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Book Review: Rethinking Abortion: Equal Choice, the Constitution, and Reproductive Politics. by Mark A. Graber.

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RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS. By Mark A. Graber.[1] Princeton, New Jersey: Princteon University Press. 1996. Pp. 244. Hardcover, $24.95.

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Rethinking Abortion is a piece of unapologetic "advocacy scholarship"—with the emphasis on "advocacy." Pronouncing existing arguments unsatisfactory, Mark Graber offers what he describes as "a better and more persuasive attack on pro-life policies than conventional pro-choice broadsides." (p. 193) Graber's argument—which he calls "equal choice" (p. 6)—is not exactly new; as he points out, the argument was prominently proposed and debated in the years before *Roe v. Wade*, and indeed was a principal focus of argumentation in *Roe* itself. (p. 64) But after *Roe*, the "equal choice" argument pretty much disappeared from the public scene. Not pausing to reflect on *why* pro-choice proponents might have chosen to retire the argument from active duty, Graber now calls it up again and presents it with gusto. "Once Americans are fully exposed to the philosophical and constitutional case for equal choice," he foresees,

> legislators and executives will stop regulating abortion, voters will elect large pro-choice majorities, justices will continue (or resume) treating *Roe* as an authoritative constitutional decision, and opponents of legal abortion will refrain from proposing new bans until their pro-life policies have some reasonable chance of being fairly administered.

(p. 118)

The bulk of Graber's discussion is presented as legal argument, and I will focus first and mainly on that aspect of his book. But Graber also provides a lengthy prescription for pro-choice political action. His political discussion is primarily addressed to, and can best be assessed by, pro-choice strategists—a group to which I can't pretend to belong—so I will describe that part of the book only briefly. Finally, I will note what seem to me some major and interesting questions that Graber raises, and indeed continually butts up against, but that his chosen purposes do not permit him to pursue.

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I. THE CONSTITUTIONAL CASE FOR ABORTION RIGHTS

Given the torrent of legal theorizing about abortion over the last two decades or so, one might question whether what the world needs now is yet another constitutional argument for abortion rights. Haven't the existing arguments succeeded well enough? Sensitive to this doubt, Graber explains that the constitutional debate has largely been carried on in ignorance of the relevant social realities. A closer look at those realities, he suggests, leads to two conclusions: first, that the familiar arguments both for and against abortion rights are deeply flawed and, second, that an alternative "equal choice" argument for such rights readily satisfies even conservative understandings of equal protection. (p. 90) We can consider each of these claims in turn.

Criticism of existing arguments. "The most influential proponents and opponents of legal abortion are oblivious to the [relevant] details of contemporary social life," Graber asserts (p. 37)—they live in a "looking glass world" composed of "pseudo-empirical claims" (pp. 20-21)—and so his first chapter aims to show how their innocence of social realities undermines the familiar arguments for and against abortion. Occasionally his criticisms seem on point. For instance, the argument that abortion restrictions would not have been enacted if legislatures were not so heavily dominated by men *does* seem to be placed in doubt by studies showing that on the whole women are more favorable than men to restrictions on abortion. (p. 34-35) Graber also devotes several pages to showing that Catharine MacKinnon's claims about the relative infrequency of truly consensual sexual intercourse amount to "bald assertions" wholly unsupported by empirical evidence, and that MacKinnon distorts the one study she purports to rely on (Kristin Luker's *Taking Chances*). In fact, Graber argues, the study contradicts MacKinnon's views. (p. 30-33)

Some of the evidence discussed by Graber might also usefully serve to curb the more extreme rhetoric to which advocates sometimes resort. For instance, Graber contends that pro-lifers greatly overestimate the increase in abortions that resulted from *Roe* (p. 265 nn. 40-42); if he is right, then responsible advocates ought to avoid making such claims. He also contends that post-*Roe* restrictions both on abortion funding and on abortion itself have had very little impact on the actual number or availability of abortions (p. 7, 20, 65-69); if so, then some pro-choice rhetoric might need to be tempered.

For the most part, though, the empirical facts presented by Graber seem well shy of startling, and hardly cry out for major revisions in the current constitutional debate. For example, Graber explains to pro-choice advocates that very few of the women who choose abortion became pregnant as a result of rape or incest. In addition, complete forbearance from sex is not considered by American psychiatrists to be a symptom of mental disorder. And even people who want to engage in sex can do so without risking pregnancy—for example, through permanent sterilization. (p. 27) Graber explains to opponents of abortion rights that statutes prohibiting abortion have served a variety of purposes, not merely the protection of fetal life, that such statutes in the past were rarely enforced, and that the existence of prohibitions on the books did not necessarily reflect "a present pro-life social consensus." (p. 22-25) It seems unlikely that these revelations will set off a crisis in either pro-choice or pro-life circles.

Moreover, a good deal of the discussion in Chapter One seems only distantly related to Graber's ostensible purpose of showing how existing arguments are undermined by empirical research; instead, Graber seems eager simply to accuse advocates—especially pro-life advocates—of inconsistency, hypocrisy, and moral insensitivity. For instance, he repeatedly levels the familiar charge that pro-lifers are inconsistent or hypocritical because they do not support government programs for promoting contraception or because they regularly oppose government spending for welfare measures that might reduce the need for abortion. (p. 23-24) To be fair, in a note at the back of the book Graber partially exempts "the Roman Catholic Church, the National Right to Life Committee, and several prominent pro-life Republicans" from the latter charge. (p. 166 n.47)

In an obscure paragraph Graber likewise indicts Robert Bork for moral obtuseness. Or at least that *seems* to be his point, as best I can make out. Here is the argument:

> Bork suggests that constitutional theorists need never explore why persons actually oppose abortion. "Knowledge that [abortion] is taking place," he declares, "can cause moral pain." In Bork's opinion, courts in a democracy have no authority to prevent persons from enjoying the "gratification" that comes when bans on abortion ease this "moral pain," unless abortion rights are "covered specifically or by obvious implication by a provision of the Constitution."[48]

(p. 24)[3] Graber then goes on to castigate Bork for paying no attention to the *source* of the pain felt by those opposed to abortion; it is evidently a matter of indifference to Bork, Graber asserts, "whether anti-abortion activists are horrified by the death of unborn children, disgusted that other persons are committing acts that their religion regards as mortal sins, or fear that legal abortion will reduce the numbers, significance, and influence of their racial group." (p. 24)

Bork's position is flawed, Graber seems to say, because it fails to recognize and explore some moral or perhaps constitutional distinctions that right-thinking people would regard as important. Perhaps this *is* a deficiency in Bork's position, though Graber might explain *why* these distinctions in possible anti-abortion motivations have constitutional significance. He doesn't; nor does he himself attempt any inquiry into the complicated empirical question that he chastises Bork for ignoring. So what exactly is the relevance of Graber's criticism? One's puzzlement will only be enhanced if one turns to the back of the book and looks up endnote 48 (as few readers will), or if one looks up the discussion in Bork's book (as even fewer readers will), and discovers that in the material quoted Bork is not even talking about abortion. Instead, he is discussing the *Griswold* contraception case specifically, and defending an originalist approach to constitutional interpretation generally.

In the endnote Graber justifies his bracketed insertion of "abortion" into the quotation because Bork "explicitly asserts that the same logic applies to all constitutional arguments." (p. 166 n.48) In a sense that is true; Bork surely would not limit his originalist approach to questions involving contraception, and he applies the sort of qualified moral skepticism expressed by his point about "moral pain" and "gratification" in a general way to argue that judges should never appeal to moral values not grounded in the constitutional text. Like Graber, I have serious doubts about this position. Still, it seems a bit severe to fault Bork for not exploring some difficult questions about possible anti-abortion motivations without mentioning to readers, in the text, that Bork was not talking about abortion at all.

It is a peripheral point, no doubt; but Graber's treatment of Bork is reflective of his mode of argumentation throughout the book. As I noted at the outset, this is advocacy scholarship.

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3. Quoting Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 257-58 (Simon and Schuster, 1990).

The "equal choice" argument. Although criticizing familiar arguments for abortion rights, Graber believes that constitutional principles and case law decisively support a different argument that enjoys the added benefit of being well grounded in the facts. The argument might be presented as a syllogism. Its major premise asserts that the equal protection clause means that persons have a right to be governed under general laws that both in their language and their implementation treat all citizens equally, not discriminating on the basis of race or socioeconomic class. (p. 76) The minor premise is that although statutes prohibiting abortion have typically been nondiscriminatory on their face, in practice they were (and, if reenacted, would be) radically underenforced; the result is "gray markets" in which abortion is readily available to affluent women but much less accessible to poor women and women of color. (p. 84-85) It follows that the "law in action" unconstitutionally discriminates. (p. 77) Q.E.D.

Students about to take a constitutional law exam and thus in an "issue-spotting" mode might immediately object that the argument as I have described it ignores or obscures distinctions that current cases and doctrine make crucial. The argument lumps race discrimination together with wealth discrimination, although current case law treats those problems very differently. And the argument fails to distinguish between laws that are *intended* to burden or disfavor a protected group and laws that merely have a "disparate impact" on a protected group. Under current doctrine, the former laws presumptively violate equal protection but the latter do not. So existing constitutional doctrine seems to pose at least two serious and perhaps fatal challenges to Graber's argument. Does Graber have plausible responses to these challenges?

The answer to that question, I'm afraid, is simple and plain: No. Graber quotes official statements asserting in sweeping terms that the law must protect "rich and poor" alike, (pp. 80-84) but he simply does not address case law mandating a very different level of scrutiny for racial and wealth distinctions. A legally uninformed reader would be led to believe that constitutional doctrine treats race discrimination and wealth discrimination in the same way.

Graber also puts off acknowledging the intentional discrimination/disparate impact problem for as long as possible. Not until halfway through the book, and only after he has already laid out the "equal choice" argument and pronounced it to be clearly in accord with existing law, does he explicitly confront—or at

least take notice of—the "disparate impact" (p. 90-100) problem; and even then his discussion of the problem is quite simply muddled. A general reader of this section would finish with only the haziest notions of *who* must intend *what* in order to establish a constitutional violation, or of what "intent" means in this context, or of the realistic likelihood of establishing the requisite intent by a showing of aggregate or statistical disparities.

This is not to say that Graber himself misunderstands the law: For all I know, his discussion may be muddled by design. The underlying problem, I think, is that although Graber insists that his argument for abortion rights is distinctive by virtue of being grounded in facts and social realities, the social realities as Graber himself describes them simply do not show a violation of constitutional doctrine as it is currently expounded by the courts. In the absence of facial statutory discrimination or discriminatory legislative motivation, Graber would need to show that government officials intentionally discriminated—and if given another chance, *would* discriminate—against protected classes of persons in enforcement of abortion statutes, as in *Yick Wo v. Hopkins*,[4] and his discussion *does* focus on enforcement. But his description of the social realities reveals only disparate impact, not intentional discrimination.

Although pre-*Roe* enforcement practices were hardly uniform, some recurring patterns are conspicuous. If Graber's factual presentation is accurate, abortion laws were *always* radically underenforced. Police and prosecutors often went after incompetent abortion practitioners who were likely to endanger their patients—but did not interfere with competent abortion providers, including not only doctors but also midwives and underground clinics. (pp. 46-47) Thus, "[i]n most communities, state officials ignored and sometimes protected competent abortionists; only abortionists who killed their clients were arrested." (p. 90) In addition, officials sometimes took action against providers who offered abortion services to the general public but left more discreet private practitioners alone. And officials did not attempt to second-guess the judgments of doctors who found that an abortion fell within a statutory exception such as "medically necessary." (pp. 47-50)

As a result of this underenforcement, affluent women could almost always obtain abortions in hospitals, or from private physicians, or through "abortion tourism" (p. 62)—that is, traveling to jurisdictions where abortion was legal (although if abortion

4. 118 U.S. 356 (1886).

was as readily available in practice as Graber suggests, it is not clear why this last expedient should have been necessary). Graber sometimes seems to say that poor women could also routinely obtain safe abortions, if not from physicians then from competent midwives and underground clinics. (pp. 46-47) Still, women who could not afford to have a private physician, or receive regular hospital treatment, or travel, naturally found it more difficult to obtain safe abortions than wealthier women did. It also seems entirely plausible, as Graber argues, that poorer and less educated women would have found it more difficult to satisfy procedural requirements that were imposed sometimes by statute but often by hospitals themselves. (pp. 55-59)

So we can accept Graber's contention, I think, that poor women and women of color had less access to safe abortion than well-off white women did, and we can also accept that many of the officials charged with administering the laws understood this situation. But none of this comes close to showing that law enforcement officials themselves intentionally discriminated against poor women or women of color in the sense required by existing constitutional doctrine. On the contrary, the patterns of selective enforcement described by Graber readily suggest legitimate underlying policies.

For example, police or prosecutors not committed to eradicating abortion *per se* might try to put incompetent or "back alley" practitioners out of business in an effort to protect women seeking abortion from excessive risk. Thus, while leaving prohibitions largely unenforced, "[l]aw enforcement officials did occasionally make considerable efforts to prevent rank amateurs from performing abortions that maimed their clientele." (p. 46) That policy hardly seems illegitimate; indeed, it seems calculated to protect the poorer classes who would most likely be victimized by substandard practitioners. Or prosecutors with at least a weak commitment to discouraging abortion but unable or unwilling to devote a significant portion of their scarce resources to that purpose might naturally attempt to prosecute providers who offer abortion to the general public, both because these providers are easier to detect and convict and because they might be performing *more* abortions than the typical private physician. For similar reasons, prosecutors might very sensibly decide not to devote their limited resources and expertise to second-guessing hospital judgments about whether particular abortions were really "medically necessary." Indeed, Graber notes that the primary impediment to more complete enforcement was a lack of evidence that

made prosecution next to impossible in situations in which women did not consider themselves victims. (p. 45)

In a world of scarcity and pervasive selective enforcement, such policies are perfectly familiar. So it is hard, frankly, to credit Graber's professed inability to understand how such policies could have served objectives other than class or race discrimination. And indeed, Graber readily overcomes his incomprehension when the immediate argument does not call for it. For example, his quite lengthy discussion of the "equal choice" argument is followed by a very brief chapter presenting a more "due process"-oriented argument. This argument, though potentially interesting, largely overlaps with the earlier one and is presented in conclusory fashion; given the constraints of a short review, I have not discussed it here. Still, it is significant that Graber begins *this* chapter, in which race and class discrimination is not as central to the argument, by observing:

> No two communities policed bans on abortion in the same fashion, and considerations other than racial or class prejudice influenced the administration of pro-life measures. . . Such policies did little to reduce abortion rates but did communicate a communal sense that abortion (or nonprocreative sexuality) violated societal mores.

(p. 108)

In short, the empirical facts as presented by Graber describe pervasive underenforcement but no intent by government officials to discriminate on impermissible grounds, and a more lucid discussion would reveal that the "equal choice" argument is untenable. So perhaps Graber was in the position of the lawyer who thinks he has no choice except to obfuscate. Consider, for instance, the following argument: Graber observes that under civil rights *statutes* regulating private employment, a showing of disparate impact is enough to establish a *prima facie* violation. He couples this observation with a Supreme Court dictum suggesting that the constitutional mandate to eliminate race discrimination "is most compelling in the judicial system." From this it follows, according to Graber, that "police and prosecutors should, at a minimum, be subject to the antidiscrimination rules that presently govern private employers." The next paragraph begins with the assertion that "[t]he equal choice argument easily satisfies the conservative constitutional test for finding purposive discrimination." (p. 90)

It takes considerable effort—more, finally, than I could muster—to take this sort of sloppy argumentation seriously. But per-

haps Graber does not mean the argument to be taken seriously *as legal analysis*. To be sure, he sometimes asserts that the equal choice position "relies primarily on constitutional and legal arguments." (p. 77) And he repeatedly claims that his argument is clearly supported by existing law. (pp. 78, 90) But Graber also suggests at times that he is perfectly aware that this is not so. For instance, he essentially concedes—correctly—that his "equal choice" argument could not begin to satisfy the requirements of *McKlesky v. Kemp*, which rejected a much stronger claim of systematic discrimination in capital sentencing, but argues that *McKlesky* was a very bad decision—indeed, a "constitutional abomination" of "the Rehnquist Court." (pp. 78, 92-95) Maybe so, but how does this position square with Graber's contention that his argument "easily satisfies" even conservative constitutional standards? Likewise, he admits that "the Rehnquist Court"—a common term of opprobrium in Graber's discussion, though in this instance he might have added the Burger Court, and the Warren Court, and every other Court to the list—"has shown little enthusiasm for actually restricting police or prosecutorial discretion." (p. 111) Same question.

Graber sometimes describes his effort as a "rhetorical strategy" (p. 10), and the most charitable course is to understand it as such, not as genuine legal analysis. It is clear, I think, that Graber views obvious constitutional problems in his position not as serious challenges to be carefully explored, but rather as irritants to be brushed aside. He concludes his chapter presenting the equal choice argument with the almost plaintive observation that the whole issue ought to be simple. "The simple idea is that people should be governed by general laws. Poor persons and persons of color ought to possess the same legal rights and be subject to the same legal sanctions as members of more privileged economic classes and races." This pristine, "simple" perspective is spoiled only because "state officials make various excuses for their failure to achieve equality"—excuses that are all the more aggravating because "many are plausible in the abstract." And "sifting through . . . pro-life alibis" involves a "long, sometimes tedious, process." (pp. 106-07) The process is one that Graber never really tries to undertake.

Graber later makes clear that he puts more stock in political action than in litigation as a pro-choice strategy. And he believes that unlike more familiar rationales based in controversial notions about privacy or fundamental rights, the "equal choice" argument can serve as the centerpiece for an effective political

movement. His more complete recommendations for political organizing are presented in the book's lengthy concluding chapter.

II. PRO-CHOICE STRATEGIES

The pro-choice position, Graber contends, enjoys the support of the most powerful elites in our society; if prudently managed and presented, therefore, that position "should never suffer electoral defeat." (p. 145) So if abortion rights are not as secure as they might be, that is because "NARAL, Planned Parenthood, and allied organizations have made errors similar to those made by many Union commanders" in the Civil War. (p. 142) Once these strategic mistakes are corrected, the future of abortion rights looks bright.

And just what are the tactical blunders that need to be remedied? Three errors stand out. First, the pro-choice movement has concentrated on influencing the judicial branch while neglecting the political sphere. Graber explains both why this strategy might have seemed attractive and what its limitations are. Specifically, the Reagan-Bush era proved that a determined administration can fill the Supreme Court with pro-life justices—Graber seems to view the current Court as being "packed with anti-*Roe* jurists" (p. 128)—and "jurists appointed on the basis of their presumed anti-*Roe* beliefs" are not likely to alter their views even as political winds change. (p. 129)

To be sure, one might have supposed that the Reagan-Bush experience proved just the opposite. Isn't *Roe* still pretty much intact? And weren't all three of the authors of the famous *Casey* Joint Opinion that saved *Roe*—Justices O'Connor, Kennedy, and Souter—Reagan-Bush appointees? But this is *my* doubt, not Graber's; he notices the question in a sentence and a brief endnote (p. 130), but quickly suggests that these justices' votes can be attributed to respect for precedent or to a desire to enhance the Republicans' political prospects. These explanations are evidently not regarded as in tension with the claim that justices appointed on the basis of presumed anti-*Roe* views will almost never disappoint their pro-life appointers.

A second error is that even when abortion rights proponents have organized for political, as opposed to legal, action they have usually adopted a sort of "Rainbow Coalition" strategy, trying to mobilize women, the poor, and minorities in support of pro-choice policies. But this strategy is misguided, Graber argues, because the empirical evidence overwhelmingly shows that these

constituencies are precisely the ones most likely to favor *restrictions* on abortion. (pp. 136-44) Beyond noting that such people are often less educated and more religious than the general population, Graber does not pause to wonder just *why* the groups that in his view are the principal victims of abortion restrictions nonetheless favor such restrictions, nor does he consider whether there might be something disturbingly paternalistic about protecting these groups from ostensible discrimination by promoting a policy they apparently do not favor. If women, the poor, and racial minorities don't understand their own true interests, evidently, then someone else will just have to step in to protect those interests for them. The bottom line is that support for pro-choice positions resides mostly with elites—"males, whites, and persons of high socioeconomic status," especially professionals such as media personnel, academicians, and lawyers (pp. 142-47)—and pro-choice political efforts should accordingly be aimed at these groups.

Finally, and most basically, pro-choice advocates have often tried to politicize the issue of abortion in a pro-choice direction when their fundamental strategy should be to *depoliticize* the issue. Abortion rights represent the status quo, after all, and will continue to do so even if *Roe* is overruled. And most politicians, excepting only those most strongly committed to pro-life views, would much prefer to do nothing about the matter. So political inertia is strong in this context. It follows that if the issue could simply be taken off the political agenda, abortion rights would be secure.

But how can an issue so divisive be depoliticized? Graber has a variety of suggestions. Abortion rights proponents ought to spend less time and money helping pro-choice candidates *win*, and instead should focus their efforts on ensuring that pro-life candidates *lose*. A similar strategy applies to judicial appointments. Since lawyers belong to an elite that strongly favors abortion rights, potential appointees who have not publicly taken any stand on abortion are very likely to be pro-choice. Hence, pro-choice people should insist on selection criteria that merely demand that appointees have given no previous indication of any stance regarding abortion; such criteria will "seem perfectly fair" but will nonetheless ensure that most judges are pro-choice. (pp. 148-49)

Graber's analysis describes what might seem a misalignment in political parties—support for abortion rights comes most strongly from the well-off, who nonetheless often prefer Republi-

can economic policies—but in the interest of depoliticization he discourages any effort to produce a more consistent alignment that might make abortion a more central aspect of any party's platform. Consequently, pro-choice Republicans figure centrally in Graber's plans. Faced with a pro-life Republican candidate, these liberal Republicans should of course vote for the Democrat. Usually, though, "such persons must stay in the Republican Party" since "defecting to the Democrats" might lead to a stronger Republican identification with the pro-life view. (pp. 150-51) This recommendation might place pro-choice Republicans in an awkward situation, but they can reduce their difficulties by focusing on the primaries, which "may prove a particularly good forum for punishing politicians who oppose legal abortion." (p. 149)

Graber is sanguine about pro-choice prospects if these recommendations are adopted. Early in his strategy discussion he offers a sort of "I Have a Dream" vision of the year 2012. In Graber's scenario, the White House has been occupied for four presidential terms by Mario Cuomo and Patricia Schroeder. Ruth Bader Ginsburg is the Chief Justice. Federal legislation commands all medical recipients of federal funds to provide abortion on demand. In this future scenario, *Webster*—a 1989 decision that in this part of the book Graber describes as signaling an "abrupt halt" to "[j]udicial solicitude for abortion rights" (p. 127) (though he elsewhere argues that the very limited restrictions it and similar cases approved have had virtually no effect on the availability of abortion) (pp. 5, 7)—and "the pro-life movement are discussed in the same way as *Dred Scott v. Sanford* and the pro-slavery movement." And "[t]he few remaining pro-life advocates are confined to the lunatic fringes of American politics." (pp. 134-35)

This "futuristic vision," as he calls it, is not so fantastic. On the contrary, with greater effort and better strategic planning it might have been realized already; the vision "illustrates just how secure legal abortion would be had proponents of reproductive choice conducted successful electoral campaigns as well as successful litigation campaigns." (p. 135) With the proper tactical corrections, there is no reason why the vision cannot be realized in the near future. A curious wrinkle might be noted here: Graber himself claims more than once to be "weakly pro-life." (pp. 162 n.19, 159) Does this mean that if Graber's prescriptions are heeded, then in the year 2012 he himself will be one of those confined to "the lunatic fringe"? But like Graber's legal analysis,

the question need not be taken seriously: I think we can be confident that Mark Graber will have no trouble adapting.

III. UNANSWERED QUESTIONS

At the heart of Graber's book lies a disturbing paradox: Anti-abortion laws did not—and if we project the pre-*Roe* situation forward, as Graber does—would not have any very significant effect on the number of unborn lives saved. Nor did, or would, such restrictions significantly affect the actual availability of abortion, especially for those classes who care most about abortion rights. To be sure, either the description or the prediction might be wrong. For example, Graber says that after *Roe* the cost of obtaining an abortion dropped dramatically—to less than a third of the former price (p. 67)—and an economist might wonder whether the demand for abortion was *so* inelastic that a price change of this kind would have *no* discernible effect. And Graber's predictions do not fully take account of the fact that given the powerful pro-life concern that has developed since *Roe*, future restrictions might be enforced more rigorously, at least in states where pro-life sentiment is powerful enough to enact such laws in the first place. Still, suppose Graber is right: Why then has the issue of abortion so traumatized the nation? Although Graber's efforts to transform the paradox into a convincing constitutional argument fail, the paradox nonetheless generates important and fascinating questions.

A natural implication of Graber's diagnosis, one might suppose, is that communities or states maintained abortion laws largely for symbolic reasons. At one point Graber says as much: "Such policies did little to reduce abortion rates but did communicate a communal sense that abortion (or nonprocreative sexuality) violated societal mores." (p. 108) For Graber this is the end of the inquiry; his implicit assumption throughout is that communicating such a message about societal mores is not a legitimate purpose that could serve to sustain a law.

His failure to go further is unfortunate, I think, because important questions, both sociological and jurisprudential, are implicated. What exactly is going on in the debate that seemingly divides and energizes the country more than any other? Why do Americans care so passionately about the symbolism of this particular issue? And is it proper for communities to enact criminal laws that serve mainly symbolic functions?

On the one hand, such laws are hardly unfamiliar. Indeed, the symbolic or educative function of law is a common jurispru-

dential topic. Supreme Court decisions from *Brown* to recent "endorsement" cases under the establishment clause have sometimes attached as much significance, or more, to the symbolism of laws as to their more tangible or material consequences. On the other hand, symbolic but largely unenforced laws strain the concept of "rule of law" as understood by thoughtful expositors like Lon Fuller, for whom "congruence between official action and declared rule" was an essential part of the "internal morality" of law.[5] Could a sensible and workable constitutional framework be developed for assessing such largely unenforced but symbolically significant laws?

At some point the sociological and jurisprudential questions converge. Law by its nature claims authority, and authority has both a sociological and jurisprudential dimension. A government without justice, as Augustine observed long ago, is not much more than a group of bandits operating on a large scale.[6] So citizens might decline to ascribe authority to a government that officially endorses practices they regard as deeply immoral, even if they also realize that in a pervasively imperfect world such practices are likely to—and perhaps even, in some tragic sense, *need to*—flourish anyway. And indeed, people are sometimes heard to say that a law, or a government, that officially refuses to honor the sacred value of life is unworthy of respect. In a complicated and obscure way, something like this concept seems to have been in the background of largely unenforced prohibitions on abortion. Similar sensibilities may be at work in the repugnance felt by many towards *Roe* even if the prospects for actually eradicating abortion seem next to nil.

A book purportedly devoted to *Rethinking Abortion* with careful attention to social realities might properly reflect on such questions. It often seems that Graber's discussion cannot help but lead him into a consideration of some of these issues; but in the end he manages to skip past them. Thus, for Graber, the complex and perhaps confused sensibilities that I have awkwardly tried to describe are pretty much reducible to "the ignorance and hypocrisy of the majority," and their significance is that they pose "a threat . . . to a just democratic order." (p. 160) In fact, attempts to restrict abortion, past and present, are largely traceable to just such "ignorance and hypocrisy." Graber's clos-

5. Lon L. Fuller, *The Morality of Law* 81 (Yale U. Press, rev. ed., 1969).
6. St. Augustine, 1 *The City of God*, ch. 4.4 at 117-18 (John Grant, 1909).

ing paragraph conveys his assessment of this situation: "Abortion issues deserve a more honest and intelligent debate." (p. 160)

Amen.