that one example of the "kind of person" he would not appoint to the Supreme Court "would be the *Dred Scott* case."[21] As the Washington punditry quickly scrambled to decode Bush's seemingly cryptic remarks, several left-leaning journalists stepped in to explain: "*Roe* = *Dred*" the title of Katha Pollitt's piece in *The Nation* announced,[22] while Timothy Noah similarly declared in *Slate* that "'*Dred Scott*' turns out to be a code word for '*Roe* v. *Wade*.'"[23] Writing a bit more diplomatically in the *Los Angeles Times*, Peter Wallsten reported that Bush had "a history of using language with special meaning to religious conservatives" before noting the allegation of Bush's critics that "the *Dred Scott* reference was an attempt" to covertly attack abortion rights "without alienating moderates."[24] Of course, for those involved in the American abortion debates it was not much of a revelation that the

[19] Senate Judiciary Committee, *The Consequences of Roe v. Wade and Doe v. Bolton*, 25.

[20] Robert P. George, "Justice, Legitimacy, and Allegiance: 'The End of Democracy?' Symposium Revisited," in Robert P. George and Sotirios A. Barber, eds. *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change* (Princeton, NJ: Princeton University Press, 2001), 322–23.

[21] Transcript of Second Presidential Debate, Washington University, St. Louis, Missouri (October 8, 2004), http://washingtpost.com/wp-srv/politics/debateref eree/debate_1008.html.

[22] Katha Pollitt, "*Roe* = *Dred*," *The Nation* (November 1, 2004) [posted online October 13, 2004], http://www.thenation.com/article/roe-dred.

[23] Timothy Noah, "Why Bush Opposes Dred Scott: It's Code for *Roe* v. *Wade*," *Slate* (October 11, 2004), http://www.slate.com/articles/news_and_politics/chatterbox/2004/10/why_bush_opposes_dred_scott.html.

[24] Peter Wallsten, "Abortion Foes Call Bush's Dred Scott Reference Perfectly Clear," *Los Angeles Times* (October 13, 2004), http://articles.latimes.com/2004/oct/13/nation/na-dred13.

pro-life movement has long drawn parallels between the issues of abortion and slavery. *The New York Times*, in fact, ran a column just a few days after Bush's remarks in which the Dean of Arts and Letters at Notre Dame predicted that "[h]istory will judge our society's support of abortion in much the same way we view earlier generations' support of torture and slavery – it will be universally condemned."[25] For the last forty years, such rhetorical invocations of slavery in the service of anti-abortion politics have been commonplace.

Writing in *Human Life Review* shortly after *Roe*'s tenth anniversary, President Ronald Reagan laid out what has now become a familiar legal and moral argument against abortion rights. Quoting then-Dean of Stanford Law School (and political liberal) John Hart Ely, Reagan asserted that the Court's opinion overturning state abortion laws in *Roe* v. *Wade* was "not constitutional law and [gave] almost no sense of an obligation to try to be." Reagan continued, perhaps a bit more eloquently than Bush:

> Nowhere do the plain words of the Constitution even hint at a "right" so sweeping as to permit abortion up to the time the child is ready to be born. Yet that is what the Court ruled.
>
> As an act of "raw judicial power" (to use Justice White's biting phrase), the decision by the seven-man majority in *Roe* v. *Wade* has so far been made to stick. But the Court's decision has by no means settled the debate. Instead, *Roe* v. *Wade* has become a continuing prod to the conscience of the nation.[26]

The closest historical parallel to the decision, Reagan suggested, was the fight over slavery in antebellum America and the Supreme Court's attempted resolution of that nationally divisive issue in the case of *Dred Scott* v. *Sandford*. Appealing to the legacy of Abraham Lincoln, and the central role of the Declaration of Independence in Lincoln's statesmanship, Reagan asserted:

[25] Mark W. Roche, "Voting Our Conscience, Not Our Religion," *The New York Times* (October 11, 2004), http://www.nytimes.com/2004/10/11/opinion/11roche.html.

[26] Reagan, "Abortion and the Conscience of the Nation," *Human Life Review* (Spring 1983). http://www.humanlifereview.com/index.php/archives/54-special-archives-spring-1983/.