Written by **Jack Kenny** on January 22, 2011

Roe v. Wade Still Lies in the "Penumbras"

Funny thing about that right, though. No one, outside the abortion industry itself, is really for it. Even the political candidates who promise to defend to the death (assuming they mean their own) the "right to choose" are not really *for* abortion. Cross their hearts and hope to die they're not. No, they want abortion to be, as President Clinton, put it, "safe, legal and rare." And what are they doing to make it more rare? Well, that's probably covered by their "don't ask, don't tell" policy.

No, that's not true, either. The abortion lobby and its fellow travelers have been promoting all sorts of measures to prevent unwanted pregnancies. They're teaching sex education and giving out condoms to school kids, the younger the better. And if the condoms don't work or the kids forget to use them (you know how kids are), well, with any luck, there's a Planned Parenthood clinic nearby that will be happy, for an appropriate fee, to dispose of the "fetal matter." And no one has to tell the parents, either. Why cause them unneeded stress when the problem can be solved so simply?

And why should anyone object to that — anyone, that is, besides those bitter people clinging to their guns and religion, as famously described by President Obama? It used to be the Catholic Church was the favorite whipping boy of the abortion "rights" brigades, but they have since discovered how much fun it can be to dump on Fundamentalists and Evangelical Christians for their benighted opposition to "reproductive choice." None of those religious organizations was around, of course, when abortion prohibitions were written into the Code of Hammurabi (app. 1700 B.C.) or the Hippocratic Oath (5th century B.C.). It appears "anti-choice" laws and the sentiments supporting them are as old as civilization, which means if you still harbor a prejudice in favor of life, you're an antediluvian extremist. Those who champion the "right" to kill babies in the womb, on the other hand, are "moderate on social issues."

John Kerry, throughout his mercifully unsuccessful campaign for President in 2004, never seemed to tire of telling audiences he used to be an altar boy and still is a Catholic, though God only knows what kind. And he, like so many other champions of "choice," is "personally opposed" to abortion. But his tender conscience won't allow him to impose his moral convictions on the rest of society. Yet in the next breath he would talk about healthcare or anti-poverty programs or protecting the environment as moral

obligations we all must share. But when have we ever heard Sen. Kerry protesting the imposition of secular, immoral values upon the whole of society? Has he ever spoken up against teaching schoolchildren that homosexuality is normal and natural lifestyle and assigning books like *Heather Has Two Mommies* to children in the early grades? And while he can't vote to impose pro-life values on our pluralistic, multicultural society, he has no qualms about taking your tax dollars and using them to pay for abortions.

Kerry's conscience is remarkably flexible, a trait he shares with a great many liberals both in the Congress and on the Supreme Court. When the case of Norma McCorvey, alias Jane Roe, was heard at the U.S. District Court in Dallas, the court upheld and expanded upon the amorphous and undefined right of privacy the U.S. Supreme Court found in *Griswold v. Connecticut* when the court struck down a rarely enforced state law banning the sale and use of contraceptives. The law violated a right of privacy not mentioned in the U.S. Constitution, but found in the "penumbras" formed by "emanations" in the Bill of Rights, as Justice William Douglas so imaginatively explained. The District Court, following that line of — er — reasoning, decided that the right to abort an infant living and growing in the womb must be in the "penumbras" also. The case went on appeal to the U.S. Supreme Court, with "Roe" claiming an unconditional right of a woman to terminate her pregnancy and District Attorney Henry Wade arguing for the right of the state to protect preborn human life.

If some of us find all the penumbras and emanations a bit confusing, so apparently did Justice Harry Blackmun, who wrote the 7-2 majority decision for the high court. For by the time the case reached the "Supremes," the right to privacy not only remained undefined, it had somehow been misplaced. Poor Harry couldn't find it. So this is what he concluded: "The right of privacy, whether it be founded in the 14th Amendment's concept of personal liberty and restriction upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." In other words, whatever it is and wherever it is, it must be big enough to include the right to abortion. Case closed.

It is ironic that Blackmun would speak in that context of the "rights reserved to the people." For what the court's decision did was deny the people in their respective states the right to protect prenatal life. It was a complete inversion of the principle Madison set forth in the writings that became known as *The Federalist Papers*: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those that are to remain with the States are numerous and indefinite." The Supreme Court is part of the federal government, but the justices often do not like the constraints of powers that are "few and defined." They would rather deal, in Blackmun's words, with what they "feel" about "concepts" of liberty found in the 14th Amendment — unless it's in the Ninth. It's remarkably adaptable, that Jurisprudence of Whatever.

Justice William Rehnquist, dissenting, pointed out that at the time the 14th Amendment was ratified in 1868, 36 laws had been passed by state or territorial legislatures limiting abortion. "To reach its result, " Rehnquist wrote, "the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of that Amendment."

On the same day the Court ruled on *Roe v. Wade*, it similarly disposed of Georgia's abortion law in *Doe v. Bolton.* "With all due respect," Justice Byron White vigorously dissented, "I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion

statutes. The upshot is that the people and the legislatures of the 50 states are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand." So much for "the rights reserved to the people."

Though it is seldom mentioned, the last sentence of the 14th Amendment says: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Congress could, perhaps, were it so inclined, define the preborn as persons within the meaning of the Amendment's guarantee that no state "shall deny to any person within its jurisdiction the equal protection of the laws." Or it could, under Article III, Section 2 of the Constitution, limit the appellate jurisdiction of the Supreme Court regarding abortion. Either course would be difficult and possibly fraught with unintended consequences. But so is the passive role the Congress has played while the Supreme Court has taken to itself the power to subvert the rule of law by making of the Constitution a Rorschach test in which the judges can find, in "penumbras" and "emanations," whatever they wish to find. It is past time for "pro-life" members of Congress to move beyond the speeches they make every 22nd of January and stop pretending the Congress is powerless to stop a runaway court of judges rewriting the Constitution as the spirit—of whatever kind—moves them.

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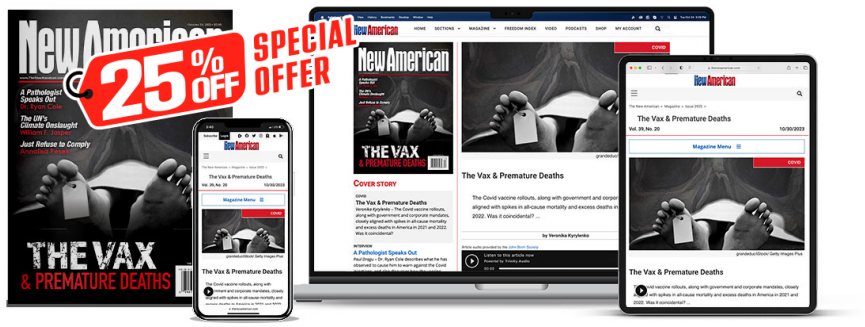

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