Abortion, Dred Scott and Horses

by Joseph DeMaio, ©2022

The U.S. Supreme Court from June 30, 2022

(Oct. 28, 2022) — Among the myriad issues dividing and fracturing the nation these days – from inflation and who is to blame (hint: he resides at 1600 Pennsylvania Avenue) to border security to energy independence, to name but a few – perhaps the most difficult is that of abortion and the battle between the "right-to-choose" camp on the one hand and the "right-to-life" camp on the other.

Full disclosure: your humble servant is a "right-to-life" proponent, but with recognition that certain limited exceptions – incest, rape and life of the mother – may need to be taken into consideration on an individual, state-by-state basis. There are other views on scope and limits or other variations on that theme, but the disclosure is made, up front.

This post will not attempt to bully or browbeat the right-to-choose element in an attempt to intimidate it into abandoning its position on abortion. Browbeating rarely works and oftentimes backfires. Your humble servant acknowledges that a view differing from his own exists. But if a "change of heart" or even an "epiphany" is to occur, it must be based on reason and rational analysis rather than on emotional *ipse dixit*: "It is so because I say it is so." Ask Tulsi Gabbard.

That said, some of the questions presented hereafter may be deemed close to crossing the "browbeat" line, but they are legitimate ones posed with an expectation – or at minimum, a hope – of being answered objectively. These are questions as to which no satisfactory answers have yet been given by the right-to-choose camp. Perhaps a P&E reader or commenter will respond.

To begin with, the recent U.S. Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*, which overruled the Court's prior 1973 decision in *Roe v. Wade*, has once again brought the thorny issue front and center.

While a "national right to abortion" has been eliminated, with the Court returning the issue to the individual states, the Court has made it clear that, depending on the collective will of the state legislatures – the essential core of a democratic republic – abortions may be forbidden altogether or they may even expand beyond the invalidated proscriptions of *Roe* or impacted in various other ways. It is a matter of democracy and states' rights under the Constitution.

Indeed, the Goofball in the Oval Office has even announced that, if given the chance, he would sign into law federal legislation "codifying" *Roe v. Wade*, yet again confirming his addled and incoherent thought processes. The bill that would be placed in front of him – the "Women's Healthcare Protection Act of 2021" ("WHPA") – would expand abortion "rights" far ***beyond*** what *Roe* had concocted from whole cloth.

Interestingly, in addressing the topic of "healthcare" – the misleading label used to camouflage the termination of a viable, living organism – the WHPA never uses the term "child" or even "fetus." It dances around the identification of what, exactly, is being aborted with terms and phrases such as "abortion services" and "fetal viability." On the other hand, even the dissenters in the *Dobbs* case see that which the Congress refuses to acknowledge: the "thing" being aborted is a "child" or, at minimum, a "fetus."

These matters invite further analysis.

First, it is clear that even the three dissenters in the *Dobbs* case – Justices Breyer, Sotomayor and Kagan – seem clearly to concede that the "thing" being aborted is a "child." Indeed, the first two sentences of Justice Kagan's dissent state: "[f]or half a century, *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to ***bear a child.***" (Emphasis added).

Against the backdrop of that recognition, a woman's decision to undergo an abortion constitutes an election to ***not*** "bear a child" even though it is already established that she is "with child" or, in medical terms, "pregnant." The decision to not bear a "child" prior to an actual state of pregnancy is called "contraception." A post-pregnancy status decision to terminate "fetal viability" is an "abortion."

Thus, it would appear that even the defenders of the right-to-choose camp sitting on the Supreme Court concede that the collection of cells being aborted is a "child." A "child" is a small, living "person." Ergo, abortion constitutes the termination of a living person. If there is another conclusion, comments are welcomed.

Second, your humble servant asks, and as addressed by the Court in *Dobbs*: where in the Constitution is the "right" to an abortion found? As the *Dobbs* decision now makes clear, such a "right" can be found *nowhere* in the Constitution. The rationale of the *Roe* decision – that an ephemeral "right" resides somewhere within the "penumbras" and "emanations" of the Constitution, there could be discerned a due process "right to privacy" perceptible only to seven Supreme Court Justices – Justices Rehnquist and White dissenting – is nonsense.

Even the Left's paragon of liberal jurisprudence – Ruth Bader Ginsberg – disagreed with the proffered basis of the original decision in *Roe*, stating that "[n]ine [*sic*] unelected judges decide this question for the nation. It should be decided by the people's elected representatives, by the members of the state legislatures." Ummm…, that is exactly what the Court has now done in the *Dobbs* case: returned the ultimate decision to the individual states. Oh, the humanity!

The "right" to "bodily autonomy" is not the same thing as a right to an abortion. "Bodily autonomy" involves one person: an abortion involves two persons, a mother and, following conception and "fetal viability," a "child."

Third, for the right-to-choose supporters of abortion who continue to ***deny*** that the goal of a successful abortion is the termination of a living, albeit small "person," the unavoidable question becomes: what then, precisely, ***is*** being terminated? If the activity or thing being terminated is "fetal viability" (*i.e.*, the continued viability of a fetus via "abortion services" as euphemistically defined in the WHPA) and which is not a person, what is it? A mere collection of cells? An assembly of molecules?

On the one hand, the reality is that abortion constitutes the intentional killing of a small human being. In most other instances, that constitutes manslaughter or murder. For those who support zero restrictions on the practice, it means termination of the continued viability of a fetus all the way from the point of conception through and including – and in some instances, beyond – the moment of birth.

On the other hand, in response to the reality that a successful abortion results in the killing of a small person, many in the right-to-choose and "my body, my choice" camp fall back on the mirage that the "thing" being aborted is not a "person," but instead is only a part of the body of the mother which is no longer wanted. In this respect, it is conceptually akin to an appendix.

But there is no rational argument to be made that an appendix is a person. It is a part of a person's gastrointestinal tract which, on occasion, becomes inflamed and painful – appendicitis – requiring surgery to remove it. Apart from continuing questions over its use and function, it is generally accepted that the removal of an inflamed appendix is far to be preferred over a perforated or burst appendix, which if left untreated, can be fatal. Moreover, an appendix does not have nervous and circulatory systems, internal organs or a spine.

However, if an appendix is not a "person," what is it? It is unquestionably a part of a person's "body." And if a person claiming "bodily autonomy" falls victim to appendicitis, that person can decide to either (a) agree to medical treatment, or (b) forego treatment. Either way, the choice remains with the person being affected. But still, what is the appendix?

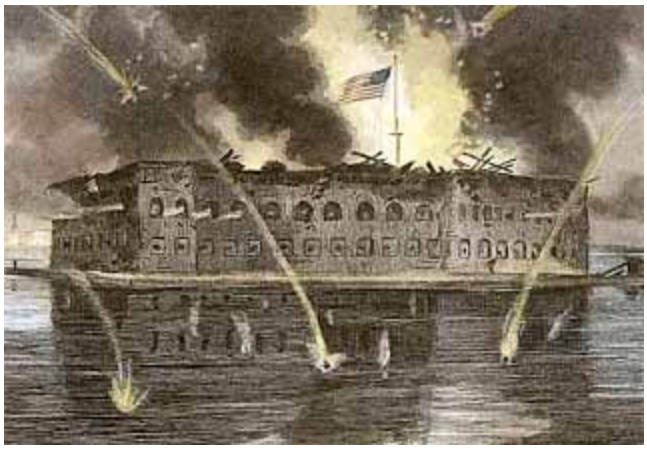
Under the my-body-my-choice theory, the appendix is, at bottom, part of the aggregated tangible personal property of the person hosting it. Similarly, if a person voluntarily wishes to donate a kidney or part of his/her liver to someone else who needs it, the my-body-my-choice theory recognizes the right of the donor to deal with his/her organs – as items of organic tangible personal property – as they wish. The liver and the kidney are the property of and belong to the donor, not anyone else. Mercifully, we are not yet at a stage where the government sanctions involuntary organ "harvesting" while the host is still alive…, emphasis on "yet."

Indeed, even the federal National Institutes of Health maintains in its research library medical papers asserting that persons have proprietary rights in their own bodies and body parts and that such rights "in our own bodies or body parts *is presupposed*." (Emphasis added)

But if a fetus is deemed to be merely "property" under the my-body-my-choice protocol in order to avoid the stigmatizing admission that an abortion kills a small "person," how, exactly, does that differ from the original rationale for the decision of the Supreme Court in *Scott v. Sandford*? That decision, of course, held that a "person of the negro race" was "property" rather than a "person" or a "citizen." This is the universally reviled – but still "on the books"– *Dred Scott* decision.

In that case, Chief Justice Roger Taney (D), appointed by President Andrew Jackson (D), concocted the disingenuous ruse that a black slave – even if emancipated under the laws of a particular state, as was Dred Scott – was not a "person" at all. Instead, blacks were chattels or items of "property" owned by the title holder. Taney stated that, historically, "a negro of the African race was regarded … as *an article of property*, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States." (Emphasis added)

Justice John McLean (R), joined by Justice Benjamin Curtis (R), dissented from Taney's ruse, stating: "In this case, a majority of the court have said that a slave may be taken by his master into a Territory of the United States, *the same as a horse, or any other kind of property*…. A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence." (Emphasis added)



The *Dred Scott* decision was rendered on March 6, 1857 in Washington, D.C. Four years and barely one month later, the first shot in the Civil War took place on April 12, 1861 at Ft. Sumter, South Carolina. While a wide spectrum of issues precipitated the battle, it is generally agreed that the *Dred Scott* decision played a major, if not triggering role in igniting the Civil War, up to this point our nation's deadliest single war.

The decision in the *Dred Scott* case has never been overruled. Instead, because of the Civil War and a realization that emancipated slaves were, and always had been as a matter of empirical fact "persons" and not merely "property" to be bought, sold or otherwise disposed of as chattels like horses, in 1865, the 13th Amendment – abolishing slavery as an institution within the United States – and in 1868, the 14th Amendment – granting citizenship and suffrage to the emancipated blacks born or naturalized here – were ratified.

As a result, rather than being "overruled" by the Supreme Court itself as a matter of jurisprudential principle in recognition of a prior "mistake," the *Dred Scott* decision was instead "abrogated" and rendered of no further binding effect following the ratification of the 13th and 14th Amendments. While the Court has taken no further action to formally "overrule" the decision, it has frequently acknowledged its abrogation.

The "overruling" of a decision occurs when the court that originally decided the case later formally determines either that because the original decision was wrong or in light of intervening events the prior decision can no longer stand, principle demands that the same body, if not the same jurists, responsible for the prior decision proactively takes steps to "overrule" it.

Here, the constitutional amendments abrogated – or, by analogy, "aborted" – any further vitality or viability of the *Dred Scott* decision. Stated otherwise, instead of sloughing off the invalidation of the decision to constitutional amendment, the current Supreme Court at least had the courage and "integrity" to *itself* overrule *Roe*, admitting that it was "wrong from the day it was decided."

Against this backdrop, the my-body-my-choice camp's position that abortion can be justified solely on a woman's "right to choose" and right to "bodily autonomy" is ill-reasoned. Not only is it premised on a phantom "right" which has no basis in the actual words of the Constitution, it does not sufficiently take into account the fact that, according to Justices Breyer, Sotomayor and Kagan, a "child" is a "person" and not, as held in *Dred Scott*, an item of "property" like a horse.

Accordingly, if one is either (a) a right-to-choose or (b) my-body-my-choice proponent, that person must also belong to one or the other – and ***only*** one or the other – of two subgroups: (1) that subgroup which concedes that the "thing" aborted is a child being willingly terminated by a decision of its mother, or (2) that subgroup which contends that the subject of the "fetal viability" being aborted – a viable fetus – is merely tangible personal "property" titled in the mother and subject to removal and disposal as would be an infected appendix or donated kidney.

If there is another, different subgroup, your humble servant is unaware of it. If a P&E reader can identify it, an invitation to comment is extended. If one is a right-to-life proponent, the dilemmas presented in the previous paragraph, of course, are non-existent. Reduced to its essence, an abortion – or, to use the euphemisms of the WHPA, the rendition of "abortion services" calculated to terminate continued "fetal viability" – results in the termination and disposal of either (a) a small living person, or (b) a type of tangible personal property.

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Those who subscribe to the first category are effectively acknowledging and accepting that the killing of a small person is taking place. Those who are still in favor of elective my-body-my-choice abortions, but who are repulsed by the thought of confessing that they are killing a small person, will presumably subscribe to the "property" theory. But in doing so, they also will be adopting the same faulty rationale of Justice Taney (D) in the *Dred Scott* case: the "thing" being aborted is not a "person," but instead is merely a part of my "property," no different than an inflamed appendix…, or a kidney…, or a small horse.

Either way, it is a Hobson's Choice for the my-body-my-choice camp.