

Evangelium Vitae, the Rhetoric of Freedom, and *Roe v. Wade*'s Totalitarian Implications

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I.

THIS YEAR MARKS not only the twentieth anniversary of *Evangelium Vitae*,¹ but also the fiftieth anniversary of the Second Vatican Council's final session (along with the release of some of its most momentous documents, including *Gaudium et Spes*²) and the tenth anniversary of Saint John Paul II's death. The alignment of these important anniversaries suggests placing the encyclical in its larger, historical context. Not only did the Council present the Church with a mandate to engage critically but openly with modernity and modern forms of thought,³ but the implementation of this mandate also constituted the driving center of John Paul's pontificate.⁴ Here, of course, I cannot offer such a panoramic view. However, I will address a small but important part of it by putting the encyclical into dialogue with American juridical-political culture,

¹ John Paul II, Encyclical Letter on the Gospel of Life *Evangelium Vitae* (Washington, D.C.: United States Catholic Conference, 1995), hereafter cited as *EV*.

² Second Vatican Council, Pastoral Constitution on the Church in the Modern World *Gaudium et Spes* (December 7, 1965), in *Vatican Council II: The Basic Sixteen Documents: Constitutions, decrees, declarations*, ed. Austin Flannery (Northport, NY: Cotto, 1996), hereafter, *GS*.

³ See, e.g., John XXIII, Apostolic Constitution Convoking the Second Vatican Council *Humanae Salutis* (December 25, 1961) (Latin text in *Acta Apostolicae Sedis* 54 [1962]): the Council will “bring the modern world into contact with the vivifying and perennial energies of the Gospel” (§3).

⁴ Cf. John Paul II, Encyclical Letter on the Redeemer of Man *Redemptor Hominis* (London: Catholic Truth Society, 1979), §2.

which remains so impervious to the Church's gestures, particularly with respect to the so-called "life issues." I will attempt to do so by drawing on *another* epochal document, the U.S. Supreme Court's decision in *Roe v. Wade* (1973).⁵ More specifically, as the title suggests, I would like to explore the sense in which we can say, along with the late Pope, that our political and legal institutions are becoming "tyrannical" (*Evangelium Vitae*, §70 [hereafter, *EV*]; cf. §20) and, even more emphatically, that "democracy, contradicting its own principles, [is] effectively mov[ing] towards a form of totalitarianism [*substantialis totalitarismi*]" (§20).

These are strong words, and they seem to clash with our cultural narrative. They may appear to be more polemical and hyperbolic than an accurate view of Western, liberal societies. Indeed, the primary rhetoric of the American political and juridical world seems to be almost entirely about "freedom" (or "choice"). Alasdair MacIntyre famously said that asking someone to die for the modern state absent poetic images would be like asking him to die for the telephone company.⁶ Perhaps this is why we typically tell ourselves that we deploy troops around the world to defend our "freedom." We rarely, if ever, speak in this context of fighting for "God and country" or "home" or "wife and children,"⁷ let alone for "the Fatherland." The invocation we do make, of course, amounts to a terrible abstraction; yet its grip on the American psyche, both popular and sophisticated, is tight. That we do invoke the idea of freedom in these quasi-religious terms is significant. One question that springs to mind is *why* we jump so readily to this particular way of expressing our patriotism. Perhaps our readiness to do so confirms the gist of MacIntyre's witticism. Yet, for freedom to be more than an abstraction, it needs to have a context and an internal order. If it is to be a genuine *good*, and therefore something worth dying for, it must be a genuinely *personal* good. This raises the question of how freedom, as we conceive it, relates to actual persons. Whatever our answers to these questions, it will no doubt seem paradoxical that the American self-image expressed by our invocation of "freedom" might harbor a form of "totalitarianism."

II.

Like other writings of the late Pope, the 1995 encyclical begins with a lengthy discussion of anthropology and culture. This starting point

⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

⁶ Alasdair MacIntyre, "Poetry as Political Philosophy: Notes on Burke and Yeats," in *Ethics and Politics: Selected Essays*, vol. 2 (New York: Cambridge, 2006), 163.

⁷ Nor "*husband* and children" in our "gender-inclusive" military.

would seem to represent the necessary foundation for properly understanding its formal doctrinal statements concerning the deliberate killing of innocents, abortion, and euthanasia, as well as its treatment of capital punishment. Often, it would seem, these anthropological reflections—both in *Evangelium Vitae* and in John Paul's other writings—are treated as window dressing. Understandably, discussion tends to track the most obviously controversial elements. Much of the commentary and debate following *Evangelium Vitae* centered, for example, on its invocation of the “ordinary and universal Magisterium” and *Lumen Gentium* §25 (*EV*, 57, 62, 65). *Evangelium Vitae*'s reformulation of the teaching concerning capital punishment also received considerable attention. There was also significant discussion of the encyclical's political and juridical passages in which John Paul calls for democratic institutions to be rooted in the truth of the human person. And then, of course, the pair “culture of life” and “culture of death” made their way into the lexicon of American politics. But little of this discussion elaborated John Paul's anthropological starting point in a truly sustained way.

The anthropological and cultural dimensions of the encyclical (and John Paul's other writings) have, nevertheless, become all the more important as the years and decades have rolled on. Far from fading away, the so-called “life issues” addressed by *Evangelium Vitae* have only become more complex and pervasive in their implications, as they have become yet more intertwined with other, related cultural developments. For example, the intervening years have brought us “gay marriage.” Certainly, the question of embryonic life—its value, its meaning, its anthropological significance—has been magnified in complexity by this development, which relies on the claim of an essential equivalency between the man-woman couple and gay pairings. Logically and inevitably, the claim for equivalency goes hand in glove with the complete normalization of various types of assisted reproductive techniques, along with their instrumentalist and eugenic implications.

By giving prominence to the anthropological context necessary for understanding the life issues, John Paul was indicating that these issues, at their root, are not only moral, ecclesiological, political, or juridical in nature. He was suggesting that treating them as a problem arising only in one of these areas is to truncate the issues at stake, and therefore to miss the challenge they present; indeed, it implies radically underestimating their significance. Here we touch on what is perhaps one of the most characteristic insights of John Paul's teaching. He understood, as few others have, that the roots of the “hot button” issues of the day are above

all else anthropological. For this reason, what is at stake in these issues is nothing less than what we understand the human person to be. And because this is so, their resolution for good or for ill will inevitably and willy-nilly shape how we understand not only the person but all things human: especially the nature of the marital, familial, ecclesial, and civil communities, the public order, and, in fact, our relationship to reality as a whole. Pertinently, our answers to these questions will also give shape to what we take law to be, its task in society, its content and limits, and its foundations.

The life issues are a perfect example of why this is so. The moral and legal questions of whether it is ever—or under what circumstances it might be—permissible to kill directly an innocent person seem compact and amenable to analytical dissection. But these questions have not been the center of the dispute, at least in the American political and legal scene. Rather, the dispute has been about personal autonomy, rights, self-determination, legitimate forms of public reason—in a word, about “freedom”—as over and against the legal and ontological status of embryos and fetuses. Let’s not forget: *Roe v. Wade* essentially granted that, if the embryo or fetus is a “person” or perhaps a “human life” in the full legal-ontological senses of these terms, then Texas would have had not only the authority but also the duty to grant it all of the protections of law.⁸ This is why the *Roe* court, in part, attempted to sidestep the issue by instead holding that government cannot select one theory of life over others.⁹ Since Texas had effectively done this, the court suggested, its abortion law depended on a publically and legally arbitrary judgment.

III.

Evangelium Vitae’s most fundamental anthropological point would seem to be theological. It is that the “Gospel of Life” is not simply a part or additional implication of the whole Gospel message: in a real way it *is* the Gospel.¹⁰ “The Gospel of Life is something concrete and personal,” John Paul tells us, “for it consists in the proclamation of the very person of Jesus” (§29). Jesus is “the ‘Word of life,’” in whom “God’s eternal life is proclaimed and given” (§30). Or, as the Gospel of John puts it, “I came that they may have life, and have it abundantly” (Jn 10:10, quoted at *EV*, §1).

⁸ *Roe*, 410 U.S. at 156–167.

⁹ *Ibid.* at 162.

¹⁰ The encyclical explains that while the phrase “Gospel of Life” is not found in Sacred Scripture, it nevertheless describes “an essential dimension of the biblical message” (*EV*, §2, n. 1).

The key to the encyclical's argument lies in recognizing how the "Gospel of Life," now situated at the centermost point of Christian faith, understands life in this world as prior to and transcendent of our own free acts. In a sense, our lives are "bigger" than we are, as they extend in their origins and destiny beyond our grasp. Of its very nature life can only be received and never be fully possessed as one's own.

Just as importantly, our lives are received not, strictly speaking, from our parents, but from a source radically prior to their free acts, albeit in and through those acts, which were themselves always already ordered by human nature as mediated through the sexual dimorphism of man and woman, husband and wife. Human generation is, in fact, a "continuation of Creation" in which God directly intercedes in the creation of a new spiritual soul in his own image (*EV*, §43).¹¹ We *procreate*; we never create. Indeed, the child is therefore already implicit, prior to any specific choice to have a child, in what is proper to the parents' love as husband and wife.

Where this understanding holds sway, it profoundly shapes the way we perceive and treat life, as well as the way we understand freedom. Given such a starting point, the maturing child him- or herself, the parents, the larger family, and society as a whole are aware, however implicitly, that the child's very existence has a source greater and earlier than any human person's or community's acts of will. According to the encyclical, only this realization can secure the true dignity and value of personal existence.

At the other end of life, no one gives himself his own destiny; we can only achieve it through a personal fiat. If our lives are "bigger" than we are, they are nevertheless nothing other than we are. They are our own beings, and therefore they cannot be separated from us as something other than us.¹² Just as the human person, insofar as he has being,¹³ is simply good, so, too, our lives can only be goods in themselves. Because they are *what* we are, they are, in one sense, our highest good, rather than a conditional or subordinate good. The human end is to be fully alive, just as a sparrow's end is to flourish as a sparrow.

In this way, we might say, life in its "earthly phase" is both absolutized

¹¹ See also John Paul II, Apostolic Letter to Families *Gratissimam Sanem* (Washington, D.C.: Office for Pub. and Promotion Services, United States Catholic Conference, 1994), §9; Pius XII, Encyclical Letter *Humani Generis* (Washington, D.C., National Catholic Welfare Conference, 1950), §36; and Thomas Aquinas, *De Pontentia*, q. 3, a. 9.

¹² Robert Spaemann, "Is Brain Death the Death of a Human Person?," *Communio: International Catholic Review* 38 (Summer, 2011): 326–340, 326.

¹³ Thomas Aquinas, *Summa Theologiae* I-II, q. 18, a. 1.

and relativized (cf. *EV*, §2). It is absolutized as the seed of eternal life, and is therefore owed absolute respect. It is also absolutized because it is the image of God's own life, and because it cannot be given by man, but only by God. To disrespect life, or to attempt to take it into our own hands, is to reject God's fatherhood and creative act. On the other hand, life in its earthly phase is also relativized to its fulfillment or complete realization in eternal life. Earthly life is only the seed and not the fullness. The martyr lays down only his earthly life for the Faith, but in doing so realizes true life.

Now following John Paul's logic, we might also say that contemporary secular culture also tends to "absolutize" and "relativize" life, but does so in an inverse manner. This inversion follows, as he observes, from the fact that many now live "as if God did not exist" (*EV*, §22), that the cultural and social "eclipse of the sense of God and of man inevitably leads to a practical materialism, which breeds individualism, utilitarianism and hedonism" (§23). For the late Pope, these developments amount to a "structure of sin" (§§12, 24, 59)—that is to say, a cultural or social pattern of sinful acts that tends to perpetuate itself. Because of this pattern of practical atheism, life in this world is absolutized precisely because it is *not* treated as rooted in a prior givenness or a transcendent order. If it is all that is, then it must be protected at all costs. We see this not only in certain tendencies in medicine and in the biotechnological drive to extend life indefinitely,¹⁴ but also in more mundane developments, such as our current public obsession with health and safety. On the other hand, our culture increasingly relativizes our lives to our experiences and ability to "enjoy" our existence. Life seems no longer to be a good in itself, but rather is subordinated and instrumentalized to those enjoyments and experiences.¹⁵ In this sense, it seems that life can even be sacrificed when it appears no longer to provide the sorts of experiences we value.

These reflections seem crucial for John Paul's larger argument. He suggests that, where practical memory of the creational framework is

¹⁴ E.g., Ray Kurzweil, quoted in Amy Willis, "Immortality Only Twenty Years Away, Says Scientist," *The Telegraph*, August 14, 2012; Caspar Llewellyn Smith, "Aubrey de Grey: We don't have to get sick as we get older," *The Observer*, July 31, 2010.

¹⁵ As put by H. Kuhse, "life is not a good in itself, but a means to something else—for example, to reach pleasant states of consciousness" (*The Sanctity of Life Doctrine in Medicine: A Critique* [Oxford: Clarendon Press, 1987], 213), quoted in Martin Rhonheimer, "Fundamental Rights, Moral Law, and the Legal Defense of Life in a Constitutional Democracy: A Constitutionalist Approach to the Encyclical *Evangelium Vitae*," *American Journal of Jurisprudence* 43 (1998): 175.

missing, the child will not be seen as “given,” as originating within an antecedent created and natural order preceding the free acts of the parents, and destined for an existence that transcends this world. Where this antecedent order and destiny are missing, the unborn child is subtly subordinated to the parents’ acts of will, and particularly those of the mother. In effect, the child is treated as a product of the mother’s act of will or choice. The developing child then tends to be treated as property or chattel until it attains a minimal level of “independence,” first signified (at least under *Roe*) by the concept of “viability,” and then more definitively by birth.¹⁶ That prenatal life is treated as property and is manifest in everyday practices ranging from abortion and the cryopreservation of embryos to the exchange of embryonic tissues. That we are later treated as our own property is demonstrated by developments ranging from so-called “gender reassignment surgery” to “physician-assisted suicide.” Even the current tattoo fad, at a deep level, may express this appetite for claiming ownership of oneself by creatively overwriting the merely “given” of the body.

IV.

Perhaps John Paul’s presentation of his case in terms of a “Gospel of Life” seems odd, given the larger context of engagement with a secular order that has carefully quarantined “religious arguments” or “theological doctrine” from public reason. And yet, the very societies that have done so have also set aside more generally the “given” altogether, whether understood from a specifically religious standpoint or not. These very same societies tend to deny not only the relevance or reality of creation, but also nature itself. In effect, our liberal legal, political, and cultural ethos tends to present the human person as a chooser before he is anything else. Because we increasingly reject any claim that we are *something* before our acts of choice, the idea that we have a nature preceding and ordering our free acts can be only seen as an assault on liberty and dignity.

It is therefore clear, whatever the rhetoric, that the violence of these societies’ opposition to the Church’s proposals is no longer truly aimed at “religious” proposals qua religious. Strictly as religious talk, what Catholics and other Christians might say is relatively “harmless” because it has been, by and large, politically neutered. Rather, the violence is aimed at any hint of a natural order antecedent to and radically shaping human

¹⁶ There has also, of course, been pressure to push this subordination well past birth, based on the infant’s relative lack of self-possession and independence, e.g., Peter Singer, *Practical Ethics* (Cambridge: Cambridge Univ. Press, 1980), 151–154.

freedom. That this violence is often nominally aimed at “religion,” especially at the Catholic faith, is simply because only here do we find a philosophical tradition antecedently nourished by the sometimes tacit framework of creation and therefore likely to sustain and nourish a realist account of nature.

In framing his argument in terms of a Gospel of Life, then, John Paul clearly believes, as *Gaudium et Spes* itself had suggested, that openness even to the idea of nature will, practically speaking, depend on a recollection of creatureliness and the Creator.¹⁷ As he puts it, “when the sense of God is lost there is also a tendency to lose the sense of man, of his dignity, of his life” (*EV*, §21).¹⁸ In fact, John Paul presupposes that this loss of a sense of God leads simultaneously to a loss of faith in reason itself.¹⁹ In our day and age, he implies, perhaps only “Christian philosophy” stands a chance of making “nature” seem to matter or to be believable or at least to not be a subtle form of oppression.²⁰

V.

Our cultural, juridical and political rejection of nature is supposed to leave us free to make our own determinations concerning human good and happiness. Nature, it would seem, is another word for tyranny (cf. *EV*, §70). And yet, some sort of framework must be given for individual acts of will. If law cannot draw on a pre-legal natural order, then all that is left is a positivistically grounded social order provided by law itself. Hence the correlate of the individual “sovereign” will is legal positivism. In fact, as we shall see, the result over time of our will-based anthropology is not the proliferation of unfettered individual will acts, but rather more law.

This brings us back to *Roe*. The court’s holding that the state could

¹⁷ Cf. Benedict XVI, *On Conscience* (San Francisco: Ignatius Press, 2007), 37.

¹⁸ This is a paraphrase of GS, which he then goes on to quote: “Without the Creator the creature would disappear. . . . But when God is forgotten the creature itself grows unintelligible” (GS, §36, quoted in *EV*, §22).

¹⁹ See John Paul II, Encyclical Letter on the Relationship of Faith and Reason *Fides et Ratio* (Boston: Pauline Books and Media, 1998), §§17, 45, and 56 (hereafter, *FR*).

²⁰ John Paul explains Christian philosophy thus: “Revelation clearly proposes certain truths which might never have been discovered by reason unaided, although they are not of themselves inaccessible to reason. Among these truths is the notion of a free and personal God who is the Creator of the world, a truth which has been so crucial for the development of philosophical thinking, especially the philosophy of being. . . . In speculating on these questions, philosophers have not become theologians, since they have not sought to understand and expound the truths of faith on the basis of Revelation” (*FR*, §76).

not impose one theory of life over others is supposed to reserve such a decision to the mother, maximizing her freedom for autonomous self-determination. It is deeply ironic, then, that the court adopted just such a particular theory. It held as a matter of constitutional law that personal life begins only at the moment of birth. Setting aside for present purposes the question of justice to the unborn, imposing this theory of the beginning of life over that of Texas does not actually create more liberty. Rather, it imposes a theory of embryonic and fetal life, hence also of human life as whole, since, as we saw, our conception of life and its meaning is dependent radically on the question of whether it is a product of an act of will—or a “choice,” as we like to put it—or is already implicit within an antecedently given order.

To see how this point plays out, it should be remembered that Texas offered two arguments in defense of its abortion regulation. First, it argued that prenatal lives must be protected as “persons” under the Fourteenth Amendment. The court dismissed this argument as lacking a basis in the language and history of interpretation of the amendment, wherein “person” had always seemed to imply postnatal individuals (congressmen and other officials, for example).²¹ This response, of course, relies on an entirely positivistic—and, we might say, “originalist”—reading of the amendment.²² However, the second argument was that, regardless of whether prenatal lives are “persons” under the amendment (i.e., “legal” or “constitutional persons”), Texas still had the authority to protect them. After all, the states actively legislated to protect “human life,” for example, in outlawing murder, long before the ratification of the Fourteenth Amendment in 1868. It is important to consider carefully the burden of this second argument. When Texas speaks of human life here, it clearly does not simply mean life in its “biological” or empirical sense. In other words, Texas is not referring to the facts that, say, the embryo or fetus is “biologically” an individual member of the human species, or that a geneticist could distinguish a human embryo from a rat or chimpanzee embryo, or even that a biologist could determine that a particular embryo or fetus is undergoing normal or relatively normal cell division or metabolic processes and is therefore “alive.”²³ These empirically based

²¹ *Roe*, 410 U.S. at 156–157.

²² Rhonheimer, “Fundamental Rights,” 162.

²³ The question of “personhood” is not answerable on empirical grounds. The category’s source is in the theological, metaphysical, and legal domains (see, e.g., Joseph Ratzinger, “Concerning the Notion of Person in Theology,” *Communio: International Catholic Review* 17.3 [Fall, 1990]: 439–454). Something similar can

truths about prenatal life are not in dispute, and so would simply beg the question. Hence, the court takes for granted that Texas essentially means by “human life” a “person” in a natural or metaphysical sense. In other words, Texas is claiming that its authority to protect “natural persons,” and not merely “constitutional” or “legal” persons, precedes the Fourteenth Amendment and, by implication, any other specific provision of the Constitution, since the states’ traditional protection of life predates the Constitution altogether. Indeed, a basic function of any political regime is the protection of life. Importantly, in making this very fundamental appeal, Texas is also claiming that it can look beyond merely legal definitions to nature in deciding what constitutes a legal person. It is this final point that the court specifically rejects.

The distinction between Texas’ two arguments is therefore highly significant: in rejecting the second argument, the court effectively eliminates the possibility of appeal to nature for understanding what an embryo or fetus *is*, metaphysically speaking. In effect, it has eliminated the possibility of appealing to a realist philosophical account. It redirects such considerations to the first argument, which is based solely on a positivistic reading of the Fourteenth Amendment. In effect, then, it implies that “person” is a purely legal category, without roots in nature, or at least without roots that could have legal bearing.²⁴

Nevertheless, there is a largely implicit metaphysical judgment in the court’s reasoning. In replacing Texas’ theory of life with its own positivistic one, the court strongly suggests that personal existence rests on a certain degree of autonomy and independence inconsistent with the dependency of prenatal life on the mother. A person in the fullest sense—that is to say, the sense encompassed by the Fourteenth Amendment—is

be said of “human life.” While the empirical sciences can point to *signs* of life, such as respiration or metabolic processes, life itself is unavoidably a metaphysical question (cf. Spaemann, “Is Brain Death the Death of a Human Person?,” 326–327: “Death and life are not primarily objects of science. . . . Life is the being of the living. *Vivere viventibus est ens*, says Aristotle. . . . Being, however, is never an object of natural science”; as well as Hans Jonas, *The Phenomenon of Life: Toward a Philosophical Biology* [Evanston, IL: Northwestern University Press, 2001]). It is important to recall that the Roe court felt it could simply wave off the arguments of Texas rehearsing “at length and in detail the well-known facts of fetal development” (*Roe*, 410 U.S.).

²⁴ As the New York Court of Appeals put it shortly before *Roe* was decided, “The point is that it is a policy determination whether legal personality should attach and not a question of biological or ‘natural’ correspondence.” (*Byrn v. New York City Health & Hospital Corp.*, 286 N.E.2d 887 [1972], at 889).

one who has the “independence” that birth initiates and toward which the threshold of “viability” suggests an intermediate stage during which further regulation might be warranted (although not constitutionally demanded). Or, as Justice Stevens suggests, human life gains value and interest for the state as it increasingly possesses at least some minimal level of consciousness or sentience,²⁵ that is to say, as it grows toward the sort of self-awareness and autonomous self-direction that correlates with bearers of rights and interests.²⁶ In other words, the moment of personhood or of the fullness of legally significant “life” coincides with the moment at which the child gains a minimal level of independence from his or her mother, foreshadowing future independent acts of will. Yet, these judgments concerning the minimal conditions for personhood or “life” are metaphysical through and through.

We have therefore stumbled upon a paradox here. The essentially procedural and positivistic language of the court is more metaphysically robust than it lets on. The court implies that the one irreducible *good* is independent self-possession in acts of will. From here it sets a standard by which governmental action can be gauged and limited. Insofar as this is the basic assumption ingredient in our cultural narrative, embryos, fetuses, the severely handicapped or ill, and often the elderly, simply cannot be persons in the full sense. This is also the implication of Locke’s understanding of the person,²⁷ which has been so influential in these debates.²⁸

What is so fascinating here is that *Roe*’s strict legal positivism results—indeed, *necessarily* results—in a tacit metaphysical judgment about the “nature” or constitution of the person. It is also interesting to note, there—

²⁵ Justice John Paul Stevens, concurring in part and dissenting in part. *Webster v. Reproductive Health Services*, 492 U.S. 490, 569 (1989).

²⁶ Ronald Dworkin, *Life’s Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Vintage, 1994), 16: “It makes no sense to suppose that something has interests of its own . . . unless it has, or has had, some form of consciousness: some mental as well as physical life.” In the end, this leads to a tautology: “What is a legal person is for the law, including, of course, the Constitution, to say, which simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person. The process is, indeed, circular, because it is definitional” (*Byrn*, at 889, citations omitted). For a discussion of legal personality as founded on legal rights and duties, see, e.g., Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard, 1949), 93ff; Bryant Smith, “Legal Personality,” *Yale Law Journal* 37, no. 3 (January, 1928): 283–299.

²⁷ John Locke, *An Essay Concerning Human Understanding*, bk. 2, ch. 27, sec. 9.

²⁸ E.g., Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984); Singer, *Practical Ethics*; Justice John Paul Stevens’ opinion in *Webster*, sup.

fore, that while *Roe* seeks to set aside nature, with its defining capacity and its implicit shaping of freedom, the court's opinion essentially defines persons, and in so doing, as we shall see, shapes and, indeed, channels freedom. In effect, law replaces nature by first presupposing, so to speak, a metaphysical judgment in favor of a non-natural, will-based "nature" or anthropology. To put the point yet another way, if the correlate to a will-based anthropology is legal positivism, the correlate of legal positivism is likewise a will-based anthropology.

The inability to see pre-legal realities other than acts of will is not confined to the "liberal" wing of the court. We can see this also in the responses of the conservative justices, who treat abortion as though the issue could be decided not on the basis of what is substantially at stake, but according to democratic or federalist principles. Hence, the response of a Justice Scalia or Thomas to the overreach of a Justice Blackmun or Kennedy is to declare that the latter have effectively deprived democratic majorities of their freedom of self-governance.²⁹ According to this logic, the Constitution's lack of a position on abortion—and therefore on the status of prenatal life—implies a permissive stance concerning legislation. In other words, the conservative justices, like their liberal colleagues, have settled on the liberal wing's "originalist" reading of the Fourteenth Amendment's use of the term "person." The difference from their colleagues, then, is in their belief that states have authority to legislate according to principles such as those expressed under the second prong of Texas' argument. Yet an ambiguity remains.

The conservative justices would argue that, in addition to being the correct interpretation of the Constitution, their jurisprudence would at least allow society to express an opinion concerning the nature of prenatal life via the democratic process. Indeed, democratic majorities and their representatives could adopt regulations intended to protect life in all of its phases, motivated, for example, by natural law principles. It therefore should fall to those who believe in such things to garner at least 51 percent of the vote.

²⁹ Needless to say, my purpose here is not to wade into the debate over judicial review or its meaning and limits under our Constitution. Like many others, I believe that the work of Justice Kennedy in *Obergefell*, *Windsor*, or *Casey*, and the work of Blackmun in *Roe* (as well as the work of a great many other justices and judges in a large number of cases) is an astonishing and promiscuously irresponsible and dangerous use of "raw judicial power" (*Doe v. Bolton*, 410 U.S. 179 [1973], at 222 [Justice White, dissenting]). However, my present point attempts to "get behind" this issue, which remains limited to the question of the correct interpretation of the positive law that is our Constitution.

It is important to recognize that, in effect, both sets of justices (in their capacity as judges) are “pro-choice”; it is just that they differ on who should make that choice. If we follow the logic of both sides, it would seem that the current range of Constitutional interpretations offers *only* variations on “pro-choice.”

Like the liberal wing, in accepting that the status of embryos or fetuses—unlike, for example, healthy five-year-olds—places them outside the protection of the Fourteenth Amendment on positivistic/originalist grounds, the conservatives also imply a will-based anthropology. They have already decided that there are no pre-legal realities that would dictate what the Constitution must mean or what interpretation must be the correct one or, finally, whether a given “law” is legitimate or a perversion of law (*EV*, §72).³⁰ Indeed, the conservative position is only the flipside of the liberal one. One position seeks to protect self-rule over and against a majority of self-rulers, while the other seeks to protect that same majority’s democratic self-rule. In either case, we have a basic displacement of nature with the sort of abstract notion of freedom criticized by *Evangelium Vitae*.

It is notable in this regard that between these two iconic positions in American jurisprudence, neither is able to make, as a matter of Constitutional interpretation, a reference to *what is*, in this case to *what* an embryo or fetus *is*. Rather, they both respond only to differing sides of the clamor of wills, individual on the one side and collectively expressed in the democratic process on the other. Our sense of law is such that we simply cannot conceive of its being truly rooted in *what is*, which of course would first require the ability to *say* what is, which in its turn would require a realist philosophical outlook.³¹

At this point we should recall that *Evangelium Vitae*’s primary political-legal argument is explicitly aimed at *democracies* that have not guaranteed the protection of life at all stages in their basic law (*EV*, §68ff). Essentially, John Paul criticizes positivistic forms of democracy, that is to say, democracy that is not juridically guided by antecedent, pre-legal truths concerning the nature of the person, life, and communities such

³⁰ Thomas Aquinas, *Summa Theologiae* I-II, q. 95, a. 2.

³¹ Leo Strauss, for example, has highlighted modernity’s basic rejection of the intelligibility of things in themselves, as seen in the classical liberalism of Hobbes and Locke (*Natural Right and History* [Chicago: University of Chicago Press, 1950], 174–775). Henry B. Veatch has made a similar claim concerning analytical philosophy (*Two Logics: The Conflict Between Classical and Neo-Analytic Philosophy* [Evanston: Northwestern University Press, 1969]).

as marriage, family, and the Church, but is rather guided by a non-natural, will-based anthropology, such as that implied by *Roe*. To follow John Paul's logic a step further, it would seem that even if the "right" legal result were produced from a merely positivistic form of democracy as just defined, we would still be faced with a problematic basis for law and an inadequate understanding of the person, even if we might rejoice for a time in the particular result. Indeed, the late Pope speaks of the inadequacy of entrusting underlying human and moral truths to "provisional and changeable 'majority' opinions" (§70). He argues that "no individual, no majority, and no state can ever create, modify or destroy, but must acknowledge, respect and promote" these human truths (§71). And he laments the idea of democracy as "a mere mechanism for regulating different and opposing interests on a purely empirical basis" (§70).

We would rejoice over such a result, then, in a way analogous to the way we would rejoice if, under the current legal regime, a woman we know were to "choose" not to have an abortion—or even if all women universally were to "choose" not to have abortions. We would be left with concerns about the implications of framing the "choice" as the exercise of a "right." We would be left with concerns, as well, about the implications of the ostensible "right" for how we legally, and therefore socio-culturally, understand the natures of motherhood, childhood, the family community, and so forth, even if each woman as an individual happened to have a perfectly wholesome view of these. The political and legal framework given to the choice would, in itself, express an unwholesome view. Analogously, we should be concerned regarding the merely correct democratic outcome, because it would effectively treat the question of abortion as one of policy rather than principle, of a majority's "right" of self-governance rather than of truth and nature.

Of course, John Paul does not mean to imply that society and culture cannot make up for, and even suppress or hide for a time, the many potential ills implied by positivistic democracy. It is one thing to live under such a system when a cultural consensus exists concerning basic human realities, and it is quite another to live under such a system when that consensus has been eroded. The question, however, would be whether, over time, democracy so conceived is not itself an *agent* of that erosion. Insofar as the state and law conceive democracy positivistically, will this view not also be communicated and eventually enforced, as we are seeing with increasing regularity today? A deeper question is whether liberal political and legal thought, even in their most benign forms, rooted perhaps in a Lockean conception of rights (as opposed to

Thomistic natural law, which is itself rooted in a robust anthropology of inclination toward perfection³²), will not possess an inner dynamic toward the sort of positivistic approach we have been discussing. This result is suggested insofar as even the most benign forms of liberalism claim not to address the deepest, most metaphysically saturated human realities, owing to their inherent goal of prescinding from the good.

It is precisely this positivistic foundation that would be communicated, then, by a conservative victory on the bench, and subsequent state legislation would take its form from within it. And, while legislative determinations might represent important cultural beliefs, elevating the question of unborn life to a higher level than questions of tax policy or public works, such determinations would, nevertheless, be rooted in the prior determination that embryos and fetuses lack the constitutional and, indeed, ontological standing of healthy five-year-olds. Hence, the Constitutional posture of the issue would still suggest the will-based anthropology implicit in the actual outcome of *Roe*. Legislation would therefore begin from the supposition that prenatal life lacks the sort of legal-metaphysical weight that might place it beyond the quotidian policy determinations of democratic rule. In short, the conservative position essentially leaves us in much the same anthropological position as the liberal one had. Each of these legal positions tacitly makes some assumptions about what a person is, and these assumptions begin with the central concepts of independence and will.

VI.

Claims that law is capable of only maximizing freedom, without expressing a position concerning *what is*, disregard ancient wisdom. This is the knowledge that law is inherently and inescapably pedagogical.³³ This pedagogy occurs not only in the sense that legislation concerning abortion will teach us that abortion is good or bad, but also at the deeper level of legal structures. Everyone knows this implicitly. That is why the battles over the life issues so often turn on the cultural and symbolic value of legal measures.

That the Constitution requires legislation for the protection of five-year-olds, but that the same Constitution is permissive (either with regard to the individual woman or to state legislatures) with respect to killing

³² *Summa Theologiae* I-II, q. 94, a. 2.

³³ E.g. Socrates' characterization of law as "wishing" to be "the discovery of what is," in *Minos*; or On Law, trans. Thomas Pangle, in *The Roots of Political Philosophy: Ten Forgotten Socratic Dialogues* (Ithaca: Cornell University Press, 1987), 36 (315a).

fetuses and embryos, tacitly presupposes and teaches, as we have seen, a truth-claim about what a human being really is. If law presupposes anthropology, however tacitly, that anthropology is effectively codified. As such, it is also broadly mediated to society in innumerable ways. Without our normally even being fully aware of it, law radically informs our sense of what is true about human reality, even when it claims to do no such thing.³⁴ Of course, it goes both ways. Law expresses cultural movement, but it also makes what was previously inchoate socially real. What, more specifically, can we then learn from *Roe*'s theory of life?

First, despite the purpose and seeming ability of the sort of liberalism represented in *Roe* to maximize such "values" as freedom, choice, independence, and self-definition, in fact, by failing to root personal being in nature, it exposes persons to manipulation and control. *Roe* implies that the only foundation for human life is the dialectic of individual wills and law's mediation, itself understood as an expression of will(s). This, in turn, implies a multiplication of "rights," which are increasingly specified and particularized to treat in ever-greater detail the infinite number of ways in which interests and goals can come into conflict. But this multiplication of rights in the interests of freedom and equality requires, in direct proportion, ever-increasing legal definition and mediation. In other words, it implies not the limitation of law, but the multiplication of laws.

Hence, if *Roe* and its "progeny" seem, with one hand, to give the mother absolute power over the life of her unborn child, this is only because prenatal life is treated as not yet capable of bearing rights and interests. But this very same logic, with the other hand, invites a multiplication of regulations of the mother's relationship with her child once it is born. Indeed, without a pre-legal foundation, the mother-child relationship can only be seen as rooted primitively in law, as essentially a legal relationship. In fact, a reading of the case law reveals that the mother-child relationship, like all familial relationships, is increasingly treated as a combination of legal, "biological," and affective relations. But these

³⁴ This is rather paradoxically confirmed in *Casey*, when on the one hand the joint opinion tells us that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" and that these "attributes of personhood" must not be "defined" or "formed under compulsion of the State" (*Planned Parenthood v. Casey*, 505 U.S. 833, 851 [1992]), while explaining elsewhere that *Roe* could not be overturned because an entire generation had "ordered their thinking and living around that case" and had "organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion" (*ibid.*, at 856).

latter two can only become rational and socially real through the work of the first. Indeed, “biological” and affective relations are but the most enfeebled remainder of “nature,” once a positivistic outlook has taken hold.³⁵ Hence biological, affective and legal relations or communities, whether considered separately or together, can never constitute a *natural* relationship or community.³⁶ That only the legal relationship counts is demonstrated by the heedless abandon with which the courts have given their imprimatur to the implication of “gay marriage’s” so-called “equivalency” (viz. that the “biological” relationships of fatherhood and motherhood can be severed without the slightest anxiety in such practices as sperm donation or surrogacy contracts).³⁷ As to affective relationships, they are susceptible to all the vagaries of the human heart, until they are given rational order by law, for example, in the Courts’ blessing of the emerging “gender/sex-neutral” conception of “marriage.” Yet, if the family is not prior to civil law, then it can only be its creature and extension, as though parents on good behavior are the state’s deputies.³⁸

At this point we are ready to recall our starting point: the question of totalitarianism. In itself, law’s displacement of natural relationships and communities implies a nearly invisible form of totalitarianism. It places in law a natureless defining and regulating power over human life and community, treating these as creatures of positive law and as extensions of the state. Even if we are treated as belonging to ourselves, as our own

³⁵ See n. 21, sup.

³⁶ For a discussion of natural communities, see my “Gay Marriage, Public Reason, and the Common Good,” *Communio: International Catholic Review* 41, no. 2 (Summer, 2014): 380–437.

³⁷ See, for example, *The Adoption of Tammy*, 416 Mass. 205 (1993).

³⁸ The tendency to reduce natural relationships to law is nothing new for American Constitutional interpretation. For example, such a reduction is suggested by *Maynard v. Hill*, 125 U.S. 190 (1888), which holds that civil marriage is a legal “status,” and therefore entirely subject to legislative control. The *Maynard* court also suggests by analogy that the parent-child relationship might be viewed similarly. Of course, there would seem to be counter-examples, most famously *Meyer v. Nebraska*, 262 U.S. 390 (1923), which in dicta said that the Fourteenth Amendment ensures the “right of the individual . . . to marry, establish a home and bring up children” (at 399), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), which stated that “the child is not the mere creature of the State” and that “those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him” for life in society (at 535). For these two latter, the “pre-legal” status of family relations is put in terms of liberal rights as over and against the state, rather than as a pre-legal natural order. Hence, these cases only represent the counterpoint to *Maynard* within the larger clash of self-determining wills as we have described it.

“property,” our being so treated is underwritten, not by anything prior to the state, but by the laws of the state. In this case, while we may not see any obvious way in which the state is controlling our actions or determining our freedom, we are, nevertheless, living under a subtle form of totalitarianism, however invisible this fact may be to us.

In making its determination concerning “life,” the court cannot but help also effectively to decide or give a certain unarticulated form to a host of other weighty human questions, such as: What is the meaning of motherhood? What is the meaning of childhood? What is the place or role of woman in society? What sort of relationship between the sexes is proper? What is the meaning and foundation of the familial and marital communities? For example, *Roe* suggests that dependency and vulnerability—as opposed to self-possession, force of will, and self-determination—imply a lack of personal integrity, indeed a lack of personal being or existence. It therefore also teaches that, insofar as pregnancy and motherhood themselves imply dependency and vulnerability, they too present at least a threat to personal integrity. This correlates with and reinforces the wider tendency toward a certain lack of respect for motherhood, as though what really counts in a woman’s life is her professional accomplishment, whereas a life given to mothering seems less than fully worthy or realized (see *EV*, §86).³⁹ Hence, *Roe* does not provide for a woman’s freedom and self-definition in relation to motherhood, but defines motherhood for her and, in doing so, subtly negates its nobility and erodes the value of its free realization altogether (cf. *EV*, §59).

Then again, with respect to the child and other familial relations, insofar as *Roe* implies viewing natural communities as radically based on acts of will, it invites viewing procreation as a form of production. This is the result *Donum Vitae* deplores, the implication in certain assisted reproductive techniques that the child is a *product* of technical activity. As John Paul puts it, “[n]ature itself, from being ‘mater’ (mother), is now reduced to being ‘matter,’ and is subjected to every kind of manipulation. This is the direction in which a certain technical and scientific way of thinking, prevalent in present-day culture, appears to be leading, when it rejects the very idea that there is a truth of creation which must be respected” (*EV*, §22). It would be naïve to deny the deep logical nexus between *Roe* and the growing legal and social acceptance of such practices as surrogacy

³⁹ See also, John Paul II, “Welcome to Gertrude Mongella, Secretary General of the Fourth World Conference on Women” (May 26, 1995), in *Pope John Paul II on The Genius of Women* (Washington, D.C.: United States Catholic Conference, 1997), 39.

contracts, both homologous and heterologous artificial insemination and IVF, and eugenic practices for children in utero. Perhaps the treatment of the person as a product is the most insidious and yet thoroughgoing denial of life's antecedent origins and transcendent destiny. It is therefore the most thoroughgoing subordination of the person to another's will and, hence, ultimately to law.

One is ostensibly free, of course, to hold privately that the mother-child, the familial, and (pertinently) the marital communities are inalienably prior to will-acts, technological production, the state, and positive law. But the state's mediating organs, its bureaucracies, its educational system, and its laws seem continually to provide an ever-shrinking space for such conceptualizations. Whispers of the thought may linger, but public realization in community and outward action will have narrowed to the slightest point on a plane with no dimensions. We see this development in professional, ethical, educational, and legal standards for psychologists, doctors, teachers, lawyers, and now even florists and bakers.

These sorts of examples of *Roe*'s "teaching" could be expanded and multiplied endlessly. What all this suggests is that such apocalyptic-sounding phrases as *Evangelium Vitae*'s "a form of totalitarianism" and the "tyrant state" (§20, cf. §70), as well as Joseph Ratzinger's "dictatorship of relativism,"⁴⁰ are far from hyperbole. As John Paul saw, the non-natural, will-based anthropology implicit in decisions such as *Roe* claims relations and even the "person" as the state's own creature, and in so doing it deeply determines people as it invisibly totalizes. To do so, it and similar public acts and works must generate an abstract notion of "freedom," with an almost mystical and religious aura. In this way, they blaspheme freedom, which is an attribute of God, a sacred order of God's creation, and, only on that basis, a human and personal good.

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Our example has been *Roe*, yet the flood of "life" issues has hardly begun. In fact, resistance to abortion is far easier to articulate within a liberal framework than the resistance to a host of developments that are beginning to emerge. In abortion, if we understand unborn life as having a personal existence, we can see a clear victim, a "someone" whose "rights" have been violated. But it is much more difficult to see whose rights are being violated by, for example, "gay marriage" on similar liberal grounds. Hence, it seems far-fetched to imagine that in forty-plus

⁴⁰ Joseph Ratzinger, "Homily at the Mass for the Election of the Supreme Pontiff" (St. Peter's Basilica, April 18, 2005).

years there will be marches on the Supreme Court on the anniversary of *Obergefell*. And yet, just as much is at stake anthropologically in that august body's latest travesty. It seems that the Catholic Church and other Christian groups are the last bulwark against this flood, because it is only here that a philosophical and theological tradition remains that is rich enough in intellectual resources to make genuine engagement with the larger culture possible. Yet even these seem sadly ill-prepared for what is to come.

The most cynical and pervasive form of tyranny and totalitarianism is the one that continually presents itself as freedom. *Evangelium Vitae* recognizes that at the root of this act of violence there is a deep-seated pessimism and self-loathing. Hence, Western culture today, perhaps more than any culture in history, needs the good news of the Gospel. Herein lies hope. 