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Unborn Children as Constitutional Persons

Gregory J. Roden, J.D.

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Preface

The featured article, by legal scholar Gregory J. Roden, discusses the question whether unborn children are "persons" within the language and meaning of the Fifth and Fourteenth Amendments. Because there is no constitutional text explicitly holding unborn children to be, or not to be, "persons," his examination is founded on the historical understanding and practice of the law, the structure of the Constitution, and the jurisprudence of the Supreme Court.

In *Roe v. Wade*, the state of Texas argued that "the fetus is a 'person' within the language and meaning of the Fourteenth Amendment." The Supreme Court responded in its majority opinion that "[i]f this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment." Unfortunately, the majority's legal analysis arrived at the opposite conclusion, "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." It is the majority's legal analysis that Mr. Roden examines in fine detail.

First, Mr. Roden points out that the Constitution does not confer upon the federal government the power to grant or deny "personhood" under the Fourteenth Amendment. Rather, the power to recognize or deny unborn children as holders of certain statutory and common law rights and duties has historically been exercised by the states. The *Roe* opinion and other Supreme Court cases implicitly recognize this function of state sovereignty.

Second, he demonstrates that, at the time *Roe* was decided, the states had exercised this power and held unborn children to be persons under their criminal, tort, and property law. Because of the unanimity of the states in holding unborn children to be persons under criminal, tort, and property law, Mr. Roden argues that the text of the Equal Protection Clause of the Fourteenth Amendment compels federal protection of unborn children as persons. Furthermore, he shows that to the extent the Court examined the substantive law in these disciplines, its legal conclusions were not warranted.

Finally, Mr. Roden illustrates the inconsistency of federal statutory law with *Roe*, in that it also treats unborn children as persons by recognizing their eligibility for federal entitlements.

Due to the length of the featured article, no other material is included in this edition.

James Bopp, Jr., J.D.
EDITOR-IN-CHIEF

Article

Unborn Children as Constitutional Persons

Gregory J. Roden, J.D.[*]

An honest judge on the bench would call things by their proper names.[1]

– AMA Committee on Criminal Abortion (1871)

ABSTRACT: In *Roe v. Wade*, the state of Texas argued that "the fetus is a 'person' within the language and meaning of the Fourteenth Amendment."[2] To which Justice Harry Blackmun responded, "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."[3] However, Justice Blackmun then came to the conclusion "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[4]

In this article, it is argued that unborn children are indeed "persons" within the language and meaning of the Fourteenth and Fifth Amendments. As there is no constitutional text explicitly holding unborn children to be, or not to be, "persons," this argument will be based on the "historical understanding and practice, the structure of the Constitution, and the jurisprudence of [the Supreme] Court."[5]

Specifically, it is argued that the Constitution does not confer upon the federal government a specifically enumerated power to grant or deny "personhood" under the Fourteenth Amendment. Rather, the power to recognize or deny unborn children as the holders of rights and duties has been historically exercised by the

[*] Attorney, Eden Prairie, Minnesota. B.B.A., *with honors*, 1979, University of Wisconsin-Madison; J.D., 1991, South Texas College of Law. Member of the United States Supreme Court Bar and Minnesota State Bar. Correspondence may be sent to greg.roden@comcast.net. I would like to express my gratitude to God for this opportunity to labor in His vineyard. I also thank my wife, Claire H. Roden, for her support throughout this project and for her editorial advice. I also extend a special recognition to Arlene Sieve for her expert proofreading; any perceived remaining errors may be attributed to the author.

[1] As quoted by Justice Blackmun in *Roe v. Wade*, 410 U.S. 113, 142 (1973).

[2] *Roe*, 410 U.S. 113, 156 (1973).

[3] *Id.* at 156-57.

[4] *Id.* at 158.

[5] Printz v. United States, 521 U.S. 898, 905 (1997).

states. The *Roe* opinion and other Supreme Court cases implicitly recognize this function of state sovereignty. The states did exercise this power and held unborn children to be persons under the property, tort, and criminal law of the several states at the time *Roe* was decided. As an effect of the unanimity of the states in holding unborn children to be persons under criminal,[6] tort,[7] and property law,[8] the text of the Equal Protection Clause of the Fourteenth Amendment compels federal protection of unborn persons.[9] Furthermore, to the extent Justice Blackmun examined the substantive law in these disciplines, his findings are clearly erroneous and as a whole amount to judicial error. Moreover, as a matter of procedure, according to the due process standards recognized in Fifth Amendment jurisprudence of the Supreme Court, *Roe v. Wade* should be held null and void as to the rights and interests of unborn persons.

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[6] *Roe*, 410 U.S. at 139:

> Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's, a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother. The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health. Three States permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving interpretation of those standards to the courts.

(footnotes omitted); *id.* at 174-75 (Rehnquist, J. dissenting) ("By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion."); Planned Parenthood of Southern Pennsylvania v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting) ("[T]he longstanding traditions of American society have permitted [abortion] to be legally proscribed.").

[7] *Roe*, 410 U.S. at 161-62:

> In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. *That rule has been changed in almost every jurisdiction.*

(footnote omitted) (emphasis added).

[8] *Id.* at 162 ("Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem").

[9] U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to *any person within its jurisdiction* the equal protection of the laws") (emphasis added).

I. The *Roe* Court's Examination of the Term "Person" was Deficient.

> The words "any person or persons"are broad enough to comprehend every human being.[10]
>
> – Chief Justice John Marshall

In *Roe v. Wade*, Justice Harry Blackmun made the claim "that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment."[11] Justice Blackmun did so by recounting that the Assistant Attorney General of Texas, Robert C. Flowers,[12] could not cite a single case holding "that a fetus is a person within the meaning of the Fourteenth Amendment."[13] Yet, the fact that Mr. Flowers could not cite such a case does not necessarily mean there were none. The question then becomes, are there any?

In the first volume of the United States Supreme Court opinions, on page four, is found the case of *Lessee of Ashton v. Ashton*. In *Ashton*, the Supreme Court of Pennsylvania upheld the property rights of a posthumous child in a one-page opinion.[14] In *Ashton*, an interest in land had been left by

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[10] United States v. Palmer, 16 U.S. 610, 631 (1818).

[11] *Roe*, 410 U.S. at 157.

[12] *Id.* at 115.

[13] *Id.* at 157.

[14] Lessee of Ashton v. Ashton, 1 U.S. 4 (1760). The complete opinion reads as follows:

> On special Verdict. Devise to the *first Heir Male* of I. S. *when* he shall arrive to the Age of 21 Years, he paying to A. and B. the Daughters of I. S. [40 Pounds] each. *After Deviser's Death* I. S. had a Son, who attained the Age of 21 Years, and paid his Sisters the [40 Pounds] each.
>
> The Question was, whether the Son of I. S. could take by executory Devise? It was objected for the Defendant, 1st. That this being a present Devise it could not take Effect because to a Person not *in esse*. 2nd. That though it might be construed a future Devise, yet it was too remote; for an executory Devise must take effect within the Compass of a Life or Lives *in esse,* or at farthest within nine Months after: And in this case I. S. might have had no Son but a Daughter, who might have had a Daughter, who might have had a Son, who would have been the *first Heir Male* of I. S. which would have been too remote a Contingency, and would have tended to a Perpetuity. And the Case must be considered as at the Time of making the Devise, that is, how it might be; and not how it has actually happened. 3rd. That the Son of I. S. could not take, because the Limitation was to the *first Heir Male* and *Nemo est Hares Viventis*.
>
> For the Plaintiff it was answered: 1st. That this was no present Devise, the Testator taking Notice that I. S. had no Son born by the Word *first* Heir Male, and using the Words *when* and *paying*. 2nd. That this Contingency was not too remote, because the Testator by the Words first Heir Male, must have meant *first Son*; and that such a Construction must be made as to carry the Intent of the Testator into Execution. 3rd. *First Heir Male* are Words of Purchase and *Designatio Personae*, and the Law will supply the Words *of the Body* in a Will.
>
> By the Court. The Intent of the Testator is clear, that the first Son of I. S. should take. Therefore judgment By The Court.

Id. (emphasis in original).

a will to "the *first Heir Male* of I.S. when he shall arrive to the Age of 21 Years."[15] As the "Son of I. S." had not been born at the time the will was probated, the devise was contested.

With both parties to the suit agreeing that there was no present devise in this situation, again the "Son of I. S." not having yet been born, this case fell under the Rule Against Perpetuities. The Rule Against Perpetuities holds that interests in property must vest "within a life or lives in being (treating a child in its mother's womb as in being) and 21 years afterwards."[16] Accordingly, the defendant made a good argument under the rule—the first male heir of I. S. could have been any number of generations removed, "I. S. might have had no Son but a Daughter, who might have had a Daughter, who might have had a Son."[17] But instead, the court was persuaded by the plaintiff testator's intent argument that "the Testator by the Words first Heir Male, must have meant first Son,"[18] and found for the plaintiff.

In *Lessee Ashton v. Ashton* there is a right in property, enforceable by a court of law, passing from the Devisor to the "Son of I. S.," unborn at the time of the Devisor's death. Correspondingly, this property right creates the legal duty of other parties desiring an interest in the property to respect it and comply with it. And, if they do not comply with their duty afforded the right, then the court may enforce this right of the posthumous child, and compel the defendant to dutifully comply.

Cases such as *Ashton* illustrate the very essence of the legal use of the word "person"—a human being who has rights that are enforceable in a court of law.[19] Rather than the theological, philosophical or medical

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[15] *Id.* (emphasis in the original).

[16] McArthur v. Scott, 113 U.S. 340, 381-82 (1884).

[17] *Ashton*, 1 U.S. at 4.

[18] *Id.*

[19] "Persons are the subject of rights and duties; and, as a subject of a right, the person is the object of the correlative duty, and conversely," BLACK'S LAW DICTIONARY 1300 (4th ed. 1951); "Law. A human being (natural p[erson]) or body corporate or corporation (artificial p[erson]), having rights or duties recognized by law," THE OXFORD UNIVERSAL DICTIONARY 1478-79 (3d ed. 1944, rev. with addenda 1955); "Law. A human being, a group of human beings, a corporation, an estate, or other legal entity recognized by law as having rights and duties," THE RANDOM HOUSE COLLEGE DICTIONARY 990 (rev. ed. 1975); "[O]ne (as a human being, a partnership, or a corporation) that is recognized by law as the subject of rights and duties," WEBSTER'S NEW COLLEGIATE DICTIONARY 848 (1981); "[I]n law, any individual or incorporated group having certain legal rights and responsibilities," WEBSTER'S UNABRIDGED DICTIONARY 1338 (2d. ed. 1983); "[I]n law, an individual or incorporated group having certain legal rights and responsibilities," S. GIFIS, BARRON'S LAW DICTIONARY 343 (2d ed. 1984); "Law. A human being or organization with legal rights and duties," THE AMERICAN HERITAGE DICTIONARY 925 (2d. college ed. 1985); "[O]ne (as a human being, a partnership, or a corporation) that is recognized by law as the subject of rights and duties," *Merriam-Webster's Online Dictionary*, http://www.m-w.com/dictionary/person (last visited Nov. 23, 2007).

approaches to personhood Justice Stewart urged in *Roe's* oral reargument,[20] and Justice Blackmun largely adopted in *Roe*,[21] the Court[22] should have thoroughly examined the term "person" as a legal term[23]; especially since the Court is a court of law, not one of theology, philosophy or medicine.

Although Justice Blackmun did not ignore the legal aspect of the term "person," but to the extent he did investigate, it was deficient. Justice Blackmun observed: "The Constitution does not define 'person' in so many words."[24] And, after a superficial examination of the use of the word in the Constitution, Justice Blackmun surmised, "But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application."[25]

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[20] *See* http://www.cnn.com/SPECIALS/1998/roe.wade/audio/reargue/transcript.html (last visited Mar. 24, 2008).

[21] *Roe*, 410 U.S. at 132-60.

[22] This article will, where appropriate, refer to the United States Supreme Court as the "Court."

[23] Moreover, the idea that "person" as a legal term, instead of denoting a human being per se, was discussed in one of Justice Blackmun's primary sources, Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?* 17 N.Y.L.F. 335, 401-10 (1971) [hereinafter "*The Phoenix*"]. There, Means was debating the amicus brief filed on behalf of Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology (410 U.S. 115 n.*):

> The question is not, as the ACOG dissenters put it, whether or not "The Unborn Offspring of Human Parents is an Autonomous Human Being." Of course it is. It is "human," since it was produced by human parents, and it is a "being", since it exists. And it is "autonomous," if nothing more is meant by that adjective than that it possesses a unique genetic organization. The question is whether, prior to birth, the offspring of human parents is a human *person*. Only *persons* are the subjects of legal rights, whether constitutional or other.[n.175]

Id. at 409 (emphasis in the original). Means continues his thoughts along this line in footnote 175:

> Thus Sir Frederick Pollock declared: "The person is the legal subject or substance of which rights and duties are attributes. An individual human being, considered as having such attributes, is what lawyers call a *natural person*." F. Pollock, *A First Book of Jurisprudence* 111 (3d ed. 1911) (emphasis in original). One need only read the words of the Federal Constitution, including its amendments, to realize that their framers penned these texts with this same notion in mind. The fifth and fourteenth amendments do not confer rights upon human life; they treat life as the object, not as the subject, of rights. They forbid governments to deprive a *person* of his life, without due process of law. If the phenomenon of human life can exist apart from a human person, it is not protected by the fifth or fourteenth amendment. The crucial question, therefore, is whether a human person is present in the life which is asserted to be inviolable. It is not human life, as such, but the human person, as such, that is sacred.

Id. at 409-10 n.175.

[24] *Roe*, 410 U.S. at 157.

[25] *Id.*:

> The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the

Borrowing an argument from Cyril C. Means, Jr. (NARAL's General Counsel at the time *Roe* was decided),[26] Justice Blackmun pointed to the Apportionment Clause as a specific example in which unborn are excluded from a Constitutional provision. He noted, "We are not aware that in the taking of any census under this clause, a fetus has ever been counted."[27] Yet, this textual inquiry does not hold water when examined against the overall "structure of the Constitution."[28] It may be observed that "Indians not taxed," are constitutionally prohibited as being *counted* as persons under the Apportionment Clause of the Constitution[29] and the Fourteenth Amendment[30] itself.[31] Yet, "Indians not taxed" are, of course, considered persons under the Fourteenth Amendment.[32] This is because the protections of the Fourteenth Amendment are afforded to all persons "within the territorial jurisdiction"[33] of a state regardless of whether they are citizens, aliens, or Indians "not taxed."

Persons within the territory of the United States, but not within the "several states" are similarly treated: "The populations of the District of Columbia, Puerto Rico and the U.S. Island Areas are excluded from the apportionment population because they do not have voting seats in the U.S.

> Constitution: in the listing of qualifications for Representatives and Senators, Art. I, 2, cl. 2, and 3, cl. 3; in the Apportionment Clause, Art. I, 2, cl. 3;[n.53] in the Migration and Importation provision, Art. I, 9, cl. 1; in the Emolument Clause, Art. I, 9, cl. 8; in the Electors provisions, Art. II, 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, 1, cl. 5; in the Extradition provisions, Art. IV, 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.

Id. (footnotes omitted).

[26] Means, *The Phoenix*, *supra* note 23, at 402-03.

[27] *Roe*, 410 U.S. at 157 n.53.

[28] Printz v. United States, 521 U.S. 898, 905 (1997).

[29] U.S. CONST. art. I, § 2:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

[30] U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

[31] Although, the formula for the apportionment clause does not include "Indians not taxed," they have been counted since the 1860 census. *See* Collins, *Native Americans in the Census, 1860–1890*, 38 PROLOGUE (No.2, Sum. 2006), http://www.archives.gov/publications/prologue/2006/summer/indian-census.html (last visited Mar. 27, 2008).

[32] Washington v. Yakima Indian Nation, 439 U.S. 463 (1979).

[33] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1885).

House of Representatives."[34] Surely, no one is going to argue that the residents of the District of Columbia, Puerto Rico, and the U.S. Island Areas are not persons because they are excluded from the apportionment count?[35]

Yet, Justice Blackmun's limited examination of the Constitution did not consider the Preamble, which clearly states the purpose of the Constitution is also to protect the interests of those who are not yet born:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and *our Posterity*, do ordain and establish this Constitution for the United States of America.[36]

Still, the substantive rights of national citizenship are rather limited. The Court listed some of these rights in *Twining v. State of New Jersey*:

> Privileges and immunities of citizens of the United States, on the other hand, are only such as arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States. Thus, among the rights and privileges of national citizenship recognized by this court are the right to pass freely from state to state; the right to petition Congress for a

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[34] U.S Census Bureau, *Questions and Answers on Apportionment*, http://www.census.gov/population/www/censusdata/apportionment/faq.html (last visited Mar. 27, 2008).

[35] Besides which, there is no constitutional prohibition of Congress deciding that unborn persons may be included in a future census for the purposes of the Apportionment Clause. The same cannot be said of "Indians not taxed," and persons not residing in the several states, who are constitutionally excluded for the purposes of the Apportionment Clause. If we derive anything from the text of the Constitution regarding persons and the Apportionment Clause, it is that any class of persons within the several states must be specifically excluded if they are prohibited from being counted. But, it is a non sequitur to argue the converse, that persons excluded by the Apportionment Clause are likewise excluded from all rights granted by the Constitution; it simply does not follow and the Court had never before made that inference. Consider *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), wherein the Court characterized the constitutional status of Native American Indians to the United States, at that time, as "that of a ward to his guardian," who may "look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants." *Id.* at 17. The Court held it did not have original jurisdiction in the case before it as "an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution." *Id.* at 20. Although, the Court allowed Indians were not without redress to the courts, "The mere question of right might perhaps be decided by this court in a proper case with proper parties." *Id.*

[36] U.S. CONST. Preamble (emphasis added). *See* Stenberg v. Carhart , 530 U.S. 914, 953 (2000) (Scalia, J., dissenting):

> The notion that the Constitution of the United States, designed, among other things, "to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity," prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.

> redress of grievances; the right to vote for national officers; the right to enter the public lands; the right to be protected against violence while in the lawful custody of a United States marshal; and the right to inform the United States authorities of violation of its laws.[37]

As none of these rights ordinarily pertain to the circumstances of unborn children, it is not reasonable to expect any federal case law holding unborn children to possess these national rights and privileges.

II. The Power to Establish Personhood Under the Fourteenth Amendment Resides with the States.

> The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator.' Sovereignty, for this purpose, rests alone with the States.[38]
>
> – Chief Justice Morrison Waite

The Fourteenth Amendment, Section 1, states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[39]

Missing in this textual inquiry of the Constitution is the consideration of a question at the heart of the *Roe* opinion: where in the Constitution does it give the federal government the power to decide who is and who is not a person under the Fourteenth Amendment, or anywhere else for that matter? The closest the Constitution comes to this is the grant of power to Congress under Article 1, Section 8, "To establish an uniform Rule of Naturalization." Naturalization is the power to turn persons into citizens.[40] "Persons" is used as a broad term denoting all human beings, as distinct from the more narrow term "citizens," denoting a member of the "political body, who, according to

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[37] Twining v. State of New Jersey, 211 U.S. 78, 97 (1908) (citations omitted).

[38] U.S. v. Cruikshank, 92 U.S. 542, 553 (1875).

[39] U.S. CONST. amend. XIV, § 1.

[40] BLACK'S LAW DICTIONARY 925 (5th ed. 1979) ("Naturalization. The process by which a person acquires nationality after birth and becomes entitled to the privileges of citizenship. 8 U.S.C.A. § 1101 et seq.").

our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives."[41] Hence, the Constitution does not grant the federal government control over the status of a human being as a "person" as it does their status as a citizen.

Personhood is derived from the inherent, natural rights of the people and the inherent power of the several states.[42] In *Strader et al. v. Graham*, the court declared, "[E]very State has an undoubted right to determine the status of domestic and social condition of the *persons* domiciled within its territory, except so far as the powers of the States in this respect are restrained, or duties and obligations imposed upon them by the Constitution of the United States."[43]

The rights of life, liberty and property are natural rights which pre-existed our state and federal governments, as affirmed in the Declaration of Independence. It is the states, not the federal government, which have the primary duty to protect those unalienable rights. As the Court stated in *United States v. Cruikshank*:

> The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the

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[41] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857). *See Slaughter-House Cases*, 83 U.S. at 95 (Field, J., dissenting) ("The Chief Justice, in that case [Dred Scott], and a majority of the court with him, held that the words 'peoples of the United States' and 'citizens' were synonymous terms; that the people of the respective States were parties to the Constitution; that these people consisted of the free inhabitants of those States; that they had provided in their Constitution for the adoption of a uniform rule of naturalization; that they and their descendants and persons naturalized were the *only persons* who could be citizens of the United States, and that it was not in the power of any State to invest *any other person* with citizenship so that he could enjoy the privileges of a citizen under the Constitution, and that therefore the *descendants of persons* brought into this country and sold as slaves were not, and could not be citizens within the meaning of the Constitution.") (emphasis added).

[42] *See* Printz v. United States, 521 U.S. 898, 918-19 (1997) ("Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty,' THE FEDERALIST No. 39, at 245 (J. Madison)"); Garcia v. San Antonio Metro. Transit. Auth., 469 U.S. 528 (1985) ("Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty,' THE FEDERALIST No. 39, at 245 (J. Madison). Finally, the developed application, through the Fourteenth Amendment, of the greater part of the Bill of Rights to the States limits the sovereign authority that States otherwise would possess to legislate with respect to their citizens and to conduct their own affairs. The States unquestionably do 'retai[n] a significant measure of sovereign authority.' They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government. In the words of James Madison to the Members of the First Congress: 'Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.'" (citations omitted)).

[43] Strader v. Graham, 51 U.S. (10 How.) 82, 93 (1850) (emphasis added).

> governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect *all persons within their boundaries* in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, *rests alone with the States*.[44]

The federal constitution was derived from the sovereign states,[45] who in turn received their power of government from the people.[46] Our federal government is one of limited, enumerated powers—powers granted to it from these states.[47] The Court affirmed such basic notions of federalism in *Printz v. United States* and observed:

> It is incontestible that the Constitution established a system of "dual sovereignty." Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text, including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the amendment provision, Article V, which requires the votes of three fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights." Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the

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[44] United States v. Cruikshank, 92 U.S. 542, 553 (1875) (emphasis added).

[45] THE FEDERALIST, No. 32 (A. Hamilton):

> An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a *partial* union or consolidation, the State governments would clearly *retain all the rights of sovereignty* which they before had, and which were *not*, by that act, exclusively *delegated* to the United States.

Id. (emphasis added).

[46] *E.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 370 (1885) ("Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.").

[47] United States v. Morrison, 529 U. S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995); Gregory v. Ashcroft, 501U.S. 452, 457-58 (1991); Cooley v. Board of Wardens of Port of Philadelphia, 53 U.S. 299, 320 (1851), Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.").

> United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[48]

Logically then, the federal government could only receive from the states the powers the states had to give. Hence, if the federal government has a power, then the states must likewise have the same power currently, or have held that power at one time.[49] So, to argue the federal government has the power to decide who is or is not a person is to argue that the states hold the same power, or at least held it at one time. As the Court instructed in *Printz v. United States*, "Because there is no constitutional text speaking to this precise question, the answer... must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."[50] So it is of great significance that the states had historically decided the question of personhood of unborn children, which is apparent in Justice Blackmun's *Roe* opinion.

In the course of his opinion, Justice Blackmun engaged in a defective examination of the accord of "legal rights to the unborn" under state tort, probate, and property law, and proclaimed they were allowed only "in narrowly defined situations"[51]:

> In areas *other than criminal abortion*, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held. In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn

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[48] Printz v. United States, 521 U.S. 898, 918-19 (1997).

[49] Ware v. Hylton, 3 U.S. 199, 231 (1796) (Chase, J., seriatim) ("The proof of the allegation that Virginia had transferred this authority to Congress, lies on those who make it; because if she had parted with such power it must be conceded, that she once rightfully possessed it."); Cooley v. Board of Wardens of Port of Philadelphia, 53 U.S. 299, 320 (1851) (Curtis, J.) ("It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states.").

[50] *Printz*, 521 U.S. at 905.

[51] *Roe*, 410 U.S. at 161.

> children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem. Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as *persons in the whole sense*. [52]

The various disciplines of law by which Justice Blackmun admits the unborn are afforded legal rights are known as municipal law, "That which pertains solely to the citizens and inhabitants of a state."[53] Though federal powers are limited and enumerated,[54] state powers are "numerous and indefinite,"[55] and they include the powers to promulgate criminal,[56] tort,[57]

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[52] *Id.* at 161-62 (footnotes omitted) (emphasis added).

[53] BLACK'S LAW DICTIONARY 918 (5th ed. 1979).

[54] *See generally*, United States v. Morrison, 529 U. S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995); Gregory v. Ashcroft, 501 U.S. 452, 457-58 (1991); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten . . . .").

[55] Gregory v. Ashcroft, 501 U.S. at 457-58 (1991), which states:

> The Constitution created a Federal Government of limited powers. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system. As James Madison put it:
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> > The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.
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> THE FEDERALIST, No. 45, pp. 292-93 (C. Rossiter ed. 1961) (J. Madison).

[56] *Lopez*, 514 U.S. at 566 ("The Constitution ... withhold[s] from Congress a plenary police power."); *id.* at 584-85 (Thomas, J., concurring) ("[W]e always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power."); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 426, 428 (1821) (Marshall, C.J.):

> Connected with the power to legislate within this District is a similar power in forts, arsenals, dock yards, &c. Congress has a right to punish murder in a fort or other place within its exclusive jurisdiction, but no general right to punish murder committed within any of the States....
>
> It is clear that Congress cannot punish felonies generally, and, of consequence, cannot punish misprision of felony.

Id. See United States v. Morrison, 529 U. S. 598 (2000) (Congress may not regulate noneconomic, violent intrastate crime); Chapman v. California, 386 U.S. 18, 22 (1967) ("Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.' 28 U.S.C. 2111."); *id.* at 24 (on direct review, on a writ of certiorari, "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."); Brecht v. Abrahamson, 507 U.S. 619, 622 (1993) (on collateral review, on a writ of habeas corpus, the standard of review is whether the constitutional error had a "substantial and injurious effect.").

[57] Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996); Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); Todd v. Sandidge Construction Co., 341 F.2d 75, 77 (4th Cir. 1964).

probate,[58] and property law.[59] State municipal law concerns the rights of life, liberty, and property, which, as the Court has said, "include all civil rights that men have."[60] Of great importance is that the states retained their exclusive jurisdiction over municipal law even after the enactment of the Fourteenth Amendment. As the Court stated in the *Civil Rights Cases*:

> [The Fourteenth Amendment] does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment.[61]

Note too that Justice Blackmun begins the paragraph examining municipal law by admitting that unborn children were persons under criminal law,[62] —the "restrictive criminal abortion laws in effect in a majority of States"[63] at the time *Roe* was written. Accordingly, he did not assert that unborn children were not persons. Rather, he declared that they were not "persons in the whole sense." The one area of law dealing most directly with the right to life, the criminal law, is the one area of law that is admitted to "endorse any theory that life... begins before live birth or to accord legal rights to the unborn." Yet, somehow, unborn children are not deemed to be "persons *in the whole sense.*" Blackmun could not provide one citation to justify the distinction between "persons" and "persons *in the whole sense.*" There are but two uses of the phrase "persons in the whole sense" in the whole of Supreme Court decisions since 1893,[64] Blackmun's use of it in *Roe* and Justice Stevens' quotation of the same in *Planned Parenthood v.*

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[58] Marshall v. Marshall, 547 U.S. 293 (2006), Markham v. Allen, 326 U.S. 490 (1946).

[59] *Lopez*, 514 U.S. 549 (Congressional power to regulate interstate commerce is limited to the regulation of activities related to commercial transactions that, in the aggregate, substantially affect interstate commerce. It is not a plenary power to regulate activities involving local property that merely relate to economic productivity.)

[60] Civil Rights Cases, 109 U.S. 3, 13 (1883).

[61] *Id.* at 11. Likewise the Court wrote in Terrace v. Thompson, 263 U.S. 197, 216-17 (1923):

> The Fourteenth Amendment... does not take away from the state those powers of police that were reserved at the time of the adoption of the Constitution. And in the exercise of such powers the state has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people.

[62] *Roe*, 410 U.S. at 161 ("In areas *other than criminal abortion*, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth") (emphasis added).

[63] *Id.* at 129.

[64] *See* http://www.findlaw.com/casecode/supreme.html (last visited May 2, 2008) ("Full-Text Search" for "persons in the whole sense").

Casey.[65] Regardless of the veracity of Blackmun's holding, his methodology comports with the overarching notion that personhood "within the language and meaning of the Fourteenth Amendment"[66] is to be derived from the municipal law of the states.

Indeed, the very text of the Fourteenth Amendment directs any inquiry concerning "persons" to their relation to the state: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person *within its jurisdiction* the equal protection of the laws.[67] The amendment does not say, "any person within its jurisdiction or the jurisdiction of the federal government." This particular argument will be discussed in more detail in Section X, "Unborn Children are Persons within the Jurisdiction of the States under the Fourteenth Amendment."

Clearly, *Roe's* holding that some members of the human species may be killed at the will of others, is based upon the arbitrary and capricious idea that, unless individuals are "persons in the whole sense," they have no constitutional protections. Consequently, any group of persons may have their right to life negated by being designated persons in less than the whole sense, a criteria without any ascertainable standard.

The argument that personhood "within the language and meaning of the Fourteenth Amendment" is to be derived from the municipal law of the states would be weakened if it were found to be opposed by the "essential postulate[s]"[68] of the Constitution, or opposed by the "historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."[69] Yet, that is not the case.

If Justice Blackmun had made a balanced review of the applications of the term "person" in the Constitution, he would have divulged that women themselves had only been held to be "persons in the whole sense" by the Court a mere two years before *Roe* in *Reed v. Reed*.[70] In said case, the Supreme Court held an Idaho law, which established "a mandatory preference to males over females"[71] as administrators of wills, to be unconstitutional. Again, it was only two years prior to *Roe* that the Court declared women to be persons under the Equal Protection Clause—persons in the

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[65] Planned Parenthood v. Casey, 505 U.S. 833, 913 (1992) (citing *Roe*, 410 U.S. at 162) (Stevens, J., concurring in part and dissenting in part), which states:

> Commenting on the contingent property interests of the unborn that are generally represented by guardians ad litem, the Court noted: "Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense."

[66] *Roe*, 410 U.S. 113, 156 (1973).

[67] U.S. CONST. amend. XIV, § 1.

[68] Printz v. United States, 521 U.S. 898, 918 (1997).

[69] *Id.* at 905.

[70] Reed v. Reed, 404 U.S. 71 (1971).

[71] *Id.* at 74.

whole sense in other words.[72] Obviously, women had always enjoyed protection of their lives under state and federal law prior to them being considered "persons in the whole sense."

In addition to the word "person," there are any number of words that are not defined in the Constitution, the definition of which might be key to the issue before the Court in any given case. For example, early on in this nation's history the Supreme Court wrestled with the question of whether corporations were citizens under the Constitution and federal laws.[73] In so doing, the Court established principles for the interpretations of undefined words.

The foundational case in this area, establishing corporations as "citizens" for the purpose of establishing diversity jurisdiction, is *Bank of the United States v. Deveaux*,[74] decided by the venerated Chief Justice Marshall. In *Bank of the United States*, Marshall considered the proposition "[t]hat a corporation, composed of citizens of one state, may sue a citizen of another state, in the federal courts."[75] In order for the corporation to qualify for diversity jurisdiction, i.e., "Controversies . . . between Citizens of different States,"[76] the Court had to find that corporations were included in the term "citizen," at least for purposes of the diversity clause.[77]

In making this determination, Marshall examined the very nature of a constitution, and stated: "A constitution, from its nature, deals in generals, not in detail."[78] Marshall also considered the nature of the corporation as an extension of the rights of its members.[79] He also deliberated how the courts, including the United States Supreme Court, have treated cases in which

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[72] *Id.* at 77 ("Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause").

[73] *See* McKinley v. Wheeler, 130 U.S. 630 (1889).

[74] Bank of the United States v. Deveaux, 9 U.S. 61 (1809).

[75] *Id.* at 84-85.

[76] U.S. CONST. art. III, § 2.

[77] *Bank of the United States*, 9 U.S. at 86.

[78] *Id.* at 87:

> The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the law, are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws.
>
> A constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.

[79] *Id.* at 86-87:

> That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the union.

corporations were parties, noting "Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction."[80]

It should be remembered that Chief Justice Marshall was the jurist who authored the opinion promulgating the Supreme Court's role as the definitive interpreter of the Constitution in *Marbury v. Madison*.[81] And here, in *Bank of the United States*, he expressly delves into the question of interpreting terminology contained in the Constitution, and explicitly states that the Court is to look elsewhere than the text of the Constitution, which "from its nature, deals in generals,"[82] and does not contain definitions. Instead, Marshall appeals to prior acts of the Court implicitly touching on the matter (in this instance, accepting jurisdiction on cases with corporations as a party), common sense ("common understanding of intelligent men"[83]), the use and understanding of the term by the state courts ("If a corporation may sue in the courts of the union, the court is of opinion that the averment in this case is sufficient"[84]), and a commonality of agreement of the foregoing ("universal understanding"[85]). Thus, Blackmun's attempt to find a definition of the word "person" from the text of the Constitution was contrary to the historical understanding of the structure of the Constitution, and the jurisprudence of the Court.[86]

Accordingly, Justice Blackmun should have at least made an earnest inquiry into whether the Court's precedence implicitly decided upon the issue of "personhood" of the unborn. If he had, Blackmun would have found that Chief Justice Marshall himself had determined the word "person" encompassed all of humanity. In *United States v. Palmer*, Chief Justice

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[80] *Id.* at 87-88, 92:

> [T]he controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution of the national tribunals.
>
> Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction. Those decisions are not cited as authority; for they were made without considering this particular point; but they have much weight, as they show that this point neither occurred to the bar or the bench; and that the common understanding of intelligent men is in favour of the right of incorporated aliens, or citizens of a different state from the defendant, to sue in the national courts....
>
> If a corporation may sue in the courts of the union, the court is of opinion that the averment in this case is sufficient.

[81] *Marbury v. Madison*, 5 U.S. 137 (1803).

[82] *Bank of the United States*, 9 U.S. at 87.

[83] *Id.* at 88.

[84] *Id.* at 92.

[85] *Id.* at 88.

[86] Printz v. United States, 521 U.S. 898, 905 (1997).

Marshall was examining the use of "person" in a federal statute and found it to be a general word of inclusion, not one of limitation:

> The words of the section are in terms of unlimited extent. The words "any person or persons," are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them. [87]

As Marshall held in *Palmer*, the "unlimited extent" of the word "person" may be limited in its use by the statute per the legislature. Blackmun might then have inquired of the legislative intent of the use of "person" in the Fourteenth Amendment. If he had, he would have discovered that Congressman John Bingham of Ohio, who wrote Section One, likewise held the term "person" to be one of inclusion, not of limitation. Here is what Bingham said in a speech before the House, some nine years before the Fourteenth Amendment was enacted, regarding the similar Due Process Clause of the Fifth Amendment:

> [N]atural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guarantied by the broad and comprehensive word "person," as contradistinguished from the limited term citizen—as in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race, that "no person shall be deprived of life, liberty, or property, but by due process of law; nor shall private property be taken without just compensation." And this guarantee applies to all citizens within the United States.[88]

Likewise, one year after the Fourteenth Amendment was passed, during a debate over a reconstruction measure before the House, Congressman Bingham contrasted the words of limitation in the Magna Charta, "no freeman," with the inclusive language of the Due Process Clause, "no person":

> The gentleman read from the Magna Charta of England, that "*no freeman* shall be taken or disseized," etc., "but by the judgment of his peers and the law of the land;" forgetful of the fact that the words "*no freeman*" were *words of limitation*, and limited this great charter at the time it was adopted to one-half the population of England, and forgetful also that these *words of limitation* were *swept away by the Constitution* of the United States, in which it is declared that "*no person* shall be deprived of life, liberty, or property without due process of law." By that great law of

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[87] United States v. Palmer, 16 U.S. 610, 631 (1818).

[88] CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859). *See infra* note 326, Plyler v. Doe, 457 U.S. 202, 214-15 (1982).

> ours it is not to be inquired whether a man is "free" by the laws of England; it is only to be inquired is he a man, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty. It is not to be inquired, sir, when any man invokes the majesty of American law in defense of his rights, whether a European, an African, or an Asiatic sun looked down upon him when it pleased God to pour the first beam of light upon his understanding. Before that great law the only question to be asked of the creature claiming its protection is this: Is he a man? Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal.[89]

Accordingly, in *Wong Wing v. United States*, Justice Field declared in his separate opinion, "The term 'person,' used in the fifth amendment, is broad enough to include any and every human being within the jurisdiction of the republic."[90] Likewise, it may be asserted that the term "person," as used in the Fourteenth Amendment, is broad enough to include any and every human being within the jurisdiction of the state. The argument that personhood "within the language and meaning of the Fourteenth Amendment" is to be derived from the municipal law of the states is not weakened by the "essential postulate[s]"[91] of the Constitution. Nor is it opposed by the "historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of [the] Supreme Court."[92]

Ergo, following Marshall's example in *Bank of the United States*, Justice Blackmun should have looked to common sense, the decisions of the courts, the contemporaneous debates of Congress, and a commonality of agreement between the aforementioned avenues of inquiry. As for some additional guidance from common sense, meaning the "common understanding of intelligent men," one may ask, what is the normal action for a person to take when trying to discern the nuances of a word? Consulting a dictionary seems a reasonable and normal course of action.

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[89] CONG. GLOBE, 40th Cong., 1st Sess. 542 (1867) (emphasis added). *See* Charles Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES IN LAW & MED. 119, 186 (2007).

[90] Wong Wing v. United States, 163 U.S. 228, 242 (1896) (Field, J., concurring in part and dissenting in part). *See* Plyler v. Doe, 457 U.S. 202, 212 (1982) (footnote omitted), which states:

> In concluding that "all persons within the territory of the United States," including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government, we reasoned from the understanding that the Fourteenth Amendment was designed to afford its protection to all within the boundaries of a State. *Wong Wing*, *supra*, at 238. Our cases applying the Equal Protection Clause reflect the same territorial theme.

[91] Printz v. United States, 521 U.S. 898, 918 (1997).

[92] *Id.* at 905.

III. "Persons" Are the Subject of Legal Rights and Duties.

> In books of the Law, as in other books, and in common speech, "person" is often used as meaning a human being, but the technical legal meaning of a "person" is a subject of legal rights and duties.[93]
>
> – John Chipman Gray

The Supreme Court is not above reaching for a dictionary. In fact, Justice Blackmun did so in *Roe v. Wade*,[94] but if he had consulted *Black's Law Dictionary*, one of the more popular legal dictionaries, he would have found this entry:

> A person is such, not because he is human, but because rights and duties are ascribed to him. The person is the legal subject or substance of which the rights and duties are attributes. An individual human being considered as having such attributes is what lawyers call a *natural* person. Pollock, *First Book of Jurispr.* 110. Gray, *Nature and Sources of Law*, ch. II.[95]

One of the citations given in *Black's Law Dictionary* for its definition of person is *Nature and Sources of Law* by John Chipman Gray (Royal Professor of Law, Harvard University). By way of introduction, and in testimony to the high regard for Professor Gray's book, the Supreme Court used it as a citation in *Erie R. Co. v. Tompkins*[96] to justify its overturning of the "oft-challenged doctrine of *Swift v. Tyson*."[97] In his book, Gray explained that the purpose of government is the protection of "human interests,"[98] largely through the forbearance of wrongful conduct. Rights are essentially the ability to enforce such forbearance, and duties are one's obligations to so forbear wrongful conduct:

> The rights correlative to those duties which the society will enforce of its own motion are the legal rights of that society. The rights correlative to those duties which the society will enforce on the motion of an individual are that individual's legal rights. The acts and forbearances which an organized society will enforce are the legal duties of the persons whose acts and forbearances are enforced.[99]

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[93] J. GRAY, NATURE AND SOURCES OF LAW 27 (2d ed. 1927).
[94] *Roe*, 410 U.S. at 134 n.20, 159, 160 n.59.
[95] BLACK'S LAW DICTIONARY 1300 (4th ed. 1951). *See supra* note 19.
[96] Erie R. Co. v. Tompkins, 304 U.S. 64, 72 n.3 (1938).
[97] *Id.* at 69.
[98] GRAY, *supra* note 93, at 12.
[99] *Id.*

From this fundamental interplay between one person's rights, the duty of other persons to respect those rights, and the power of the state to enforce such duties, Gray derives a definition of what constitutes a legal right: "The full definition of a man's legal right is this: That power which he has to make a person or persons do or refrain from doing a certain act or certain acts, so far as the power arises from society imposing a legal duty upon a person or persons."[100]

Here, Professor Gray comes to an important facet of rights: the person seeking to enforce his right must seek to exercise his rights in a court of law. This involves an act of the will on the part of the party enforcing his right: "[I]n order that a legal right be exercised, a will is necessary, and, therefore, so far as the exercise of legal rights is concerned, a person must have a will." However, "[s]ome human beings have no will; such as newborn babies and idiots. Perhaps it is not correct to say that they are absolutely without wills, but their potentiality of will is so limited that it may be neglected. Yet, though without wills, newborn babies and idiots have rights."[101]

Gray goes on to note that in the case of infants, which have a legal disability, a next friend, or a guardian "exercises his will and brings a suit in the name and behalf of the infant. The will of the guardian is *attributed* to the infant. It is not the guardian, but the infant, who is the subject of the right—the legal person. We usually say this attribution is a fiction."[102]

Gray observes that this is a use of a "dogmatic fiction," "to be praised when skillfully and wisely used," in attributing the will of the person under a disability to their next friend/guardian. Moreover, this attribution of the will is necessary when an individual's will is truly absent, as in the case of "a newborn child or of an idiot."[103] But, what about unborn children? In that regard, Gray engages in this discussion:

> Included in human beings, normal and abnormal, as legal persons, are all living beings having a human form. But they must be *living* beings; corpses have no legal rights. Has a child begotten, but not born, rights? There is no difficulty in giving them to it. A child, five minutes before it is born, has as much a real will as a child five minutes after it is born; that is, none at all. It is easy to attribute the will of a guardian, tutor, or curator to one as to the other. Whether this attribution should be allowed, or whether the embryo should be denied the exercise of legal rights, is a matter which each legal system must settle for itself. In neither the Roman nor the Common Law can a child in the womb exercise any legal rights.
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> But putting an end to the life of an unborn child is generally in this country an offence by statute against the State; and in our Law a child once

[100] *Id.* at 18.
[101] *Id.* at 27-29.
[102] *Id.* at 29-30 (emphasis in the original).
[103] *Id.* at 38.

> born is considered for many purposes as having been alive from the time it was begotten.[104]

The court in *Byrn v. New York City Health & Hospitals Corp.*,[105] a case cited by Justice Blackmun[106] as a case denying the personhood of the unborn, ended their citing of Gray at this point. By doing so, they ignored this key sentence: "Whether this attribution should be allowed, or whether the embryo should be denied the exercise of legal rights, is a matter which each legal system must settle for itself." This is especially so in the United States in which there is no general common law, but rather a federal system of government in which each state is sovereign and was always understood to retain the power to adapt the common law of England as it saw fit.[107] Accordingly, inquiries into the received common law, ought to focus on the common law as adapted by the several states,[108] not the common law of

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[104] GRAY, *supra* note 93, at 37-39 (emphasis in the original).

[105] Byrn v. New York City Health & Hospitals Corp., 286 N.E. 2d 887, 889 (1972).

[106] *Roe*, 410 U.S. at 158.

[107] Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658-59 (1834):

> It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.
>
> When, therefore, a common law right is asserted, we must look to the state in which the controversy originated. And in the case under consideration, as the copyright was entered in the clerk's office of the district court of Pennsylvania, for the first volume of the book in controversy, and it was published in that state; we may inquire, whether the common law, as to copyrights, if any existed, was adopted in Pennsylvania.
>
> It is insisted, that our ancestors, when they migrated to this country, brought with them the English common law, as a part of their heritage.
>
> That this was the case, to a limited extent, is admitted. No one will contend, that the common law, as it existed in England, has ever been in force in all its provisions, in any state in this union. It was adopted, so far only as its principles were suited to the condition of the colonies: and from this circumstance we see, what is common law in one state, is not so considered in another. The judicial decisions, the usages and customs of the respective states, must determine, how far the common law has been introduced and sanctioned in each.

[108] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 65-68 (1996) (Justice Souter, with whom Justice Ginsburg and Justice Breyer joined, dissenting), which states:

> Virtually every state reception provision, be it constitutional or statutory, explicitly provided that the common law was subject to alteration by statute. *See* Wood 299-300; Jones 99. The New Jersey Constitution of 1776, for instance, provided that 'the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law . . . .' N.J. Const., Art. XXII (1776), *in* 6 W. Swindler, Sources and Documents of United States Constitutions 452 (1976). Just as the early state governments did not leave reception of the common law to implication, then, neither did they receive it as law immune to legislative alteration."); Fisher v. Haldeman, 61 U.S. (20 How.) 186, 194 (1857) (In a suit regarding title to an island in the Susquehanna River, the Court noted, "By the common law, fresh-water rivers do not come within the category of navigable rivers, and the riparian owners had a right to all the islands in the river, '*ad medium filum aquae*.' But such has never been the law in Pennsylvania."); Rundle v. Delaware and Raritan Canal Co., 55 U.S. (14 How.) 80, 91, 93 (1852) (In a suit

England, as Blackmun maintained in *Roe*.[109] And so, it is of critical importance that Professor Gray proceeded to describe the development of unborn persons' common-law rights during colonial times:

> The history of the development of the Common Law on this subject is curious. Originally, a child does not seem to have been considered for any purpose as living before his birth. The House of Lords, at the end of the seventeenth century, misunderstanding the existing law, and to the great disgust of the Judges, allowed a child who was begotten but not born at the end of a life estate to take the property as if he had been born at that date. Then the doctrine was extended to cover all cases where it was for the benefit of the child to be considered as having been born. Is the doctrine to be extended to cases where such extension benefits, not the child, but others? It is well settled that it does so extend in cases arising under the Rule against Perpetuities; whether it should be extended to other cases is yet *sub judice*.[110]

What Professor Gray stated is that the common law, by the end of the seventeenth century, attributed property rights to unborn children, and that "the doctrine was extended to cover all cases where it was for the benefit of the child to be considered as having been born."[111] That is to say, the common law treated the unborn as persons by the end of the seventeenth century, prior to the promulgation of our Constitution; this was the status of the common law received by the states.

According to Professor Gray, the Rule against Perpetuities in particular treated an unborn child as in being; as he stated in another important treatise, titled *The Rule Against Perpetuities*, "[T]he rule seems, in the absence of statute, to be always adopted throughout the United States in its modern English form."[112] As has been shown, in one of the earliest cases in the Supreme Court series, *Lessee Ashton v. Ashton*, the Supreme Court of Pennsylvania upheld the property rights of a posthumous child as not being too remote.[113]

> between a riparian owner in Pennsylvania and a New Jersey defendant, the Court held that Pennsylvania case law "must be treated as binding precedents in this court," even though such case law "differ[ed] materially from that of England.

See also, Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 144 (1829) ("The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.").

[109] *Roe*, 410 U.S. at 138 ("In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law.").

[110] GRAY, *supra* note 93, at 39 n.2.

[111] *Id.*

[112] J. GRAY, THE RULE AGAINST PERPETUITIES § 200 (4th ed.) (footnote omitted).

[113] Lessee Ashton v. Ashton, 1 U.S. (1 Dall.) 4 (1760).

In Volume I of Blackstone's *Commentaries*, written a few decades before our Constitution was written, Blackstone agrees with Gray's admission of the rights accorded unborn persons:

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in the contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor. An infant *en ventre sa mere*,[114] or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.[115]

In the foregoing quote, Blackstone elaborates on matters of inheritance, guardianship, and the like, pertaining to the unborn child to demonstrate that unborn children are persons with absolute rights under the common law from the moment of conception. The rights under property law began at conception, thus, so did personhood under the common law.

The Court's unhistorical notion in *Planned Parenthood v. Casey*, 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"[116] (the "sweet-mystery-of-life passage" as Justice Scalia tagged it),[117] is a far cry from Professor Gray's assessment that "Human society is organized for the protection and advancement of human interests."[118] To whit, Gray's

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[114] S. GIFIS, BARRON'S LAW DICTIONARY 156 (2d. ed. 1984) ("EN VENTRE SA MERE, in gestation; in the womb of one's mother. 100 N.W.2d 445, 447. In the law of property, a person who is *en ventre sa mere* has the same rights as, and is entitled to the same protections as, a person who has been born. POWELL, REAL PROPERTY § 796(3).").

[115] 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 125-26 (1st ed., University of Chicago Press facsimile 1979) [hereinafter "COMMENTARIES (1st ed.)"].

[116] *Planned Parenthood*, 505 U.S. at 851.

[117] Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (emphasis in original):

> And if the Court is referring not to the holding of *Casey*, but to the dictum of its famed sweet-mystery-of-life passage, *ante*, at 13 ("'At 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'"): That "casts some doubt" upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. I have never heard of a law that attempted to restrict one's "right to define" certain concepts; and if the passage calls into question the government's power to regulate *actions based on* one's self-defined "concept of existence, etc.," it is the passage that ate the rule of law.

[118] GRAY, *supra* note 93, at 12.

conception has internal logic from which he could derive an ascertainable standard, "The full definition of a man's legal right is this: That power which he has to make a person or persons do or refrain from doing a certain act or certain acts, so far as the power arises from society imposing a legal duty upon a person or persons." In the next section it will be shown that our legal history validates Professor Gray's understanding of jurisprudence rather than the Court's depiction in *Casey*.

IV. The Purpose of Society is to Protect the Rights of Persons.

> For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities.[119]
>
> – William Blackstone

It is no coincidence that Professor Gray's notions of the purpose of society comport with those of William Blackstone:

> Now the rights of persons that are commanded to be observed by the municipal law are of two sorts; first, such as are due *from* every citizen, which are usually called civil *duties*; and, secondly, such as belong to him, which is the more popular acceptation of *rights* or *jura* ….
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> By the absolute *rights* of individuals we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it….
>
> For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals….
>
> The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at

[119] 1 COMMENTARIES 120 (1st ed.).

> his creation, when he endued him with the faculty of freewill. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish.[120]

It should not escape notice that Justice Blackmun himself affirmed that Blackstone's "vision of liberty unquestionably informed the Framers of the Bill of Rights."[121] Similarly, the Supreme Court itself has affirmed this general notion of our legal society in *Munn v. State of Illinois*.[122] In that opinion, Chief Justice Waite first noted the American form of government was a change in the form of government from Great Britain, "but not the substance."[123]

As expressed by Chief Justice Waite, government is a social compact which dutifully binds each citizen to observe "laws for the common good."[124] Thereby, government is given the inherent power to establish "laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another."[125] From this it necessarily follows that a person who suffers an injury by another can seek recourse in the courts under the laws established. Likewise, this right of a person to seek redress in the courts becomes a duty of the government to facilitate this process, and thereby provide a just protection of the injured party's rights. These sentiments, in addition to being inherent in every case at law, were also held by Chief Justice Marshall in *Marbury v. Madison*,[126] the case which stands

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[120] *Id.* at 119-21 (emphasis in the original).

[121] O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 803 n.11 (1980) (concurring opinion) (citing 1 W. BLACKSTONE, COMMENTARIES *129) ("Blackstone, whose vision of liberty unquestionably informed the Framers of the Bill of Rights, . . . wrote that '[t]he right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.'").

[122] Munn v. State of Illinois, 94 U.S. 113 (1876).

[123] *Id.* at 124, which states:

> When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

[124] *Id.*

[125] *Id.*

[126] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

as the very cornerstone of Supreme Court jurisprudence. In *Marbury*, Marshall had this to say about "civil liberty":

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[127]

Marshall's concept of government was also expressed by one of his predecessors on the Court, James Wilson. Wilson is one of the six original justices appointed to the Supreme Court by President Washington. He had the distinction of being a signer of both the Declaration of Independence and the Constitution, the latter of which he played an important role in drafting. Wilson was also a professor of law in the College of Philadelphia (which merged into the University of Pennsylvania), at which he "delivered a series of lectures that are landmarks in the evolution of American jurisprudence."[128] Wilson's lectures are littered with citations to Blackstone's *Commentaries*, and, accordingly, his conception of government also comports with Blackstone's:

> Government, in my humble opinion, should be formed to secure and to enlarge the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind.[129]

In this vein, perhaps the Court in *Jacobson v. Massachusetts* gave its most explicit denouncement of *Casey's* existential "sweet-mystery-of-life" notion that "liberty" is some sort of individualistic, subjective exercise.[130] In *Jacobson*, the Court upheld Massachusetts' exercise of its state police power to require its residents to submit to smallpox vaccinations. The Court rejected the plaintiff in error's argument that his liberty was unconstitutionally invaded when the state subjected "him to fine or imprisonment for neglecting or refusing to submit to vaccination."[131] Justice Harlan, the author of the *Jacobson* opinion, wrote:

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[127] *Id.* at 163.

[128] 12 ENCYCLOPAEDIA BRITANNICA 690 (15th ed.).

[129] 2 WORKS OF JAMES WILSON (B. Wilson ed., 1804), *available at* http://www.constitution.org/jwilson/jwilson.htm (last visited Sept. 13, 2007).

[130] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[131] *Id.* at 26.

> But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.... Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.... In *Crowley v. Christensen*... we said: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law."[132]

The Court in *Casey* upheld *Roe's* holding on abortion because (during the 19 years since it was decided) it had become a precedent.[133] Yet, *Casey's* "sweet-mystery-of-life passage" stands in direct opposition to William Blackstone's,[134] Justice Wilson's,[135] Chief Justice Marshall's,[136] Chief Justice Waite's,[137] Justice Harlan's,[138] Justice Field's,[139] and Professor John Chipman Gray's[140] expressed understanding of civil liberty; not to mention the implicit

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[132] *Id.* at 26-27.

[133] 505 U.S. at 854-69.

[134] 1 COMMENTARIES 121 (1st ed.) ("But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish.").

[135] WILSON, *supra* note 129 ("In these general relations, his rights are, to be free from injury, and to receive the fulfilment of the engagements, which are made to him: his duties are, to do no injury, and to fulfil the engagements, which he has made.").

[136] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

[137] Munn v. State of Illinois, 94 U.S. 113, 124-25 (1876) states:

> When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain.... Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good.

[138] Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) ("Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.").

[139] Crowley v. Christensen, 137 U.S. 86, 89-90 (1890) ("Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to be equal enjoyment of the same right by others. It is then liberty regulated by law.").

[140] GRAY, NATURE AND SOURCES OF LAW, *supra* note 93, at 18 ("The full definition of a man's legal right is this: That power which he has to make a person or persons do or refrain

understanding of civil liberty in the whole of American jurisprudence—"it is the passage that ate the rule of law."[141] No doubt, this existentialist sound-bite "calls into question the government's power to regulate *actions*" if laws are voidable "*on* one's self-defined 'concept of existence.'"[142] But for the "sweet-mystery-of-life passage," it would be absurd to argue that persons can define their existence as being free from the duties prescribed in constitutional, criminal, and tort law. Can a defendant for murder claim his "concept . . . of the universe" makes him some sort of legal titan who may kill others at will? Justice James Wilson would have had none of this; in affirmation of rights accruing to the unborn, he wrote:

> With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger.[143]

Ultimately, the "sweet-mystery-of-life passage" is self refuting—if liberty under our Constitution grants one freedom from all government restraint based on the individual's totally subjective opinion of right and wrong, then, necessarily, the liberty to define away anything propounded by the Supreme Court is included. Thereby, the historic social compact our Founding Fathers entered into, our Constitution, is exchanged for an illusory contract. The Court has forgotten Justice James Wilson's instruction that there are *two* pillars upon which our criminal and civil law rests, rights *and duties*, "To each class of rights, a class of *duties* is correspondent."[144]

By the holdings in *Marbury v. Madison*, *Munn v. State of Illinois*, and *Jacobson v. Massachusetts*, it is demonstrated that our government was understood as having the power to regulate "the conduct of its citizens one towards another,"[145] such that the vested rights of persons are accorded the corresponding legal duties of other persons; in essence, "liberty regulated by law."[146] Accordingly, persons in our society give up that portion of liberty by which the government may enforce his duty to respect and observe another

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from doing a certain act or certain acts, so far as the power arises from society imposing a legal duty upon a person or persons.").

[141] Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting). *See* Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES IN LAW & MED. 119, 154-71 (2007), wherein the Court's departure from the "rule of law" is asserted to be "rule by law."

[142] *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting).

[143] WILSON, *supra* note 129 (citing 1 COMMENTARIES 129 (1st ed.).

[144] *Id.* (emphasis added).

[145] Munn v. State of Illinois, 94 U.S. 113, 124-25 (1876).

[146] Crowley v. Christensen, 137 U.S. 86, 90 (1890).

person's rights. This is in full accord with the Preamble of our Constitution and is an implementation of it. As such, the "historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of [the] Court"[147] will be examined with regards to the property rights of unborn children, beyond those observed in *Lessee Ashton v. Ashton*.

V. The Authorities Cited by the *Roe* Court Affirm the Property Rights of Unborn Persons.

> Let us see what the nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian. . . . Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of other persons.[148]
>
> – Justice Sir Francis Buller

In his *Roe* opinion, Justice Blackmun disingenuously dismissed the property rights of unborn children as being only contingent in nature and because the "[p]erfection of the interests involved . . . has generally been contingent upon live birth [. . .] the unborn have never been recognized in the law as persons in the whole sense."[149] And, in *Casey*, Justice Stevens quoted Justice Blackmun without qualification on this important point.[150]

Yet, in *Roe*, to support this speculation, Justice Blackmun cited three articles in footnote 66: "Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 UCLA L. Rev. 233, 235-38 (1969); Note, 56 Iowa L. Rev. 994, 999-1000 (1971); Note, *The Law and the Unborn Child*, 46 Notre Dame Law. 349, 351-54 (1971)." A cursory examination of these articles reveals that they not only do not support Blackmun's contention but refute it.

In the *UCLA Law Review*, David W. Louisell, Elizabeth Josselyn Boalt Professor of Law, University of California, Berkeley, wrote:

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[147] Printz v. United States, 521 U.S. 898, 905 (1997).

[148] Thellusson v. Woodford, 4 Ves. 227, 322-23, 31 Eng. Rep. 117, 163-64 (1798).

[149] *Roe*, 410 U.S. at 162.

[150] Planned Parenthood v. Casey, 505 U.S. 833, 913 (1992) (Stevens, J., concurring in part and dissenting in part), which states:

> Commenting on the contingent property interests of the unborn that are generally represented by guardians ad litem, the Court noted: Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

> The common law's recognition of the unborn child as a human person for property law purposes appears to reflect a basic psychological evaluation that in law, as in ordinary thought, "child" includes the conceived child but as yet born. Apparently the civil law and its terminology reflect the same normative use of language.[151]

Justice Blackmun's claim that "Perfection of the interests involved, again, has generally been contingent upon live birth" does not square with Louisell's conclusion that, "[I]n law, as in ordinary thought, 'child' includes the conceived child but as yet born."[152]

Next, consider this paragraph from the cited note appearing in the *Iowa Law Review*:

> It seems clear, therefore, that *the law of property has recognized for centuries that the unborn child is a person from the moment of conception*. It would appear that the Constitution, which also evidences a considerable interest in protecting property rights, should be interpreted to reflect at least as great a concern for protecting the interest of the unborn child to continued life. Such an interpretation would also appear to bring a certain consistency to the Constitution itself, since to deprive the unborn child of life implicitly sacrifices his rights and interests in property.[153]

"[T]he law of property has recognized for centuries that the unborn child is a person from the moment of conception"![154] Could the jurist's conclusions and the explicit opinions contained in his cited material be more diametrically opposed? Perhaps not, but sadly this is quite typical of the *Roe* opinion.[155]

And, William J. Maledon, in his article in *Notre Dame Lawyer*, declared, "It seems clear, therefore, that the law of property recognizes the rights of the unborn child from the moment of conception for all purposes which affect the property rights of that child."[156] Maledon supports this statement with numerous case citations. These cases held as follows: (1) a

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[151] Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233, 238 (1969).

[152] *Id.*

[153] Note, *The Unborn Child and the Constitutional Conception of Life*, 56 IOWA L. REV. 994, 1000 (1971) (emphasis added).

[154] *Id.*

[155] *See* Roden, Roe v. Wade *and the Common Law: Denying the Blessings of Liberty to our Posterity,* 35 UWLA L. REV. 212 (2003); Roden, *Prenatal Tort Law and the Personhood of the Unborn Child: A Separate Legal Existence*, 16 ST. THOMAS L. REV. 207 (2003).

[156] Note, *The Law and the Unborn Child*, 46 NOTRE DAME LAW. 349, 354 (1971) (authored by William J. Maledon).

child *en ventre sa mere* is within a bequest description of "children living"[157]; (2) an unborn child, in addition to inheriting "all manner of estates,"[158] may "take remainders, whether vested or contingent, as though living"[159]; (3) an "unborn child may be an actual income recipient prior to the time of his birth"[160]; (4) an unborn child may be "a tenant in common with his own mother"[161]; and (5) an unborn child "is considered an existing person at the time of his father's death and is thereby a beneficiary entitled to participate in any damages recovered in an action for the wrongful death of his father."[162]

Maledon's case citations, supporting his assertion that "the law of property recognizes the rights of the unborn child from the moment of conception,"[163] are irreconcilable with Blackmun's "contingent upon live birth"[164] averment. Why Blackmun cited these articles that explicitly refuted his assertion is a mystery, that is, unless his intent was to deceive the casual reader.

Regardless of any alleged supporting citations, Justice Blackmun's statement, "Perfection of the interests involved, again, has generally been contingent upon live birth," has no basis in our legal history. All attorneys, and even the larger part of our educated laity,[165] know that persons under the age of majority, "infants," are under various legal disabilities,[166] which can delay the enforcement of property rights until adulthood.[167] Perfection, in the sense of a person being capable *sui juris* of possessing and enforcing his interest in land, was contingent on attaining adulthood under the common law.[168]

Likewise, as Professor Gray stated:

> But, further, there are certain human beings who are not destitute of natural wills, but to whom the Law, for one reason or another, denies what

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[157] *Id.* at 352 (citing Hall v. Hancock, 32 Mass. (15 Pick.) 225, 257-58 (1834), and citing a number of other cases in accord with this holding).

[158] *Id.* (citing Aubuchon v. Bender, 44 Mo. 560, 568 (1869)).

[159] *Id.*

[160] *Id.* at 354 (citing Industrial Trust Co. v. Wilson, 61 R.I. 169, 200 A. 497 (1938)).

[161] *Id.* (citing Biggs v. McCarty, 86 Ind. 352 (1882)).

[162] *Id.* (citing Herndon v. St. Louis & S.F. R. Co., 37 Okla. 256, 128 P. 727 (1912)).

[163] *Id.*

[164] *Roe*, 410 U.S. at 161.

[165] *See, e.g.*, Age of Majority, http://en.wikipedia.org/wiki/Age_of_majority (last visited Feb. 4, 2008).

[166] *See* Robb v. Vos, 155 U.S. 13, 40-41 (1894).

[167] *See* King v. Mullins, 171 U.S. 404, 419 (1898); Stewart v. Keyes, 295 U.S. 403, 408 (1935).

[168] "Minors' estates. Property of those who have not reached their legal majority and which must be administered after their death or during their lives under a court appointed fiduciary." BLACK'S LAW DICTIONARY 900 (5th ed. 1979).

> may be called a legal will; that is, the Law says their natural wills are inoperative for the exercise of certain classes of rights.[169]

Then Professor Gray goes into an example of "a young man of nineteen" whose suit for property damages suffered to his house would be denied under the common law as he had not attained the age of majority.[170]

The Rule Against Perpetuities illustrates that the common law treated the legal status of born and unborn children in much the same way; the Court recited the rule in *McArthur v. Scott*:

> To come within the rule of the common law against perpetuities, the estate, legal or equitable, granted or devised, must be on which, according to the terms of the grant or devise, is to vest upon the happening of a contingency which may by possibility not take place within a life or lives in being (treating a *child in its mother's womb* as *in being*) and twenty-one years afterwards.[171]

The time period of twenty-one years is not an arbitrary time period. The twenty-one years is to allow a posthumous child to come to the age of majority, at which time he may "perfect" his property rights. As stated in Professor John Gray's other authoritative[172] book, *The Rule Against Perpetuities*:

> And in *Thellusson v. Woodford*, Lord Alvanley, M. R., said that the period of twenty-one years had never "been considered as a term, that may at all events be added to such executory devise or trust. I have only found this *dictum*; that estates may be unalienable for lives in being and twenty-one years, merely because a life may be an infant, or *en ventre sa mere*." And Macdonald, C. B., in delivering the opinion of the judges in the House of Lords, said: "The established length of time, during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of such posthumous child."[173]

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[169] GRAY, NATURE AND SOURCES OF LAW, *supra* note 93, at 29.

[170] *Id.* at 29-30.

[171] McArthur v. Scott, 113 U.S. 340, 381-82 (1884) (emphasis added).

[172] *See, e.g.*, Graves v. Schmidlapp, 315 U.S. 657, 660 (1942); Erie R. Co. v. Tompkins, 304 U.S. 64, 72 n.3 (1938); Shukert v. Allen, 273 U.S. 545, 547 (1927); Henry v. U. S., 251 U.S. 393, 395 (1920); Fitchie v. Brown, 211 U.S. 321, 333 (1908); BLACK'S LAW DICTIONARY 1300 (4th ed. 1951).; J. CRIBBET & C. JOHNSON, CASES AND MATERIALS ON PROPERTY 332-33 (5th ed. 1984); http://www.socialaw.com/bicentennial/cgray.htm (last visited Oct. 20, 2008) ("John Chipman Gray 'wrote the book' on the ever-perplexing Rule Against Perpetuities. Oliver Wendell Holmes, Jr., called Gray 'a scholar born' and noted 'His treatise on Perpetuities is a quiet masterpiece that stands on an equal footing with the most famous works of the great English writers upon property law.'").

[173] GRAY, THE RULE AGAINST PERPETUITIES, *supra* note 112, at § 183 (footnote omitted).

Even after attaining the age of majority, there are any number of things that might preclude the perfection of title. Perhaps that is why "perfect" (or any variation of the word) is not mentioned in any of the articles Blackmun cited. "Perfect" when used as a verb is a term that has more to do with the judicial enforcement of a property right[174] or, when used as a noun, to indicate a right in property that ought to be free from effective judicial attack,[175] rather than the nature of the right itself. The important point here is that there is little difference in the law between an infant born and an infant unborn, they are both under the disability of minority. Surely, one cannot use this same logic to establish a constitutional right of a parent to snuff out the life of a child or teenager.

Historically, the focus in property law, as it relates to constitutional rights, is not on "perfection," but rather "vesting."[176] Still, there seemed to be some distinction on case law for the treatment of property rights of the unborn. As David W. Louisell stated:

> The requirement, stated in certain cases, that the courts recognize pre-natal existence only for the benefit of a child subsequently born alive, has been suggested by some to indicate that the courts have merely

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[174] Woodward v. Commissioner, 397 U.S. 572, 576 (1970) ("The courts, not believing that Congress meant all litigation expenses to be capitalized, have created the rule that such expenses are capital in nature only where the taxpayer's 'primary purpose' in incurring them is to defend or *perfect* title.") (emphasis added); Wells v. Bodkin, 267 U.S. 474, 478 (1925) ("The only objection to the inheritance was that under the homestead laws an entryman can not *perfect* title to two homesteads. If he chooses to relinquish one, it removes objection to his *perfecting* the other, certainly when he does this under the permission granted him by the Secretary of the Interior.") (emphasis added).

[175] *See* Wood v. Lovett, 313 U.S. 362, 385 (1941) (Black, J., dissenting) ("And in this connection it is not to be forgotten that appellants could have obtained a *perfect* title by openly and adversely holding possession of the land for two years-a privilege which the state courts finally and authoritatively found had not been exercised.") (emphasis added); Stewart v. Keyes, 295 U.S. 403, 417 (1935); Benedict v. Ratner, 268 U.S. 353, 358, 365 (1925).

> We are of opinion that so much of the section as purports to free from any bar of the statutes of limitation a cause of action such as is here presented, notwithstanding the full period of limitation had run prior to the act's approval, falls nothing short of an attempt arbitrarily to take property from one having a *perfect* title and to subject it to an extinguished claim of another.
>
> As respects suits to recover real or personal property where the right of action has been barred by a statute of limitations and a later act has attempted to repeal or remove the bar after it became complete, the rule sustained by reason and preponderant authority is that the removing act cannot be given effect consistently with constitutional provisions forbidding a deprivation of property without due process of law. "The reason is," as this court has said, "that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become *vested* in him, and to give the act the effect of transferring this title ... would be to deprive him of his property without due process of law."

Stewart v. Keyes, 295 U.S. at 417 (footnotes omitted) (emphasis added).

[176] McArthur v. Scott, 113 U.S. 340 (1884); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

> developed a rule of construction and that these cases are no authority on the question of whether or not the unborn child does, in fact, have any legal rights.[177]

Louisell continued, providing this answer to the offered objection:

> But when a lawsuit is commenced on behalf of an unborn child on the theory that property rights accrued to him while he is still in gestation, almost inevitably that child will have proceeded to term and been successfully born. . . . Under such circumstances it is understandable, but really gratuitous and superfluous, for the court to observe that the child must have been born alive. The observation is only dictum; it does not necessarily require a different result in those cases where the observation is inappropriate.[178]

More importantly, Louisell also gave examples of rights enforced for the child in the womb, proving beyond any doubt that the unborn are recognized as accruing rights in the womb—rights not "contingent upon live birth":

> The unborn child can also take, under a will, as a tenant in common with its own mother.[179] It can have a sale of land set aside where the sale involves descendant land a portion of which is held to vest in the unborn child prior to its birth.[180]
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> The suggestion that the unborn child is a legal non-entity was clearly rejected in *Industrial Trust Co. v. Wilson*.[181]Here the court held that a

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[177] Louisell, *supra* note 151, at 236.

[178] *Id.* at 236-37.

[179] *Id.* at 236 n.15 (citing Biggs v. McCarty, 86 Ind. 352 (1882)). Biggs v. McCarty, 1882 WL 6473, *7 (Ind.) states:

> Upon these facts we think it fair to infer that the testator died after the quickening of the second child, and at a time when it was legally capable of taking the estate jointly, or as a tenant in common, with its mother Angeline; that consequently, upon the testator's death, by the plain terms of the devise, the land in controversy vested in the devisee Angeline and the child with which she was then pregnant as tenants in common. Hannan v. Osborn, [4 Paige, 336]; Shotts v. Poe, 47 Md. 513; Viner v. Francis, 2 Cox, 190; Benson v. Wright, 4 Md. Ch. Dec. 278.

[180] Louisell, *supra* note 151, at 236 n.16 (quoting Deal v. Sexton, 144 N.C. 110-11, 56 S.E. 691, 692 (1907)), which states:

> The court recognized that constitutional rights of the unborn child are at stake when it stated: "If we hold, as we must, that the inheritance vested immediately in the plaintiff, while *en ventre sa mere*, upon the death of the father, the conclusion must follow that such inheritance ought not to be divested.... [A] person must have an opportunity of being heard before a court can deprive him of his rights, and ... an unborn child, not having been made a party, can recover from those claiming his title."

[181] Louisell, *supra* note 151, at 236 n.17, quoting Industrial Trust Co. v. Wilson, 200 A. 467, 475-76 (1938), which states:

> The only question remaining to be answered is whether or not Roswell's posthumous child, Melba, is to be considered a surviving child and therefore entitled to share equally with her brothers and sister in said income from the date of the death of Roswell. We know of no good reason in law why she should not. The law appears to be well settled that, if it is for its

posthumous child was to begin sharing in the proceeds of a trust at the date of her father's death rather than upon the date of her subsequent birth. Thus, the child was an actual income recipient prior to the event of her birth.

The state of the law in American courts is fairly well summed up in the case of *In re Holthausen's Will*,[182] where a New York court states that: "It has been the uniform and unvarying decision of all common law courts in respect of estate matters for at least the past two hundred years that a child *en ventre sa mere* is 'born' and 'alive' for all purposes for his benefit."[183] ....

Provision for the appointment of a general curator to the person or property of a child conceived but not yet born, to act for him until his birth and thereafter to render an accounting, seems to bespeak the same regard

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benefit, a child begotten but not actually born is treated as in being. Doe v. Clarke, 2 H.Bl. 399; Hall v. Hancock, 15 Pick., 32 Mass., 255, 26 Am.Dec. 598; McLain v. Howald, 120 Mich 274, 79 N.W. 182, 77 Am.St.Rep. 597; 2 SIMES, LAW OF FUTURE INTERESTS, § 388.

There is, however, a question as to whether such a child comes into the legal enjoyment of such benefit from the death of its father or at the time of its birth. In England it has been held that it is at the latter date. Rawlins v. Rawlins, 2 Cox 425, 30 Eng.Rep. 196. But the court, in an exceedingly brief opinion, gives no reason for such a holding and cites no prior authority to support it. We are disinclined to follow that case under such circumstances, and especially since, in the instant case, there appears to be no sound reason for treating Melba differently in this matter from her brothers, Caldwell and Byron, and her sister, Elizabeth Colt Wilson.

[182] Louisell, *supra* note 151, at 236 n.18 (citing *In re* Holthausen's Will, 175 Misc. 1022, 26 N.Y.S.2d at 140 (Sur. Ct. 1941)).

[183] *Id.* at 236 n.19, quoting *In re* Holthausen's Will, 175 Misc. 1022, 1024-26, 26 N.Y.S.2d 140, 143, 145 (1941), which states:

> It has been the uniform and unvarying decision of all common law courts in respect of estate matters for at least the past two hundred years that a child *en ventre sa mere* is "born" and "alive" for all purposes for his benefit. In Wallis v. Hodson, 2 Atkyns 115, 118, 26 Eng. Reprint 472, decided on January 22, 1740, Lord Chancellor Hardwicke said "Nothing is more clear, than that this law considered a child in the mother's womb absolutely born, to all intents and purposes, for the child's benefit."
>
> Identical conceptions are found in many other English cases and in the early decisions in this State. Trower v. Butts, 1 Sim. & St. 181, 184, 57 Eng.Reprint, 72: Doe v. Clarke, 2 H.Bl. 399, 400, 126 Eng.Reprint, 617; Stedfast ex dem. Nicoll v. Nicoll, 3 Johns.Cas. 18, 24; Marsellis v. Thalhimer, 2 Paige Ch. 35, 39, 21 Am.Dec. 66.
>
> Every recent decision in this state relating to estate matters in which the issue has been determined has held that such a child is "living" within the connotation of wills and statutes. Quinlan v. Welch, 69 Hun 584, 585, 23 N.Y.S. 963, affirmed 141 N.Y. 158, 36 N.E. 12; Cooper v. Heatherton, 65 App.Div. 561, 566, 73 N.Y.S. 14; Matter of Voight, 178 App.Div. 751, 756, 164 N.Y.S. 738, 1117; Matter of McEwan's Will, 202 App.Div. 50, 53, 195 N.Y.S. 460; Matter of Wells' Will, 129 Misc. 447, 452, 221 N.Y.S. 714; Matter of Abbe's Estate, 138 Misc. 210, 212, 245 N.Y.S. 291; Matter of Wall's Estate, 138 Misc. 213, 214, 245 N.Y.S. 310; Matter of Levy's Estate, 138 Misc. 670, 671, 245 N.Y.S. 710; Matter of Gebhardt's Estate, 139 Misc. 775, 776, 249 N.Y.S. 286; Matter of Wolf's Estate, 140 Misc. 595, 596, 251 N.Y.S. 552; Matter of Crespi's Estate, 158 Misc. 383, 387, 285 N.Y.S. 780; Matter of Lesser's Estate, 158 Misc. 895, 899, 287 N.Y.S. 209. ....
>
> Since, therefore, on the present record, it must be determined that the petitioner was begotten prior to the death of the original testator, such a person is deemed to be "alive" and "in being" for all purposes of estate law.

> for the unborn as for the born infant.[184] An unborn child can have an action brought by a guardian appointed for the purpose to have the father compelled to support the child prior to its birth.[185] A court may also order the appointment of a special guardian as a procedural device to effectuate its decree for the administration, over religious objection, of medically necessary blood transfusions to save a pregnant woman's life or that of her unborn child.[186] The court, admitting that it is a difficult question as to whether an adult may be compelled to submit to blood transfusions, had no difficulty in ordering the transfusion here because it was "satisfied that the unborn child is entitled to the law's protection" when a transfusion is necessary to save its life.[187]

Before moving on, some note should be taken of the case in which blood transfusions were ordered for the benefit of the unborn child, the 1964 case *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*.[188] It is significant that the Supreme Court declined to review the case on appeal![189] In this case, the New Jersey Supreme Court decided that "the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother," if necessary to save her life and her unborn child's life, despite the mother's religious objections to receiving blood transfusions. The New Jersey Supreme Court stated, "We have no difficulty in so deciding with respect to the infant child."[190]

Additionally, Justice Blackmun's statement, "Perfection of the interests involved, again, has generally been contingent upon live birth"[191] is particularly unworkable when compared to many other contexts in which persons hold property rights. For example, if only the holding of perfected interests can qualify one as a person, then the constitutional status of our nation's mortgaged populace would be problematic, if perfection means holding title

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[184] Louisell, *supra* note 151, at 243 n.59 (citing QUEBEC CIVIL CODE, arts. 337-38, 345 (1967); and Montreal Tramways v. Leveille, [1933 4 D.L.R. 337, 341 (Sup. Ct. Can. 1933)).

[185] Louisell, *supra* note 151, at 244 n.60, which states:

> Kyne v. Kyne, 38 Cal. App. 2d 122, 100 P.2d 806 (1940); Metzger v. People, 98 Colo. 133, 53 P.2d 1189 (1936). CAL. CIV. CODE § 29 (West 1954) provides that a child conceived but not born is to be deemed an existing person for the protection of its interests. The Kyne court read this section together with § 196a of the same code and held that one of these "interests" was the right to have the father compelled to support it.

[186] *Id.* at 244 n.61 (citing Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964); Hoener v. Bertinato, 67 N.J. Supp. 517, 171 A.2d 140 (1961)).

[187] *Id.* at 244 n.63 (citing Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 423, 201 A.2d 537, 538, *cert. denied*, 377 U.S. 985 (1964)).

[188] Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).

[189] *Id.*

[190] *Id.* at 538.

[191] *Roe*, 410 U.S. at 162.

to a property free of any enforceable claims.[192] Again, the historic concern of the Supreme Court has not been whether a person claims a perfect interest in property, but rather a *vested* interest. For example, if James Madison had actually delivered William Marbury's commission as justice of the peace in the district of Columbia, then Marbury's property interest in that appointment would have been perfected, and he would have had no reason to initiate what came to be one of the most famous and important cases in our nation's history. But, as it was, Madison did not deliver the commission, and Marbury sought a remedy for this wrong in the courts. So, the first consideration of Chief Justice Marshall was, "Has the applicant a right to the commission he demands?"[193] The answer was, of course, yes. In the words of Chief Justice Marshall:

> Mr. Marbury, then, since his commission was signed by the president and sealed by the secretary of state, was appointed; and as the law creating the office gave the officer a right to hold for five years independent of the executive, the appointment was not revocable; but *vested* in the officer legal rights which are protected by the laws of his country.
>
> To withhold the commission, therefore, is an act deemed by the court not warranted by law, but violative of a *vested* legal right.
>
> This brings us to the second inquiry; which is,
>
> 2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.[194]

Later, Chief Justice Marshall would add, "The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority."[195] Then, he went on to hold:

> It is to deliver a commission; on which subjects the acts of congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a *vested* legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable at the will of the executive; and being so appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his

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[192] *See* Wood v. Lovett, 313 U.S. 362, 385 (1941) (Black, J., dissenting); Stewart v. Keyes, 295 U.S. 403, 417 (1935); and Benedict v. Ratner, 268 U.S. 353, 358, 365 (1925).

[193] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 154 (1803).

[194] *Id.* at 162-63 (emphasis added).

[195] *Id.* at 167.

> hands for the person entitled to it; and cannot be more lawfully withheld by him, than by another person.[196]

Here is perhaps the most important case in Supreme Court history turning on the very issue of a vested right. As has been demonstrated by this discussion of Justice Blackmun's footnote 66 citations, states, "in most jurisdictions,"[197] have held that these rights vest in the womb and that they are not "contingent upon live birth."[198] Without a doubt, the Supreme Court has consistently held they are bound by a state's interpretation of its own law.[199] So, in accordance with the doctrine of stare decisis, state decisions

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[196] *Id.* at 172-73 (emphasis added).

[197] Note, *The Law and the Unborn Child*, 46 NOTRE DAME LAW. 349, 369 (1971) (authored by William J. Maledon).

[198] Louisell, *supra* note 151, at 235-38; Note, *The Unborn Child and the Constitutional Conception of Life*, 56 IOWA L. REV. 994, 999-1000 (1971); Note, *The Law and the Unborn Child*, 46 NOTRE DAME LAW. 349, 351-54 (1971) (authored by William J. Maledon); Biggs v. McCarty, 86 Ind. 352 (1882); Deal v. Sexton, 144 N.C. 110, 56 S.E. 691 (1907); Industrial Trust Co. v. Wilson, 61 R.I. 169, 200 A. 467 (1938); *In re* Holthausen's Will, 175 Misc. 1022, 26 N.Y.S.2d at 140 (Sur. Ct. 1941); Kyne v. Kyne, 38 Cal. App. 2d 122, 100 P.2d 806 (1940); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).

[199] Eisenstadt v. Baird, 405 U.S. 438, 442 (1972) ("This construction of state law is, of course, binding on us. *E.g.*, Groppi v. Wisconsin"); Groppi v. Wisconsin, 400 U.S. 505, 507 (1971) ("As the case reaches us we must, of course, accept the construction that the Supreme Court of Wisconsin has put upon the state statute. *E.g.*, Kingsley Pictures Corp. v. Regents."); Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959) ("We accept too, as we must, the construction of the New York Legislature's language which the Court of Appeals has put upon it. Albertson v. Millard, 345 U.S. 242; United States v. Burnison, 339 U.S. 87; Aero Mayflower Transit Co. v. Board of R. R. Comm'rs, 332 U.S. 495."); and Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938), which states:

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Edward Hines Yellow Pine Trustees v. Martin, 268 U.S. 458, 462-63 (1925) states:

> Both the meaning of statutes of a state and the rules of the unwritten law of a state affecting property within the state are peculiarly questions of local law to be ascertained and established by the state courts. For that reason federal courts ordinarily hold themselves bound by the interpretation of state statutes by the state courts. Walker v. State Harbor Commissioners, 17 Wall. 648; Barrett v. Holmes, 102 U.S. 651; Geekie v. Kirby Carpenter Co., 106 U.S. 379, 385, 1 S. Ct. 315; McArthur v. Scott, 113 U.S. 340, 5 S. Ct. 652; Schley v. Pullman Car Co., 120 U.S. 575, 580, 7 S. Ct. 730; Bucher v. Cheshire R. Co., 125 U.S. 555, 8 S. Ct. 974; Ridings v. Johnson, 128 U.S. 212, 224, 9 S. Ct. 72; Heath v. Wallace, 138 U.S. 573, 11 S. Ct. 380; Bauserman v. Blunt, 147 U.S. 647, 13 S. Ct. 466; Balkam v. Woodstock Iron Co., 154 U.S. 177, 14 S. Ct. 1010; American Land Co. v. Zeiss, 219 U.S. 47, 31 S. Ct. 200; Quong Ham Wah Co. v. Industrial Accident Commission, 255 U.S. 445, 41 S. Ct. 373; North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S. Ct. 491, decided May 11, 1925. And follow rules of property declared by state courts. Jackson ex dem. St. John v. Chew, 12 Wheat. 153; Suydam v. Williamson, 24 How. 427; Williams v. Kirtland, 13 Wall. 306; League v. Egery et al., 24

holding that the rights of unborn persons vest in the womb ought to be binding upon the Supreme Court. As "[t]here is no federal general common law,"[200] how could it be otherwise?

Justice Blackmun's theory that, "Perfection of the interests involved, again, has generally been contingent upon live birth,"[201] cannot be squared with the "historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of [the] Court."[202] Going further, Blackmun was wrong not just in theory but in fact as well—the unborn had been held to be persons by the Supreme Court prior to *Roe v. Wade*. A Supreme Court case finding unborn children to hold vested rights, *McArthur v. Scott*[203]—a case that directly contradicts Blackmun's dismissal of unborn

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How. 264; Smith Purifier v. McGroarty, 136 U.S. 237, 10 S. Ct. 1017; Warburton v. Wright, 176 U.S. 484, 20 S. Ct. 404.

Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658-59 (1834) states:

> It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.
>
> When, therefore, a common law right is asserted, we must look to the state in which the controversy originated. And in the case under consideration, as the copyright was entered in the clerk's office of the district court of Pennsylvania, for the first volume of the book in controversy, and it was published in that state; we may inquire, whether the common law, as to copyrights, if any existed, was adopted in Pennsylvania.
>
> It is insisted, that our ancestors, when they migrated to this country, brought with them the English common law, as a part of their heritage.
>
> That this was the case, to a limited extent, is admitted. No one will contend, that the common law, as it existed in England, has ever been in force in all its provisions, in any state in this union. It was adopted, so far only as its principles were suited to the condition of the colonies: and from this circumstance we see, what is common law in one state, is not so considered in another. The judicial decisions, the usages and customs of the respective states, must determine, how far the common law has been introduced and sanctioned in each.

See also Lucas v. South Carolina Costal Council, 505 U.S. 1003, 1027 (1992) (footnote omitted), which states:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property.

and Rogers v. Tennessee, 532 U.S. 451 (2001) (The Tennessee Supreme Court's retroactive application to a defendant of its decision abolishing the common law year and a day rule murder rule did not deny petitioner due process of law in violation of the Fourteenth Amendment.).

[200] Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[201] *Roe*, 410 U.S. at 162.

[202] Printz v. United States, 521 U.S. 898, 905 (1997).

[203] McArthur v. Scott, 113 U.S. 340 (1884).

person's property rights as "contingent upon live birth"[204]—will now be considered.

VI. Supreme Court Jurisprudence Recognized the Due Process Rights of Unborn Persons Prior to *Roe*.

> It was, though, very stupid of Quintus Mucius to include among the instances of possession those cases in which we possess something by magisterial order in order to preserve it, because the magistrate who sends a creditor into possession to preserve the thing, or because an undertaking has not been given in respect of threatened damage or in the *interests of an unborn child*, does not grant possession proper but only the *guarding and custody* of the thing.[205]
>
> – Digest of Justinian

Due process seeks to ensure that each person is given a fair opportunity to have his side of an issue heard in a court of law before he is deprived of life, liberty or property. Nearly ninety years before *Roe*, the Court held that unborn persons were entitled to protection under the Due Process Clause in the case of *McArthur v. Scott*.[206] In *McArthur*, the Court held that the inheritance and property rights of the unborn descendants of General Duncan McArthur were violated by a state court case in which the unborn descendants did not have adequate representation, "[N]o provision was made for the preservation of the rights of after-born grandchildren."[207]

McArthur v. Scott originated in a diversity action brought in the Southern District of Ohio, "This is a bill in equity by the children of Allen C. McArthur, a son of General Duncan McArthur, to enforce a trust and establish a title in fee in lands in Ohio under the will of their grandfather."[208] Duncan McArthur "died on May 12, 1839, leaving an instrument in writing, dated October 30, 1833, purporting to be duly executed and attested as his last will."[209] His will directed that some land he held be conveyed "in trust for the benefit of his five surviving children and their heirs."[210]

Shortly after Duncan McArthur's death, on July 8, 1839, Allen C. McArthur had filed a bill contesting the will; per the Statement of Facts:

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[204] *Roe*, 410 U.S. at 161.
[205] DIG. 41.2.3.23 (PAUL, Ad Edictum 54) (emphasis added).
[206] McArthur v. Scott, 113 U.S. 340 (1884).
[207] *Id.* at 396.
[208] *Id.* at 342.
[209] *Id.*
[210] *Id.*

> That bill "further insists and states that said instrument is void and of none effect, because it is wholly impracticable and cannot be carried into effect... because it tends to establish perpetuities, and does establish such perpetuities, which are contrary to the genius of our institutions and the spirit of our people and their laws, and indeed contrary to the common law."[211]

All the children and living grandchildren were parties to the suit—the grandchildren had one of their parents appointed as guardian ad litem. On October 28th of the same year, a jury trial held the instrument in question was "not the valid last will and testament of the said Duncan McArthur, deceased."[212]

A subsequent administration of Duncan McArthur's estate partitioned the real estate among his heirs who variously occupied, improved, and sold parcels of the land. So, the issue seemed to be settled, at least "for the period of thirty-four years and eleven months"[213] until Allen C. McArthur's youngest son and namesake brought his suit to enforce his grandfather's testamentary trust in the Circuit Court for the Southern District of Ohio. Allen C. McArthur was the youngest grandchild of Duncan McArthur and arrived at age twenty-one years on March 4, 1875; his four sisters and their husbands joined him in the suit. The plaintiffs were all citizens of Illinois or Kentucky, and the defendants were all citizens of Ohio. After hearing the arguments from both sides, the Circuit Court dismissed the bill and the plaintiffs appealed to the Supreme Court.

Justice Horace Gray (the half-brother of John Chipman Gray) provided this distillation of the facts:

> The principal provisions of the will of Duncan McArthur, material to the decision of this case, are as follows: By the fifteenth clause, he directs that his lands . . . shall be leased or rented by his executors "until the youngest or last grandchild which I now have, or may hereafter have," the child of either of his five surviving children, Allen C., James McD., Effie, Eliza Ann or Mary, "who may live to be twenty-one years of age, shall arrive at that age." By the sixteenth clause, he directs that, until that time, the income of these lands, and the dividends of all stocks held by him or purchased by his executors, shall be by them annually divided equally among the five children aforesaid, or the issue of any child dying, and among the grandchildren also as they successively come of age.
>
> The seventeenth clause provides as follows: "It is my further will and direction that after the decease of all my children now living, and when and as soon as the youngest or last grandchild... shall arrive at the age of

[211] *Id.* at 348.
[212] *Id.* at 350.
[213] *Id.* at 351.

> twenty-one years, all my lands" in question "shall be inherited and equally divided between my grandchildren *per capita* . . . but it is to be understood to be my will and direction that if any grandchild aforesaid shall have died before said final division is made, leaving a child or children lawfully begotten, such child or children shall take and receive *per stirpes* (to be equally divided between them) the share of my said estate.[214]

Then, Justice Gray summed up the legal issues most concisely:

> This case presents three principal questions: First. Whether the equitable estate is fee which Duncan McArthur by his will undertook to devise to his grandchildren, children of his five surviving children, was vested or contingent?
>
> Second. Whether the devise of that estate, so far as it is to the present plaintiffs, was void for remoteness?
>
> Third. Whether the decree in 1839, setting aside his will and annulling the probate, is a bar to this suit?[215]

Tackling the first issue, Justice Gray initially noted the devise of the legal "title in the lands to the executors and their successors . . . in trust for the uses and purposes expressed in the will, to have and to hold until the final division or partition." Justice Gray also noted the primary equitable interest was a life estate:

> The equitable estate created by the gift in the sixteenth clause of the income to the children and grandchildren, being an estate which must endure for the lives of the children, and might endure throughout the lives of the grandchildren, though subject to be sooner determined in the contingency of the coming of age of the youngest grandchild, was technically an estate for life.[216]

With that, Justice Gray got to the real issue, "The nature of the equitable estate in remainder created by the seventeenth clause." He considered the argument put forth on behalf of some of the defendants, that the interest of the grandchildren was only that of an equitable contingent remainder "contingent upon the arrival of the youngest grandchild at twenty-one years of age."[217]

Other defendants, who based their defense on the adequacy of the grandchildren's representation in the original suit, allowed that "all the grandchildren took a vested remainder in fee; and the gift over to the

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[214] *Id.* at 375-76.
[215] *Id.* at 375.
[216] *Id.* at 377 (citing 2 BL. COM. 121).
[217] *Id.*

children of any deceased grandchild… was an executory devise."[218] The Court agreed with this latter theory, noting:

> [S]ound policy as well as practical convenience requires that titles should be vested at the earliest period, it has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event.[219]

Shifting through the particulars of the case before it, the court ruminated over the possibility of all the children and grandchildren dying before any grandchild arrived at the age of twenty-one years per the seventeenth clause. Under this hypothetical, the required contingency of a grandchild arriving at the age of twenty-one would never occur. Consequently, a literal reading of the will would mean that the great-grandchildren would thereby be cut off from any share of the estate. Yet, the Court was of the opinion such an understanding of the will would be "in direct contravention of the general intent of the testator."[220] Justice Gray went on to write:

> The more reasonable inference is, that upon the determination of the life estate by the death of all children and grandchildren, for whose benefit it was created, the great-grandchildren would be immediately entitled to the remainder. Upon that construction, the contingency contemplated must necessarily happen at some time, either by the arrival of the youngest grandchild at twenty-one years of age, or by the death of all the grandchildren under age; and the case would come within the settled rule that "where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event which must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainderman is in esse and ascertained; provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession."[221]

Consequently, the Court answered the first inquiry by finding the grandchildren's interest was vested:

> For these reasons, we are of the opinion that the will purports to devise to all the grandchildren per capita, children of the surviving children of the testator, a *vested* remainder in fee; and to the children per stirpes of any

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[218] *Id.* at 378.
[219] *Id.*
[220] *Id.*
[221] *Id.* at 378-79 (citations omitted).

> grandchildren deceased before the arrival of the youngest grandchild at twenty-one years of age, a similar estate in fee by way executory devise.[222]

The Court then considered the second matter, "Whether the devise of that estate, so far as it is to the present plaintiffs, was void for remoteness?" At the outset of this discussion, it should be noted that, as the Court already held the grandchildren received a vested remainder in fee, the issue of remoteness was moot since remoteness concerns itself with contingent rather than vested interests. This is precisely what the court reasoned in the end. But there are some pertinent points to be drawn from the courts analysis of the remoteness issue.

The primary focus of questions on remoteness centers upon the application of the Rule Against Perpetuities, which seeks to eliminate situations in which contingent interests do not vest within a reasonable amount of time. In *McArthur v. Scott*, the Court, in applying the rule, noted how it encompassed children in the womb:

> To come within the rule of the common law against perpetuities, the estate, legal or equitable, granted or devised, must be on which, according to the terms of the grant or devise, is to vest upon the happening of a contingency which may by possibility not take place within a life or lives in being (*treating a child in its mother's womb as in being*) and twenty-one years afterwards."[223]

The appellees protested the "much debated" practice of allowing a period of gestation for unborn children under the Rule.[224] Yet, the Court held that the testator's document did not violate the Rule Against Perpetuities. Additionally, the Court took no notice of the appellees' untenable polemic that the rule was "incompatible with republican institutions."[225] The fault of

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[222] *Id.* at 381 (emphasis added).

[223] *Id.* at 381-82 (emphasis added).

[224] *Id.* at 365-66 (Harrison for appellees), which states:

> The statute of 10 and 11 William III., c. 16, having provided that children en ventre sa mere, born after his father's death, should, for the purposes of the limitations of estates, be deemed to have been born in his lifetime. *Goodman v. Goodright*, 2 Burr. 873. The next step was to allow a period of nine months for gestation at the beginning of the term, as the life in being during which the term would run might be that of a child . *Long v. Blackall*, 7 T. R. 100.—2. This common-law rule as to perpetuities the legislature regarded as incompatible with republican institutions: this was the mischief which it [Ohio] attempted to remedy by the statute.... Among other results, which, as we contend flowed from these several decisions:.... (b.) Grandchildren or great-grandchildren, or other immediate issue or descendants of persons in being at the time of making the will, may take an estate in remainder, or any future estate, by way of executory devise, &c., provided they are in esse when the particular estate given a person living when the will is made terminates by his death. (c.) But grandchildren or great-grandchildren, or other issue or descendants of persons in being at the time of making the will, who are born subsequently to the death of the person in being when the will was made, and to whom a particular estate is given, cannot take.

[225] *Id.* at 365.

their argument can be revealed by, again, opening the very first volume of the United States Supreme Court reporter series, turning to page four, and the case of *Lessee of Ashton v. Ashton*,[226] in which the Supreme Court of Pennsylvania upheld the property rights of a posthumous child as not being too remote, as already discussed. More importantly, in *McArthur*, the Court gave judicial notice to the common law practice of "treating a child in its mother's womb as in being." A rule which may therefore be said to be compatible with our nation's history and practice.

Yet, as disclaimed at the beginning of this discussion, the Court already held the grandchildren received a vested remainder in fee. So, the issue of remoteness was moot as remoteness concerns itself with contingent rather than vested interests. As the Court stated:

> But, however that may be, the conclusion, already announced, that the estate in remainder devised by Duncan McArthur was *vested* in all his grandchildren per capita, with an executory devise over of the shares of those who should die . . . removes all difficulty in the application of the statute to the shares devised to the plaintiffs, grandchildren of the testator; for the devise to the grandchildren, immediate issue of persons in being a the making of the will, was clearly not prohibited by the statute; and, even under the English rule, the executory devise over of the shares of deceased grandchildren to their children, if void for remoteness, would not defeat the previous valid devise of a *vested* remainder to the grandchildren.[227]

The court then went on to transition to the final inquiry, being, "Whether the decree in 1839, setting aside his will and annulling the probate, is a bar to this suit?"[228]:

> The necessary conclusion is that these plaintiffs, being grandchildren of the testator, took equitable vested remainders under his will. But until the determination of the particular estate by the death of all the testator's children and the arrival at the age of twenty-one years of the youngest grandchild who reached that age, the legal estate in fee being in the executors, and the grandchildren owning the equitable estate in remainder had no right to a conveyance of the legal title. The present bill, filed little more than a year after one of the plaintiffs, who was the youngest grandchild of the testator who live to the age of twenty-one years, arrived at that age, must therefore be maintained, unless the title of the plaintiffs under the will of their grandfather has been defeated by the decree rendered in 1839, setting aside the will.[229]

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[226] 1 U.S. (1 Dall.) 4 (1760).
[227] McArthur v. Scott, 113 U.S. 340, 384 (1884) (emphasis added).
[228] *Id.* at 375.
[229] *Id.*

The Court first looked to Ohio statutory and case law. Of primary interest was the case of *Holt v. Lamb*.[230] In that case, as in the whole of Ohio law, the courts saw that their primary duty was not to do injustice "by depriving persons in interest of a day in court."[231] The Court summed up its inquiry of Ohio law:

> The decision of the Supreme Court of Ohio in *Holt v. Lamb*, eighteen years ago, recognized by the same court thirteen years afterwards in *Reformed Presbyterian Church v. Nelson*, as establishing that under the statute of Ohio a decree setting aside a will is void as against all persons in interest who were not parties to the suit in which it was rendered, and never impugned or doubted in that State, must... be accepted by this court as conclusive evidence of the law of Ohio.[232]

As the Court noted, Ohio law comported with a general sense of justice, "The general rule in equity, in accordance with the fundamental principles of justice, is that all persons interested in the object of a suit, and those whose rights will be directly affected by the decree, must be made parties to the suit."[233] The Court then took up the next logical question:

> The plaintiffs in the present case, being as yet unborn, could not, of course, have been made actual parties to the suit in which the decree setting aside the will of their grandfather was rendered; and the question remaining to be considered is, whether there was such a virtual representation of their interests, that they are bound by the decree. This question cannot be satisfactorily or intelligibly treated without first recapitulating the facts.[234]

One of the first things the Court recited were the actual parties to the original bill in equity. It should not escape notice that Mrs. Trimble's daughter, who was *en ventre sa mere* at the time of the decedent's passing, was admitted as a defendant without objection, in keeping with the common law rule of treating a child *en ventre sa mere* as in being.[235] Yet, the real issue was the representation of grandchildren not even conceived at the time of the testator's death, "unborn" in that sense of the word.

The Court also noted the "irregularity" of the parents, persons "having adverse interests," appointed guardians ad litem of their children.[236] This was indeed against the common law, to which Blackstone attested:

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[230] Holt v. Lamb, 17 Ohio 374 (1867).
[231] *McArthur*, 113 U.S., at 388 (quoting Holt v. Lamb, 17 Ohio 374, 384-87 (1867)).
[232] *Id.* at 391.
[233] *Id.* at 391-92.
[234] *Id.* at 392.
[235] 1 COMMENTARIES 125-26 (1st ed.).
[236] *McArthur*, 113 U.S. at 395.

> Next are guardians in socage, . . . who are also called guardians by the common law. These take place only when the minor is entitled to some estate in lands, and then by the common law the guardianship devolves upon his next of kin, to whom the inheritance cannot possibly descent; as, where the estate descended from his father, in this case his uncle by the mother's side cannot possibly inherit this estate, and therefore shall be the guardian.[237] For the law judges it improper to trust the person of an infant in his hands, who may possibly become heir to him; that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust.[238] The Roman laws proceed on a quite contrary principle, committing the care of the minor to him who is the next to succeed to the inheritance, presuming that the next heir would take the best care of an estate, to which he has a prospect of succeeding: and this they boast to be "summa providential." But in the mean time they forget, how much it is the guardian's interest to remove the incumbrance of his pupil's life from that estate, for which he is supposed to have so great a regard. And this affords Fortescue,[239] and Sir Edward Coke,[240] an ample opportunity for triumph; they affirming, that to commit the custody of an infant to him that is next in succession, is "*quasi agnum committere lupo, ad devorandum*[241]."[242]

This begs the question, how the common law could be construed to hold the child *en ventre sa mere* to be destructible at the whim of the mother, when the common law took extraordinary steps to preserve the property rights of the said child? As Blackstone pointed out, the common law purposely went beyond the protections of the Roman law because of very concern for the adverse interests of the child and his relatives. The Court in *McArthur*, after noting this "irregularity" of the parents appointed guardians ad litem of their children, the Court declared:

> But neither the living grandchildren, nor the guardians appointed to represent them, could represent the estate devised by the testator to his executors in trust for unborn grandchildren and great-grandchildren.

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[237] "Litt. §. 123." 1 COMMENTARIES 449 n.g. (1st ed.).

[238] *"Nunquam custodia alicujus de jure alicui remanet, de quo babeatur suspicio, quod possit vel velit aliquod jus in ipsa hereditate clamare.* Glanv. l. 7. c. 11." 1 COMMENTARIES 449 n.h. (1st ed.).

[239] "c. 44." 1 COMMENTARIES 450 n.l. (1st ed.).

[240] "1 Inst. 88." 1 COMMENTARIES 450 n.m. (1st ed.).

[241] "This policy of our English law is warranted by the wise institutions of Solon, who provided that no one should be another's guardian, who was to enjoy the estate after his death. (Potter's Antiqu. l. 1. c. 26.) And Charondas, another of the Grecian legislators, directed that the inheritance should go to the father's relations, but the education of the child to the mother's; that the guardianship and right of succession might always be kept distinct. (Petit. Leg. Att. l. 6. t. 7.)" 1 COMMENTARIES 450 n.n. (1st ed.). *See* J. JONES, A TRANSLATION OF ALL THE GREEK, LATIN, ITALIAN, AND FRENCH QUOTATIONS WHICH OCCUR IN BLACKSTONE'S COMMENTARIES 40 (1889) ("Like committing the lamb to the wolf to be devoured.").

[242] 1 COMMENTARIES 449-50 (1st ed.).

> In suits affecting the rights of residuary legatees or of next of kin, the general rule is that all the members of the class must be made parties.... Under the Ohio statute and decisions, the court had nothing to do with the construction or the legal effect of the provisions of the will, but had only to try the question of will or no will as between the parties before it, and with no effect upon the rights of those not made parties. ... [N]o provision was made for the preservation of the rights of after-born grandchildren.[243]

The court also held that the grandchildren's rights were impaired in another manner: "But the graver objection is that at the time of rendering the decree the court had before it no one representing the office of the executors, or the trust estate devised to them."[244] The Court observed from a reading of a number of cases, "[I]t follows that where the successive estates are *equitable*, and supported by a *legal* estate devised in trust, the trustees also are necessary parties."[245] The key distinction in these cases is that equitable interests are derivative of the legal estate. So, adequate representation of those parties holding equitable interests requires that the trustees, holders of the legal estate, be parties to such proceedings. The Court accordingly held that as no one represented the executors or the trustees, then no one represented the grandchildren's equitable interests[246] in their grandfathers estate (not even their parents as guardians ad litem):

> Executors and trustees, appointed by the testator to perform the trusts of the will and to protect the interests of his beneficiaries, are as necessary

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[243] McArthur v. Scott, 113 U.S. 340, 395-96 (1884).

[244] *Id.* at 396.

[245] *Id.* at 402 (emphasis added). The Court further noted that there are circumstances, "exceptions to the general rule," under which it is "obliged to settle the validity and effect of contingent limitations even to persons not in being." *Id.* Still, in those cases, "the executors and trustees must be considered as the legal representatives of the rights of persons not yet in esse." *Id.* (quoting State of New York Chancellor Walworth, in Lorillard v. Coster, 5 Paige 172, 215.).

[246] *Id.* at 393-94, which states:

> That all the heirs at law were before the court is true, for the five children (with the Kercheval and Bourne grandchildren) were the heirs at law. But, according to the will, the children, as well as the grandchildren, took merely *equitable* interests. To none of them was any *legal* title devised. The five present plaintiffs, children of the complainant in that suit, as well as the children afterwards born of the testator's other surviving children, all grandchildren of the testator, and entitled under the will to share with his other grandchildren, were not parties, and, being yet unborn, could not be personally made parties. And although the testator, to secure the interests of all his children and grandchildren, under the will, and, as he declared, to prevent them from being defrauded or imposed upon, had devised the *legal* title in fee to his executors and their successors, and committed to them the execution of the trusts which he created, yet *no personal representative* of the testator, *no executor of trustee* appointed under the will, and no administrator with the will annexed, *was a party to the proceeding* at the time of the trial of the issue and the rendering of the final decree setting aside the will and annulling the probate.

Id. (emphasis added).

> parties to a proceeding to annul a probate, as the heirs at law are to a suit to establish the validity of a will. And upon a review of the cases no precedent has been found, either in a court of probate or in a court of chancery, in which a decree disallowing a will, rendered in a suit brought to set it aside, or to assert an adverse title in the estate, without making such executors, or an administrator with the will annexed, a party to the suit, has been held binding upon persons not before the court.
>
> As under the statute of Ohio, as construed by the Supreme Court of that State, a decree annulling the probate of a will is not merely irregular and erroneous, but *absolutely void*, as against persons interested in the will and not parties to the decree, and as these plaintiffs were neither actually nor constructively parties to the decree setting aside the will of their grandfather, it follows that that decree is no bar to the assertion of their rights under the will. To extend the doctrine of constructive and virtual representation, adopted by courts of equity on considerations of sound policy and practical necessity, to a decree like this, in which it is apparent that there was no real representation of the interests of the plaintiffs, would be to confess that the court is powerless to do justice to suitors who have never before had a hearing.[247]

The Court, of course, was not "powerless to do justice" in *McArthur*, because, as Chief Justice Marshall had held in *Marbury*, vested legal rights are protected by the laws of the United States.[248] Likewise, Chief Justice Waite declared in *Munn v. State of Illinois*, "Rights of property which have been created by the common law cannot be taken away without due process."[249] Ergo, it was in accordance with *Marbury* and *Munn* that Justice Gray held: "The record of the decree setting aside the will showed that neither these plaintiffs, nor any executors or successors of executors in the trust, were parties to the suit; and consequently that the plaintiffs' *title* under the will, as originally admitted to probate, was not affected by that decree."[250]

The grandchildren's title under the will, while they were unborn and otherwise under the age of majority, was accordingly protected from actions that worked to the detriment of their title, "The subsequent partition among the heirs at law, and the conveyances by them to third persons for valuable consideration, cannot affect the title of these plaintiffs."[251] Not that sub-

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[247] *Id.* at 404 (emphasis added). As the Court had observed earlier in the opinion: But persons claiming under the will admitted to probate, who are not made defendants to the bill to set it aside, are not bound, or their rights affected, by the decree upon that bill; and may treat it as a nullity, and maintain actions, against any one claiming under it, for lands devised to them by the will as originally admitted to probate. Holt v. Lamb, 17 Ohio St. 374. *Id.* at 387.

[248] 5 U.S. (1 Cranch) at 162-63.

[249] Munn v. State of Illinois, 94 U.S. 113, 134 (1876).

[250] McArthur v. Scott, 113 U.S. 340, 405 (1884) (emphasis added).

[251] *Id.* at 404.

sequent purchasers were totally out of luck, "The subsequent purchasers must therefore look to their vendors, and have not equity as against these plaintiffs."[252]

It is important to delineate the areas of federal responsibility illustrated by *McArthur v. Scott*. The states have historically determined how and when unborn humans become persons with vested rights by operation of their sole jurisdiction over municipal law.[253] Yet, if a violation of due process should occur within that sphere of legal jurisdiction, the Supreme Court may correct that violation of due process under the Fourteenth Amendment.[254] In essence, the states may adapt and modify the common law to suit their valid purposes, but in doing so cannot contravene the rights of persons under its common law in an arbitrary or unreasonable manner. It is this balance that Chief Justice Taft maintained in *Truax v. Corrigan*:

> It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment

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[252] *Id.* at 405.

[253] Edward Hines Yellow Pine Trustees v. Martin, 268 U.S. 458, 462-63 (1925), which states:

> Both the meaning of statutes of a state and the rules of the unwritten law of a state affecting property within the state are peculiarly questions of local law to be ascertained and established by the state courts. For that reason federal courts ordinarily hold themselves bound by the interpretation of state statutes by the state courts. McArthur v. Scott, 113 U.S. 340, 5 S. Ct. 652. And follow rules of property declared by state courts.

Id. (citations omitted).

[254] Holden v. Hardy, 169 U.S. 366 (1898), which states:

> While the people of each state may doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the constitution of the United States certain fundamental principles, to which each member of the Union is bound to accede as a condition of its admission as a state. Thus, the United States are bound to guaranty to each state a republican form of government, and the tenth section of the first article contains certain other specified limitations upon the power of the several states, the object of which was to secure to congress paramount authority with respect to matters of universal concern. In addition, the fourteenth amendment contains a sweeping provision forbidding the states from abridging the privileges and immunities of citizens of the United States, and denying them the benefit of due process or equal protection of the laws.
>
> This court has never attempted to define with precision the words "due process of law," nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice, which inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice, and an opportunity of being heard in his defense....
>
> ... Recognizing the difficulty in defining with exactness the phrase "due process of law," it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation, and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense.

Id. at 389-91 (Brown, J.).

> is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles.[255]

Accordingly, Justice Blackmun's holding can be restated: "Perfection of the interests by adverse parties, again, has generally been contingent upon adequate representation of the unborn. In short, the unborn have . . . been recognized in the law as persons in the whole sense under the Due Process Clause."[256] Consequently, to say that *Roe v. Wade* was "wrongly decided"[257] is an understatement—it was decided in direct contradiction of the Due Process Clause protections previously afforded the unborn in *McArthur v. Scott*.

VII. The States Provided Due Process Protection of the Lives of Unborn Children.

> The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother.[258]
>
> – Justice Horace Gray

The common law required a stay of execution of a female should she be found to be pregnant with a living child—"quick with child."[259] Per the

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[255] Truax v. Corrigan, 257 U.S. 312, 329-30 (1921) (Taft, C.J.). In *Truax* the Court held an Arizona law, prohibiting injunctions in peaceful labor disputes, deprived the business owners of their property without due process of law, and also denied them the equal protection of the laws. Although, the dissent disagreed that the case before the Court warranted such an application of the Fourteenth Amendment, the theory behind the majority's holding was not in dispute:

> Practically every change in the law governing the relation of employer and employee must abridge, in some respect, the liberty or property of one of the parties-if liberty and property be measured by the standard of the law therefore prevailing. If such changes are made by acts of the Legislature, we call the modification an exercise of the police power. And, although the change may involve interference with existing liberty and property of individuals, the statute will not be declared a violation of the due process clause, unless the court finds that the interference is arbitrary or unreasonable or that, considered as a means, the measure has no real or substantial relation of cause to a permissible end.

Id. at 355 (Brandeis, J., dissenting).

[256] *Roe*, 410 U.S. at 162.

[257] Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992) ("To overrule prior law for no other reason than that would run counter to the view, repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.").

[258] Union Pacific R. Co. v. Botsford, 141 U.S. 250, 253 (1891).

[259] 4 COMMENTARIES 387-88 (1st ed.):

> REPRIEVES may also be *ex necessitate legis*: as, where a woman is capitally convicted, and

introductory quote from the *Union Pacific R. Co. v. Botsford*[260] decision, the common law writ *de ventre inspiciendo* was recognized by the Supreme Court as a due process protection for the life of the unborn child whose mother was convicted of a capital crime. Cyril Means (NARAL's General Counsel at the time *Roe* was decided) admitted in *The Phoenix*, "this had been the rule in England from at least as early as 1349."[261] There is a unanimity of opinion that the several states adopted this common law rule by decision or statute.[262] In 1914, *Bouvier's Law Dictionary* attested to the writ, also known as pleading pregnancy, being "recognized in America" under an entry for "jury of women."[263] *Bouvier's* continues:

> pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, *in favorem prolis*; and therefore no part of the bloody proceedings, in the reign of queen Mary, hath been more justly detested than the cruelty, that was exercised in the island of Guernsey, of burning a woman big with child: and, when through the violence of the flames the infant sprang forth at the stake, and was preserved by the bystanders, after some deliberation of the priests who assisted at the sacrifice, they cast it again into the fire as a young heretic. A barbarity which they never learned from the laws of ancient Rome; which direct, with the same humanity as our own, "*quod praegnantis mulieris damnatae poena differatur, quoad pariat*:" which doctrine has also prevailed in England, as early as the first memorials of our law will reach. In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to enquire the fact: and if they bring in their verdict *quick with child* (for barely, *with child*, unless it be alive in the womb, is not sufficient) execution shall be staid generally till the next session; and so from session to session, till either she is delivered, or proves by the course of nature not to have been with child at all. But if she once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a farther respite for that cause. For she may now be executed before the child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice.

Id. (footnotes omitted).

[260] Union Pacific R. Co. v. Botsford, 141 U.S. 250 (1891). Justice Gray goes on to state with regards to the writ's civil applications, which was the inquiry in Botsford, "But the learning and research of the counsel for the plaintiff in error have failed to produce an instance of its ever having been considered, in any part of the United States, as suited to the habits and condition of the people." *Id.* at 253. The *Albany Law Journal* records a request for the civil use of the writ *de ventre inspiciendo* in a probate case involving a will contest involving a posthumous child of a Mr. Rollwagen. During the will contest, it was alleged that the surviving spouse of Mr. Rollwagen was not pregnant with said child. 10 ALB. L. J. 3-4 (1874-1875). The request was denied: "[T]he court decided that as the lady was not going to be hanged, and did not herself solicit the investigation, there was no power to compel her to submit to the wishes of her antagonists, and they must not try to anticipate the evidence, but must wait and see what time and the lady bring forth." *Id.* at 4.

[261] *The Phoenix*, *supra* note 23, at 377 (citing Commonwealth v. Bathsheba Spooner, 2 AM.CRIM.TRIALS 175 (1778).

[262] Cyril Means also admitted in *The Phoenix*, speaking of the *Bathsheba Spooner* case, "The only instance I have been able to discover of the hanging of an American feloness whom the jury of matrons had found pregnant but not quick occurred in Massachusetts in 1778." *The Phoenix*, *supra* note 23, at 378 n.88.

[263] J. BOUVIER, BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 1786 (Rawle's Rev. 1914).

> "While the cases are very rare, there is no evidence (or authority, it might be added) that a jury of women is not a part of the machinery of the law in those states in which the common law prevails." 12 A. & E. Encyc. of L. 331. Such a jury was impaneled in a criminal case in Chester county, Pa., June 27, 1689; 5 Haz. Pa. Reg. 158; Records of Upland Court now in the Pennsylvania Historical Society. See 48 Am. L. Rev. 280.
>
> It may be safely affirmed that no woman who pleads pregnancy in delay of execution will in any common-law jurisdiction be sentenced to death without examination into the truth of the fact pleaded, and in absence of other statutory provision, it is difficult to see how she could be deprived of this common-law right.[264]

The Chester county Pennsylvania case from June 27, 1689 was recorded by Samuel Hazard in his *Register of Pennsylvania*.[265] It was reported as a criminal conversation case, which would in the present times be considered a civil proceeding for the tort of alienation of affections.[266] Yet, in colonial Pennsylvania it was a criminal proceeding; the record reads:

> On the 27th of the 6th mo. 1689—A case of crim-con came before the court; the parties having confessed themselves guilty of the charge were presented by the Grand Inquest, "upon which they are both called to the bar, where they made their appearance, and upon her further confession and submission a jury of women, whose names are under written order to inspect."[267]

The reporting of sexual matters at the time was rather cryptic, as is this case, the exact nature of the crime is not mentioned.[268] Yet, we are informed of the jury of matrons finding, "They make a return that they cannot find she is (as charged) neither be they sure she is not."[269] *Bouvier's* also cites two cases involving capital offenses wherein the writ was issued, *State v.*

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[264] *Id.*

[265] 5 Haz. Pa. Reg. 158 (1830).

[266] S. GIFIS, BARRON'S LAW DICTIONARY 111 (2d. ed. 1984) ("CRIMINAL CONVERSATION see alienation of affections."). BARRON'S then notes under the definition of alienation of affections, "The inference may be in the nature of adultery (a tort then called CRIMINAL CONVERSATION) or may result from lesser acts which deprive the other spouse of affection from his or her marital partner." *Id.* at 18. *See The Crim. Con. Case.; Award of Six Cents Damages. United States Circuit Court. Before Hon. Judge Shipman*, N. Y. TIMES, Nov. 23, 1860, at 5.

[267] 5 Haz. Pa. Reg. 158 (1830).

[268] *Id.* On the same page appears the reporting of the criminal case of John Clews and Elinor Arme, "now his wife," for "committing ****". They pleaded guilty and Elinor's sentence was to "stand at the common whipping post for one quarter of an hour, with a paper upon her breast thus—'I heare stand for an Example to all others, for committing the most wicked and notorious Sin of ****.'" *Id.*

[269] *Id.* The reporting continued with one final note, "[The case is recorded at full length on the records of this date.]" *Id.*

Arden,[270] a 1795 case in South Carolina, and the 1778 Massachusetts case of *Commonwealth v. Bathsheba Spooner*.[271]

The *State v. Arden* case is significant in that the criteria of "quick with child" is replaced with simple "pregnancy": "The prisoner was then asked if she had any thing to offer why sentence of death should not be pronounced against her? Upon which she pleaded *pregnancy*."[272] An explanatory note in the margin states, "Pregnancy may be pleaded by a woman, after conviction, before sentence of death is passed upon her; which shall be tried by a jury of matrons."[273] The jury of matrons "examined the prisoner, and found that she was not pregnant."[274]

The 1778 Massachusetts case of *Commonwealth v. Bathsheba Spooner* is a notorious one. Mrs. Spooner was convicted of being an accessory before the fact to her husband's murder, "that she 'invited, moved, abetted, counseled and procured' the murder to be committed."[275] She was sentenced to death along with three co-conspirators. She pleaded pregnancy to the Governor's Council, "that she was enceinte," and a respite of four weeks was granted for jury of matrons to be summoned, make their examination and report their findings to the court.[276] The case was reported in *American State Trials*, which notes, "The effect of this plea is that a jury of women called a Jury of Matrons, is summoned, and if they find it to be true, the execution must be put off until the woman's confinement."[277] The jury of twelve matrons, assisted by two male midwives, initially returned a verdict that Mrs. Spooner was "not quick with child."[278] Still, Mrs. Spooner maintained that she was pregnant and so she was examined again sixteen days later. The second examination was completed with the assistance of two additional midwives, one male and one female, and only two matrons, one having been present at the first examination and the other not present. The four midwives were of the opinion that Mrs. Spooner was "now quick with child."[279] Whereas, the two matrons' opinion was "that she is not even now quick with child."[280] With the split opinion from the second examination, the Governor's Council "refused all further delay" and the sentences were carried

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[270] State v. Arden, 1 Bay 487 (1795).
[271] Commonwealth v. Bathsheba Spooner, 2 AM.CRIM.TRIALS 175 (1778).
[272] State v. Arden, 1 Bay 487, 489 (1795).
[273] *Id.*
[274] *Id.* at 489-90.
[275] *Spooner*, 2 AM. CRIM. TRIALS, at 177.
[276] *Id.* at 196.
[277] *Id.* at 196 n.9.
[278] *Id.* at 196, 198.
[279] *Id.*
[280] *Id.*

out.[281] Unfortunately, the matrons in both examinations were very much mistaken, as "a post-mortem examination proved."[282]

Bathsheba Spooner's case resulted in criticism directed towards the jury of matrons. With the advances in medical science and practice, the jury of matrons gave way to examinations by physicians. Professor James Oldham's book *Trial by Jury* devotes a chapter to the study of jury of matrons, and he concludes: "By the late nineteenth century, the obstetrician-gynecologist had come into existence as the recognized expert on the subject of pregnancy. With these developments, the jury of matrons became superfluous."[283] Noting that the *Spooner* case was the last one in which a jury of matrons was impaneled, the *Harvard Law Review* had this to say in 1889:

> It was hardly likely that the jury of matrons would be summoned again so long as Mrs. Spooner's case was fresh in mind. Moreover, the progress of the science of medicine has been so great during the past century that every year has seen it less expedient to resort to such clumsy means, when doctors can be had. It is not strange that the "Albany Law Journal" jeers at the Pennsylvania papers for suggesting that a jury be summoned; "it is antiquated," is the taunt. It is possible, even, by an examination of the later cases, to discover a tendency to put questions of alleged pregnancy to doctors for decision. The writ in Mrs. Spooner's case, for example, added two "men midwives" to the twelve matrons—a departure from common-law practice not entirely happy, however, if we judge by the result. The jury of women in Anne Wycherley's case asked for and got the assistance of a surgeon.... In view of all these facts, it seems quite likely that a question of pregnancy arising to-day would be referred for decision directly to doctors.[284]

Coinciding with the abandonment of the jury of matrons for examinations by physicians, there was a significant change in the evidentiary requirement—note the above quote from the *Harvard Law Review* uses the term "pregnancy" instead of "quick with child," as did the *Arden* case. In the nineteenth century the "quickening" distinction was being modified by judicial decision and abandoned by statutory law to fit the burgening scientific evidence that the fetus was alive from the moment of conception. The case of *Regina v. Wycherley* cited above is notable. In this 1838 English case before Baron Gurney, he gave this instruction to the surgeon assisting the jury of matrons, "'Quick with child' is having conceived. 'With quick

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[281] *Id.* at 199-201.

[282] Note, 3 HARV. L. REV. 45 (1889). *See* 39 ALB. L. J. 326-327 (1889); J. BOUVIER, BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 1786 (Rawle's Rev. 1914).

[283] JAMES OLDHAM, TRAIL BY JURY 113-14 (2006).

[284] Note, 3 HARV. L. REV., at 45.

child' is when the child has quickened."[285] Although, some commentators have argued that *Wycherley* returned the meaning of the phrase "quick with child" to "the legal meaning of the phrase to what had been its meaning in the Middle Ages: bearing a living child regardless of how the fact that the child was alive was determined or how long the pregnancy continued."[286]

Similarly, some states adopted their criminal common law to fit the scientific evidence of the time; the Supreme Court of Pennsylvania declared in 1850, "The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated."[287] The first case in this movement of the law was another abortion case before the Pennsylvania Supreme Court in 1848, *Commonwealth v. Demain*.[288] In *Demain*, one count of the indictment did not allege "quickness." The attorney general argued that the quickness distinction, although recognized in Massachusetts "has been recognized nowhere else," and cited Dr. Theodric Romeyn Beck's *Elements of Medical Jurisprudence* to support his argument, which prevailed.[289] Beck was influential in his criticism of the quickening distinction and argued that evidence of "vitality" should suffice.[290] Eventually, evidence of mere preg-

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[285] Regina v. Anne Wycherley, 8 Car. & P. 486, 487 (1838), 173 Eng. Rep. 486, 487 1688-1967.

[286] DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 282 (2006).

[287] Mills v. Commonwealth, 13 Pa. 631, 633 (1850). *See* State v. Reed, 45 Ark. 333, 334-36 (1885); Lamb v. State, 10 A. 208, 208 (Md. 1887); Commonwealth v. Taylor, 132 Mass. 261, 262 (1882); State v. Slagle, 83 N.C. 630, 632 (1880). *See also* Gray v. State, 77 Tex. Cr. R. 221, 224 (1915):

> A careful review of the authorities indicates that at [English] common law an abortion could not be produced upon a woman, unless and until the child was "quick" within her womb. The courts of our various States differ as to this, *most of them holding that an abortion can be produced at any time after conception* and before the woman was "quick" with child.

Id. at 224 (emphasis added) (cited by Justice Blackmun, in *Roe*, 410 U.S. at 136 n.27).

[288] Commonwealth v. Demain, (Pa. 1846), F. BRIGHTLY, REPORTS OF CASES, JUDGES OF THE SUPREME COURT 441 (1851).

[289] F. Brightly, *supra* note 289, at 443, which states:

> Mr. F. Wharton and Mr. Kane, attorney general, contra. ...The destruction of a child in *gremio matris*, was a murder at common law. 1 Vesey, 86; 3 Coke's Inst. 50; 1 Hawk. c. 31, § 16; 1 Russ. on Crimes, 671; 1 East. P.C. 227; and the distinction taken in Massachusetts as to quickness, has been recognized nowhere else. *Ibid.*; Bracton, lib. 3, § 21; Guy's Med. Juris. tit. 'Abortion;' 1 Beck, 172, 192. At the very period of gestation, the rights of an infant *en ventre sa mere* are equally respected. 2 Vernon, 710; Doe v. Clarke, 2 H. Bl. 339; 2 Vesey Jr. 673; Thelusson v. Woodford, 4 Vesey Jr. 340; Swift v. Duffield, 5 S. & R. 38.

[290] T. BECK, ELEMENTS OF MEDICAL JURISPRUDENCE (1823). Dr. Beck wrote about the inadequacies of the antiquated medical standard of "quickening" in abortion prosecutions, an outdated standard as he saw it, an "absurdity." *Id.* at 200. Instead of quickening, Dr. Beck elaborated on the growing and increasingly undeniable medical evidence that a fetus was alive, vitalized, prior to quickening:

> The foetus, previous to the time of quickening, must be either dead or alive. . . . Foetuses do actually die in the uterus before quickening, and then all the signs of death are present. The embryo, therefore, before that crisis, must be in a state different from that of death, and this can be no other than life.
>
> But if the foetus enjoys life so early a period, it may be asked, why no indications of it are given before the time at which quickening generally takes place? To this it may be answered,

> that the absence of any consciousness on the part of the mother, relative to the motions of the child, is no proof whatever that such motions do not exist. It is a well known fact, that in the earlier part of pregnancy, the quantity of the liquor amnii is much greater in proportion to the size of the foetus, than at subsequent periods. Is it not, therefore, rational to suppose, that the embryo may at first float in the waters without the mother being conscious of its movements, but that afterwards, when it has increased in bulk, and the waters are diminished in proportion, it should make distinct and perceptible impressions upon the uterus? Besides, it should not be forgotten, that foetal life at first must of necessity be extremely feeble, and therefore it ought not to be considered strange that muscular action should also be proportionately weak.
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> But granting, for the sake of argument, that the foetus does not stir previously to quickening, what does the whole objection amount to: Why, only that one evidence of vitality, viz. motion, is wanting; and we need not be told that this sign is not essential to the existence of life.

Id. at 200-01 (footnote omitted). Dr. Beck provides this caveat to his view in a footnote:

> There is a difference of opinion as to the real nature of quickening. It has been lately suggested by a writer, that it is altogether independent of any motion of the child, and that it is be attributed to the sudden rising of the uterus out of the pelvic cavity into the abdomen. If this opinion be true, it would afford another incontrovertible argument in favor of the position which I have advocated.

Id. at at 201 n.* (citing 27 LONDON MED. & PHYS. J. 441). Dr. Beck then continues:

> The *incompleteness* of the embryo previous to quickening, is no objection to its *vitality*. Life does not depend upon a complication of organs; on the contrary, it is found that some of the simplest animals, as the polypi, are the most tenacious of life. Besides, upon this principle, vitality must be denied to the child after birth, because many of its bones, as well as other parts of its body, are imperfect.
>
> Nor is the *want of organic action* any argument against this doctrine. Life appears to depend essentially as little upon organic action, as it does upon a complication of organs. If it did, the foetus, after quickening, would be just as destitute of life as before, for its brain, lungs, stomach, and intestinal canal, perform no more action at the eighth month than they do at the third. But if organic action be essential to life, how are we to account for those singular cases of foetuses born alive, and yet destitute of some of the most important organs in the body, such as the head, brain, [etc.]? and how are we to explain those temporary suspensions of organic activity in the bodies of adults, which sometimes happen, without the principle of life being extinguished?
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> The observations of physiologists tend also to prove the vitality of the foetus previously to quickening. According to [Anthelme Richerand's *Elements of Physiology*], blood is perceived about the seventeenth day after conception, together with the pulsation of the heart, and not long after the different organs have commenced their development. The correctness of this statement is confirmed by the observations of Blumenbach, Magendie, and others. Mauriceau relates, that he saw a foetus of about ten weeks that was alive, moved its arms and legs, and opened its mouth.... [T]he fact is certain, that *the foetus enjoys life long before the sensation of quickening is felt by the mother*. Indeed, no other doctrine appears to be consonant with reason or physiology, but that which admits the embryo to possess vitality from the very moment of conception.
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> If physiology and reason justify the position just laid down, we must consider those laws which treat with less severity the crime of producing abortion, at an early period of gestation, as immoral and unjust. They tempt to the perpetration of the same crime at one time, which at another they punish with death. In the language of the admirable Percival, "to extinguish the first spark of life, is a crime of the same nature, both against our Maker and society, as to destroy an infant, a child, or a man: these regular and successive stages of existence being the ordinances of God, subject alone to his divine will, and appointed by sovereign wisdom and goodness, as the exclusive means of preserving the race, and multiplying the enjoyments of mankind.

Id. at 201-03 (footnotes omitted) (emphasis in the original) (quoting *Percival's Works*, vol. 2.). *See* State v. Harris, 136 P. 264 (1913), which states:

> The arbitrary refusal of the common law to regard the fetus as alive in such cases until quick

nancy was sufficient for a prosecution under most state criminal statutes.[291] In 1957, *Wharton's Criminal Law and Procedure* affirmed:

> It has generally been held that under statutes defining the crime of abortion as the procuring of the miscarriage of "any woman," the vitality of the fetus at the time of the operation is immaterial. Statutes using the term "pregnant woman" have been interpreted as meaning pregnancy during any stage, regardless of the vitality of the fetus.[292]

Hence, one would not expect a modern use of the plea of pregnancy to maintain the quickening criteria. Indeed, present statutes regarding the plea of pregnancy are just that, pleas of pregnancy. The state of New York's present statute declares, "A sentence of death may not be carried out upon a woman while she is pregnant."[293] The statute required that the superintendent of a correctional facility when informed that a condemned woman might be pregnant, "shall appoint a qualified physician to examine the convicted person and determine if she is pregnant."[294] The state of Georgia's statute also only specifies pregnancy as determined by "one or more physicians."[295] In addition to a number of other states having similar statutes,[296] there is also a federal statute enacted in 1994, Title 18 U.S.C.A. Section 3596, which states, "A sentence of death shall not be carried out upon a woman while she is pregnant."[297] Additionally, Section 3596 provides that the sentence is to be implemented "in the manner prescribed by the law of the State in which the sentence is imposed." If that state law does not provide for the death penalty, another state is to be designated and its laws

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> was based on no sound physiological principle. Beck makes it plain that the movement recognized by the mother, and which is supposed to prove that her unborn child is alive, is merely one evidence of life, whereas unless life had existed long before the disastrous consequences to the mother must have already been suffered. 1 BECK, MED. JUR. 464-467.

Id. at 267; DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 283-85 (2006); OLDHAM, TRIAL BY JURY 106 (2006).

[291] CLARK & MARSHALL, A TREATISE ON THE LAW OF CRIMES 394-96 (J. Kearney 5th ed. 1952). *See* E. Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 447-520 (1961). *See also* Justice Blackmun's discussion of the American Medical Association's "role in the enactment of stringent criminal abortion legislation" during the late 19th century, *Roe*, 410 U.S. at 141-42.

[292] 2 WHARTON'S CRIMINAL LAW AND PROCEDURE, § 742, at 561 (R. Anderson 12th ed. 1957) (footnotes omitted).

[293] N.Y. CORRECT. § 657(1).

[294] *Id.* at § 657(2).

[295] GA. § 17-10-39.

[296] *See, e.g.*, ALA. CODE § 15-18-86; ARIZ. REV. STAT. § 13-4025; CAL. PENAL CODE §§ 3705, 3706; IND. CODE § 35-38-6-10; MASS. GEN. L. CH. 279, § 62; NEV. REV. STAT. §§ 176.465, 176.475; OHIO REV. CODE § 2949.31; S.D. CODIFIED LAWS § 23A-27A-27, S.D. CODIFIED LAWS § 23A-27A-28; UTAH CODE § 77-19-8 (2)(b)(i).

[297] 18 U.S.C.A. § 3596.

followed.[298] Consequently, because of the Supremacy Clause, any federal execution carried out in any state on a woman must comply with the federal statute and its version of the plea of pregnancy. Therefore, there is no reason to doubt the *Harvard Law Review's* summation, "In view of all these facts, it seems quite likely that a question of pregnancy arising to-day would be referred for decision directly to doctors."[299] Although the jury of matrons and their evidentiary standard of quickening were both replaced since the eighteenth century with scientific method and standards, the due process protections afforded unborn children of condemned mothers remains "in order to guard against the taking of the life of an unborn child for the crime of the mother."[300]

As with any due process question, the Court looks to our nation's legal history, as stated in *Washington v. Glucksberg*, "We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."[301] The Court in *Roe* failed to even consider this critical aspect of the legal protections afforded unborn children.[302] What is more, the plea of

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[298] 18 U.S.C.A. § 3596.(a), which states:
When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law.

[299] Note, 3 HARV. L. REV. 45 (1889).

[300] Union Pacific R. Co. v. Botsford, 141 U.S. 250, 253 (1891).

[301] Washington v. Glucksberg, 521 U.S. 702, 710 (1997).

[302] Particularly troubling about the failure of the Court to examine our legal history of the plea of pregnancy, was the misuse in *Roe* of Justice Gray's *Union Pacific R. Co. v. Botsford* opinion. To establish the right or liberty to abortion, Justice Blackmun, in both his *Roe* opinion and concurring opinion in *Casey*, stated that the first case in which the Court recognized the right to privacy was *Union Pacific R. Co. v. Botsford*. *Roe*, 410 U.S. at 152-153; *Casey*, 505 U.S. at 926. The Court in *Botsford* held that in a civil action, a federal court, under the rules of federal procedure at that time, could not order one party to the suit to submit to surgical examinations due to the absence of any "legal right or power to make and enforce such an order." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). But, as to allowing for a right of personal autonomy "free from all restraint," *Botsford* explicitly refutes such a notion, as the common law contained a number of circumstances permitting bodily examinations. *Id.* at 252-53. And, of course, *Botsford* cites the writ *de ventre inspiciendo* as another example. *Id.* at 253. Additionally, the Court in *Botsford* went on to state that the matter before it was not a Constitutional one, but a matter of the statutory power given by Congress to the federal courts, "But this is not a question which is governed by the law or practice of the state in which the trial is had. It depends upon the power of the national courts, under the constitution and laws of the United States." *Id.* at 256.

In addition to Justice Blackmun's selective reading of *Botsford*, another problem with his reliance on *Botsford* is that it was overturned by Congress. Subsequent to *Botsford*, Congress promulgated *The Rules of Civil Procedure for District Courts of the United States* under the authority of the Act of June 19, 1934, and under Rule 35 provided federal courts with the power to order a "physical or mental examination by a physician." The Court in *Sibbach v.*

pregnancy directly opposes Blackmun's claim that "In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth.... In short, the unborn have never been recognized in the law as persons in the whole sense."[303]

The plea of pregnancy also directly refutes Justice Blackmun's obfuscation in *Roe*, that the question of when life begins could not be answered:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[304]

Instead, Justice Blackmun denoted unborn persons as only having "potential life,"[305] and the Court stuck to that mystification, and similar derivations, ever since: e.g., "potential human life," "potentiality of human life," "potential life of the fetus," "fetus' potential human life," "life of the fetus that may become a child."[306] Until, at least, *Gonzales v. Carhart*.[307] Significantly, the Court in *Gonzales* dropped the use of the "potential life" euphemisms at the same time it asserted a more substantial state interest in prenatal life. Indeed, the Court went far beyond this and resolved "the difficult question of when life begins." In doing so, the Court in *Gonzales* affirmed the notion, inherent in the plea of pregnancy, that the determination of when life begins is a factual inquiry capable of being answered.

In *Gonzales*, the Supreme Court upheld the federal Partial-Birth Abortion Ban Act of 2003 (the "Act"). The Act provides that any physician who "knowingly performs a partial-birth abortion and thereby kills a *human fetus* shall be fined under this title or imprisoned not more than 2 years, or both." Congress used very specific in the language of the Partial-Birth

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Wilson & Co. upheld Rule 35 as a valid exercise of Congressional power and reiterated that *Botsford* was decided on the lack of federal judicial power at that time to order a medical examination. *Sibbach v. Wilson & Co.*, 312 U.S. 11-12 (1941). Moreover, the Court in *Schlagenhauf v. Holder upheld Sibbach* and affirmed that Rule 35 was not an unconstitutional invasion of privacy. *Schlagenhauf v. Holder*, 379 U.S. 104, 112-13 (1964). Hence, Justice Blackmun's application of *Botsford* in *Roe* was clearly erroneous and indicative of the judicial error that permeates Roe.

[303] *Roe*, 410 U.S., at 161-62 (footnotes omitted) (emphasis added).

[304] *Id.* at 159.

[305] *Id.* at 150, 154, 156, 163.

[306] *See* Addendum, *infra*, at 270, for a collection of these phrases.

[307] Gonzales v. Carhart, 550 U.S. 124 (2007).

Abortion Ban Act because the Court, in *Stenberg v. Carhart*,[308] struck down Nebraska's similar ban of partial-birth abortions for lack of "sufficient definiteness" in defining the abortion procedures being proscribed.

Consequently, the Act contains a scienter requirement that the abortionist knows the fetus is alive, as the Act does not punish an intact D&E of a fetus which is already dead. In the Court's discussion of this scienter requirement in *Gonzales*, there is a notable absence of the use of the "potential life" euphemisms. Instead, there is plain language affirming the live inherent in the unborn child:

> [T]he person performing the abortion must "vaginally delive[r] a *living* fetus." The Act does not restrict an abortion procedure involving the delivery of an expired fetus.... The Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus *is a living organism* while within the womb, whether or not it is viable outside the womb. We do not understand this point to be contested by the parties.[309]

Given the Court's previous strict adherence to the term "potential life" and synonymous expressions,[310] the plain language in *Gonzales* affirming the actual life of the unborn child is startling. So too is the declaration that this is no longer a contested issue. Said agreement was reached about in a lower court decision leading up to *Gonzales*, *Planned Parenthood Federation v. Ashcroft*.[311] There, the United States District Court for the Northern District of California, in its findings of fact, made this definitive statement, "The fetus may still have a detectable heartbeat or pulsating umbilical cord when the uterine evacuation begins in any D & E or induction, and may be considered a 'living fetus.'"[312] The Supreme Court accepted these findings noting that the parties in *Planned Parenthood Federation* agreed with that conclusion.[313] Consequently, the Supreme Court has now again embraced the idea that there does exist medical evidence which allows a court to make a finding of fact that life exists in the womb. Ergo, the procedures implicit in any plea of pregnancy are no longer in conflict with Supreme Court abortion jurisprudence.

This is no small matter as Justice Blackmun declared in *Roe*, "In view of all this, we do not agree that, by adopting one theory of life, Texas may

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[308] Stenberg v. Carhart, 530 U.S. 914 (2000).

[309] *Gonzales*, 550 U.S. at 147 (2007) (citing *Planned Parenthood*, 320 F. Supp. 2d, at 971-72) (emphasis added). Here the phrase "potential life" is only used in citing or quoting *Casey*. *Id.* at 146, 157, 186.

[310] Addendum, *infra*, at 270.

[311] Planned Parenthood Fed. v. Ashcroft, 320 F. Supp. 2d 957 (N.D. Cal. 2004).

[312] *Id.* at 971.

[313] *Id.*

override the rights of the pregnant woman that are at stake."[314] Thereafter, the states were prohibited from regulating abortion in a manner "inconsistent with the Court's holding in *Roe v. Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions," as the Court delimited in *Akron v Akron Center for Reproductive Health*.[315] Indeed, the states were prohibited from adopting any theory at all other than the unborn child only possessed "potential life." Now, states adopting an evidentiary theory of when life begins would not be in conflict with *Roe* and *Akron* in this regard. Rather, the states would be following the theory of when life begins from *Gonzales v. Carhart*. Abortion jurisprudence, as it now stands, is self refuting.

VIII. *Roe* is a Violation of the Fifth Amendment Due Process Rights of Unborn Persons.

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.[316]
>
> – Chief Justice John Marshall

The introductory quote to this section from Chief Justice Marshall in *Marbury* denotes the fundamental nature of due process in our system of ordered liberty. Likewise, Chief Justice Waite declared in *Munn v. State of Illinois*, "Rights of property which have been created by the common law cannot be taken away without due process."[317] Yet, there is another aspect to the due process right of the unborn ignored by the *Roe v. Wade* opinion, one of procedure. An Illinois case, *Doe v. Scott*,[318] in which a guardian ad litem had been appointed to represent the legal rights of the unborn, was appealed to the Supreme Court, about the same time as the other *Roe* cases. The guardian ad litem submitted a motion to the Supreme Court to consolidate his oral arguments with the *Roe* arguments. The Court denied the motion of the guardian ad litem.[319]

Yet, there is hardly a more fundamental aspect of due process than the right to be heard in court.[320] All persons, at the very least, must be afforded the protections of due process before those rights are taken away. For

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[314] *Roe*, 410 U.S. at 162.

[315] Akron v Akron Center for Reproductive Health, 462 U.S. 416, 444 (1983).

[316] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

[317] Munn v. State of Illinois, 94 U.S. 113, 134 (1876).

[318] Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971) ("Intervening defendant Heffernan is a licensed physician who has been granted leave to appear herein as guardian ad litem for those conceived but not yet born." *Id.* at 1387.).

[319] Doe v. Scott, 409 U.S. 817 (1972).

[320] Pennoyer v. Neff, 95 U.S. 714, 726 (1877).

example, three years before *Roe*, in *Goldberg v. Kelly*,[321] the Court held that recipients of government welfare benefits must be given a hearing before a benefit is terminated.[322]

Likewise, unborn persons are under the same legal disability as infants and as such, the courts need to appoint a guardian ad litem when litigating their rights, as the Court admitted in both *Roe* and *Casey*.[323] Yet, both Justices Blackmun and Stevens overlooked the fact that the Court had previously held not only that there must be a guardian ad litem appointed, but that the infant must be personally within the jurisdiction of the court, or the appointment of the guardian ad litem will not avail the court. Under such circumstances, any judgment pretending to decide their rights is void—*coram non judice*.[324] The Court upheld the due process right of infants not to be bound to decrees in foreign jurisdictions in *Insurance Co. v. Bangs*, a case involving the rights of an infant under a personal contract:

> That suit did not concern any property, real or personal. It was brought to cancel a contract made with his father, and any decree respecting it would necessarily have been *coram non judice*, unless the parties interested were before the court upon the service of a subpoena or their voluntary appearance. The infant, being absent from the State, could not be personally served.[325]

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[321] Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970).

[322] Said benefits were found by the Court to be a fundamental right, thereby requiring a full application of the Fourteenth Amendment Due Process prerequisites. The Court quoted the language of the Preamble to the Constitution in holding such benefits "not mere charity," but fundamental rights:

> From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. . . . At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our *Posterity*."

Id. at 264-65 (emphasis added).

[323] *Roe*, 410 U.S., at 162 ("Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem."); Planned Parenthood v. Casey, 505 U.S. 833, 913 (1992) (Stevens, J., concurring in part) ("Commenting on the contingent property interests of the unborn that are generally represented by guardians ad litem.").

[324] "In presence of a person not a judge. When a suit is brought and determined in a court which has no jurisdiction in the matter, then it is said to be *coram non judice*, and the judgment is void." BLACK'S LAW DICTIONARY 305 (5th ed. 1979).

[325] Insurance Co. v. Bangs, 103 U.S. 435, 439 (1880). *See* Galpin v. Page, 85 U.S. 350, 373 (1873), which states:

> The provisions mentioned were not strictly pursued with respect to the infant defendant. There were various omissions and irregularities in the proceedings taken which prevented the jurisdiction over her from ever attaching. It is unnecessary to specify them, as the effect of some of them has been the subject of judicial determination by the Supreme Court of the State. That court has adjudged that no sufficient service was ever made upon her, and that until such service no guardian ad litem could be appointed for her; and that adjudication is conclusive. It follows that the decree against her, and all proceedings founded upon such

The Court in *Manson v. Duncanson* restated the rule from *Insurance Co. v. Bangs* in this manner: "[I]t was not competent for the federal courts to appoint a guardian ad litem for a nonresident or absent infant, so as to subject him to a purely personal claim."[326] Accordingly, for a case to be enforceable against the personal interests of an infant, the infant must be within the jurisdiction of the court and the court must appoint a guardian ad litem—if either requisite is missing, the court's decision is void as to the rights of the infant.

Again, as Justice Gray stated in *McArthur*, "As under the statute of Ohio, as construed by the Supreme Court of that State, a decree annulling the probate of a will is not merely irregular and erroneous, but absolutely void, as against persons interested in the will and not parties to the decree."[327] As the Court in *Roe* dismissed a petition for the representation of unborn person, *Roe v. Wade* was not so much "wrongly decided"[328] as it was a nullity—absolutely void as against unborn persons. The Court in *Roe* never acquired personal jurisdiction over unborn persons, which was in itself a violation of their Fifth Amendment Right to Due Process in federal courts.

There is one more Supreme Court case testifying to the due process rights of unborn persons, and that is *Roe v. Wade* itself. Consider again the words of Justice Blackmun: "Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem."[329] The logical implication of Blackmun's admission is that, if an unborn were not represented by a guardian ad litem, then there would be a due process violation. It seems that Blackmun was trying to slight unborn persons as they had to be represented by guardians ad litem, yet, of course, this applies to any human being under the legal age of majority. Still, the question then

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decree, so far as her rights are concerned, necessarily fall to the ground. Judgment without jurisdiction is unavailing for any purpose.

[326] Manson v. Duncanson, 166 U.S. 533, 541 (1897). Although, the rule is different if the infant has an interest in real property in the jurisdiction:

> In the case of *Insurance Co. v. Bangs*, 103 U.S. 435, this court held that it was not competent for the federal courts to appoint a guardian ad litem for a nonresident or absent infant, so as to subject him to a purely personal claim. But it was distinctly admitted that, where the infant had an interest in *real estate* within the state or district, the rule was otherwise, and that the *power to appoint a guardian ad litem* in such of case was founded *in the general powers of courts of equity*. In this case it was said: "Our attention has been called to several cases in the state courts in which it has been held that a decree or judgment could not be collaterally attacked, though rendered in a case where a guardian ad litem had been appointed without service of process on the infant. Such are the cases of *Preston v. Dunn*, 25 Ala. 507; *Robb v. Irwin*, 15 Ohio, 689; and *Gronfier v. Puymirol*, 19 Cal. 629. All of them are illustrative of the position we have stated. They all relate to the interest of the infant in real property in the state."

Id. at 541-42 (emphasis added).

[327] McArthur v. Scott, 113 U.S. 340, 404 (1884).

[328] Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992).

[329] *Roe*, 410 U.S. at 162.

becomes, what if unborn persons are not represented by a guardian ad litem? The Court in *Manson v. Duncanson*,[330] relying on *Insurance Co. v. Bangs*, determined that in order for a case to be enforceable against the personal interests of an infant, the infant must be within the jurisdiction of the court and the court must appoint a guardian ad litem. As Justice Field stated in *Galpin v. Page*, a case upholding the due process right of a posthumous child to sufficient service, "[j]udgment without jurisdiction is unavailing for any purpose."[331]

The Court in *Casey*, by a legalistic application of stare decisis, upheld *Roe* against the interests of unborn persons despite their not being parties to either case. Yet, allowing judgments without personal service has never been the jurisprudence of the Court; as expressed in *Pennoyer v. Neff*:

> If, without personal service, judgments in personam, obtained ex parte against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression.[332]

So to, by the Court's holding in *Noble v. Union River Logging R. Co.*, the Court affirmed the rule that a judicial proceeding without service of process, the case is a nullity for want of personal jurisdiction:

> It is true that, in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the state upon the defendant in a common-law action, the seizure and possession of the res within the bailiwick in a proceeding in rem; a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged. So, if the court appoint an administrator of the estate of a living person, or, in a case where there is an executor capable of acting, or condemns as lawful prize a vessel that was never captured, or a court-martial proceeds and sentences a person not in the military or naval service,) or the land department issues a patent for land which has already been reserved or granted to another person,-the act is not voidable merely, but void. In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or subject- matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.[333]

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[330] Manson v. Duncanson, 166 U.S. 533, 541 (1897).

[331] Galpin v. Page, 85 U.S. 350, 373 (1873).

[332] Pennoyer v. Neff, 95 U.S. 714, 726 (1877).

[333] Noble v. Union River Logging R. Co., 147 U.S. 165, 173 (1893) (citing *Pennoyer*, 95 U.S. at 714; other citations omitted). *See* Stoll v. Gottlieb, 305 U.S. 165, 176 (1938).

As this article has demonstrated, the "historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court"[334] has been to treat unborn children as persons holding vested rights and duties. Furthermore, *Roe v. Wade* has been shown not to have acquired personal jurisdiction over unborn persons and is thereby a nullity. As it is a nullity, "its invalidity may be shown in a collateral proceeding."[335] The various procedural methods by which *Roe* may be collaterally attacked is beyond the scope of this article. For example, Professor Michael S. Paulsen urges in an article, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, that *Roe* is so lawless and immoral as to justify collateral attacks from lower court judges—"underruling" *Roe* as it were.[336] Yet, it may be asserted here that Professor Paulsen's arguments, and similar arguments, may be bolstered on the grounds *Roe* is a legal nullity with regards to the interests of any unborn child now brought before a court.

IX. Prior to *Roe*, Supreme Court Jurisprudence Recognized the Equal Protection Rights of Unborn Persons.

> The history of the [Fourteenth][A]mendment proves that the people were told that its purpose was to protect weak and helpless human beings.[337]
>
> – Justice Hugo Black

Equal protection seeks to ensure that persons in similar situations are treated equally under the law.[338] As the Court delineated in *Reed v. Reed*[339]:

> The equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[340]

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[334] Printz v. United States, 521 U.S. 898, 905 (1997).

[335] *Noble*, 147 U.S., at 173.

[336] Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J. L. & RELIGION 33 (1989) ("*[L]ower court judges can, and should, disregard the authority of Roe*.... He may, in effect, 'overrule' (or, perhaps a better term, given the relationship of the courts, 'underrule') *Roe v. Wade*." *Id.* at 82 (emphasis in the original)).

[337] Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 87 (1938).

[338] Yick Wo v. Hopkins, 118 U.S. 356, 367-68 (1885).

[339] Reed v. Reed, 404 U.S. 71 (1971).

[340] *Id.* at 75-76 (citation omitted).

One year before the Supreme Court decided *Roe*, it took up an equal protection case pertaining to unborn persons. *Weber v. Aetna Casualty & Surety Co.* was an equal protection case in which the Supreme Court held that illegitimate children could not be excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their father.[341] Justice Powell wrote the opinion for the Court; not wasting any time, he began as follows:

> The question before us, on writ of certiorari to the Supreme Court of Louisiana, concerns the right of dependent unacknowledged, illegitimate children to recover under Louisiana workmen's compensation laws benefits for the death of their natural father on an equal footing with his dependent legitimate children. We hold that Louisiana's denial of equal recovery rights to dependent unacknowledged illegitimates violates the Equal Protection Clause of the Fourteenth Amendment.[342]

Of great significance, was the fact that there were two unacknowledged illegitimate children of the father and mother, one born and the other unborn at the time of the death of its father—death being the time at which the rights of recovery are vested for surviving dependants.[343] The Supreme Court necessarily held that there was an equal protection duty owed to the *unborn* illegitimate child also, "We think a posthumously born illegitimate child should be treated the same as a posthumously born legitimate child."[344]

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[341] Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

[342] *Id.* at 165 (citing Levy v. Louisiana, 391 U.S. 68 (1968)).

[343] Similarly, under Social Security regulations, the pertinent test is whether or not the unborn child was "living with" the decedent at the time of his death, 42 U.S.C. § 416(h)(3)(C)(ii): "[S]uch insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died." Mathews v. Lucas, 427 U.S. 495, 497-98 (1975) (an opinion written by Justice Blackmun), states:

> In operative terms, the Act provides that an unmarried son or daughter of an individual, who died fully or currently insured under the Act, may apply for and be entitled to a survivor's benefit, if the applicant is under 18 years of age at the time of application (or is a full-time student and under 22 years of age) and was dependent, within the meaning of the statute, at the time of the parent's death. A child is considered dependent for this purpose if the insured father was living with or contributing to the child's support at the time of death.

See also Wagner v. Finch, 413 F.2d 267, 268-69 (1969), which states:

> [W]e agree that the illegitimate child of a deceased father, conceived before, but born after, the father's death, is sufficiently "in being" to be capable of "living with" the father at the time of his death. The fact that a worker dies before the birth of a child already "in being" is no legal or equitable reason to prohibit that child from benefits.

See also Badie v. Columbia Brewing Co., 142 La. 853, 77 So. 768 (1918); Nelson v. Galveston, H. & S. A. R. Co., 78 Tex. 621, 14 S.W. 1021 (1890); Herndon v. St. Louis & S. F. R. Co., 37 Okl. 256, 128 P. 727 (1912); The George and Richard, 3 Ad. & El. 466, 111 Eng.Rep. 491 (1871).

[344] *Weber*, 406 U.S. at 169 n.7.

Justice Powell reasoned in the opinion that the illegitimate children were as much dependent on their deceased father as the legitimate children and were therefore as much as entitled to any financial rights accruing from his death as the legitimate children:

> An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged. So far as this record shows, the dependency and natural affinity of the unacknowledged illegitimate children for their father were as great as those of the four legitimate children whom Louisiana law has allowed to recover.[n.7] The legitimate children and the illegitimate children all lived in the home of the deceased and were equally dependent upon him for maintenance and support.... [T]hey are dependent children, and as such are entitled to rights granted other dependent children.[345]

Exploring further the relationship of the unborn child, Justice Powell wrote in footnote seven that although the unborn child's relationship with his father was not as close as that of the born children, such was not the proper comparison. The proper comparison was between an unborn illegitimate child and an unborn legitimate child, persons in similar situations who deserved to be treated equally under the law:

> The affinity and dependency on the father of the posthumously born illegitimate child are, of course, not comparable to those of offspring living at the time of their father's death. This fact, however, does not alter our view of the case. We think a posthumously born illegitimate child should be treated the same as a posthumously born legitimate child, which the Louisiana statutes fail to do.[346]

Now, an objection could be made that *Weber* was still one of those cases that Justice Blackmun characterized as contingent rights of the unborn.[347] But, as was seen from the holding in *McArthur v. Scott*, unborn persons can, and do, hold vested rights—that is the inherent holding as regards the unborn child in *Weber*. Otherwise, if the unborn child's right of support was merely contingent upon birth, as the father died before birth, then the contingency failed. Rather, the right of support in *Weber* vested in the womb per Louisiana law.[348] Certainly, the Court explicitly noted the affinity and

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[345] *Id.* at 169-70.

[346] *Id.* at 169 n.7.

[347] *Roe*, 410 U.S., at 162 ("Perfection of the interests involved, again, has generally been contingent upon live birth.").

[348] Badie v. Columbia Brewing Co., 142 La. 853, 77 So. 768 (1918). Louisiana was one of the first states to hold that a posthumous child was entitled to recover under a wrongful death statute in *Badie v. Columbia Brewing Co.* In *Badie*, the Supreme Court of Louisiana did not go into a lengthy discussion of the rationale for allowing a posthumous child to recover under

dependency *en ventre sa mere* as a fact establishing the valid claim of the unborn illegitimate.

In this regard, the *Weber* decision is a logical continuation of *Levy v. Louisiana*,[349] on which it relies. In *Levy*, Justice Douglas expressed the same sentiments on the relationship between parent and child:

> Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.[n. 5]
>
> We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother. [n. 7][350]

To highlight the importance of parental support, Justice Douglas referred in footnote five of his opinion to the Louisiana statute which explicitly stated the duty of both parents to support their children, including illegitimate ones: "Under Louisiana law both parents are under a duty to support their illegitimate children."[351] And, in accordance with this duty, Justice Douglas referred in footnote seven to the corresponding right of illegitimate children to recover under Louisiana's Workmen's Compensation Act.[352]

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the statutes; largely because the lower court found for the posthumous child's cause of action without elaborating on that particular point of law. So, the Supreme Court in *Badie* simply noted, "[A]nd we concur in that view." *Id.* at 769. Yet, the *Badie* decision firmly established the notion of the personhood of the unborn child under state law. It was only five years after *Badie* that the Court of Appeal of Louisiana held that a parent of a child who died as a result of injuries received in the womb could likewise recover under the state's wrongful death statute in *Cooper v. Blank*, 39 So.2d 352 (La. 1923). The court in Cooper engaged in this discussion of the *Badie* opinion:

> This decision has an important bearing in the instant case for, as we see it, it presents the converse of the proposition we are discussing. If a child en ventre sa mere is in contemplation of law a separate entity, to the extent that a right of action survives to it for injury to its father inflicted during its gestation, why does not the right of action survive to the father for personal injuries to the child, inflicted prior to parturition?

Id. at 360. *See* Nelson v. Galveston, H. & S. A. R. Co., 78 Tex. 621, 14 S.W. 1021 (1890); Herndon v. St. Louis & S. F. R. Co., 37 Okl. 256, 128 P. 727 (1912); The George and Richard, 3 Ad. & El. 466, 111 Eng.Rep. 491 (1871). *See also* Mathews v. Lucas, 427 U.S. 495, 497-98 (1975).

[349] Levy v. Louisiana, 391 U.S. 68 (1968).

[350] *Id.* at 72.

[351] *Id.* at 72 n.5 (citing LA. CIV. CODE ANN. ARTS. 239, 240 (1952)).

[352] *Id.* at 72 n.7, which states:

> Under Louisiana's Workmen's Compensation Act (La. Rev. Stat. Ann. 23:1231, 23:1252, 23:1253 (1964)) an illegitimate child, who is a dependent member of the deceased parent's family, may recover compensation for his death. *See* Thompson v. Vestal Lumber & Mfg. Co., 208 La. 83, 22 So.2d 842 (1945). Employers are entitled to recover from a wrongdoer workmen's compensation payments they make to the deceased's dependent illegitimate

Levy also specifically took up the issue of personhood of illegitimate children. In doing so, the Court in *Levy* scolded the Supreme Court of Louisiana for their treatment of them, "We start from the premise that illegitimate children are not 'nonpersons.'"[353] Having thus been chided for holding illegitimate children to essentially be nonpersons, the Supreme Court of Louisiana was careful in *Stokes v. Aetna Casualty & Surety Co.*,[354] (the case on writ of certiorari to the Supreme Court of Louisiana in *Weber v. Aetna Casualty & Surety Co.*) to state:

> Unlike Louisiana Civil Code Article 2315, our compensation law does not treat illegitimate children as "non persons" (as the United States Supreme Court in *Levy* held that the *Article* does); the acknowledged illegitimate child is placed on a par with legitimate children; the unacknowledged illegitimate child is not denied a right to recover compensation, he being merely relegated to a less favorable position as are other dependent relatives such as parents.[355]

But the U.S. Supreme Court rejected such "finely carved distinctions" in *Weber*.[356] In so doing the Court held there was an equal protection duty owed an unborn person—a duty to treat a posthumously born *illegitimate* child the same as a posthumously born *legitimate* child. It should be stressed that the Louisiana Supreme Court's holding in *Stokes* was not overturned because they held illegitimate children, born or unborn, to be non-persons. The Louisiana court explicitly stated that the illegitimate children were persons, which necessarily included the unborn illegitimate child. Accordingly, under the principals announced in *Erie R. Co. v. Tompkins*,[357] this construction of state laws, which held unborn children to be persons, was binding upon the Supreme Court[358] and accepted by the Court without qualification in *Weber v. Aetna Casualty & Surety Co.*

Consequently, the equal protection case of *Weber v. Aetna Casualty & Surety Co.* can only be interpreted under the state law which gave rise to the claim of the unborn child. Again, the Supreme Court held that there was an equal protection duty owed to the unborn *illegitimate* child when it stated, "We think a posthumously born illegitimate child should be treated the same

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children. *See* Board of Commissioners v. City of New Orleans, 223 La. 199, 65 So.2d 313 (1953); Thomas v. Matthews Lumber Co., 201 So.2d 357 (Ct. App. La. 1967).

[353] *Id.* at 70.

[354] Stokes v. Aetna Casualty & Surety Co., 242 So.2d at 567 (1970).

[355] *Id.* at 570.

[356] Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 169 (1972).

[357] Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

[358] Eisenstadt v. Baird, 405 U.S. 438, 442 (1972); Groppi v. Wisconsin, 400 U.S. 505, 507 (1971); Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959); Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

as a posthumously born legitimate child."[359] This right held by the unborn child was not characterized by the court or underlying state law as a contingent right,[360] but rather one that vested in the womb at the time of the father's death. Accordingly, prior to *Roe*, the jurisprudence of the Supreme Court recognized both an equal protection right under *Weber v. Aetna Casualty & Surety Co.* and a due process right under *McArthur v. Scott* as owed to unborn persons.

X. Unborn Children Are Persons Within the Jurisdiction of the States Under the Fourteenth Amendment.

> To permit a State to employ the phrase "within its jurisdiction" in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment.[361]
>
> – Justice William Brennan

The Due Process and Equal Protection clauses of the Fourteenth Amendment read, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person *within its jurisdiction* the equal protection of the laws."[362] There is an important distinction between these two clauses concerning the phrase "within its jurisdiction." Justice Harlan explored this distinction in *Blake v. McClung*:

> Observe that the prohibition against the deprivation of property without due process of law is not qualified by the words "within its jurisdiction," while those words are found in the succeeding clause relating to the equal protection of the laws. The court cannot assume that those words were inserted without any object, nor is it at liberty to eliminate them from the constitution, and to interpret the clause in question as if they were not to be found in that instrument.[363]

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[359] Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 169 n.7. (1972). *See also*, DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 197 n.3 (1989) ("The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." (Citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

[360] Obviously, if the child did not survive till birth, there could be no claim for support. In this situation, to say the right was contingent upon birth is merely a truism.

[361] Plyler v. Doe, 457 U.S. 202, 213 (1982).

[362] U.S. CONST. amend. XIV, § 1 (emphasis added).

[363] Blake v. McClung, 172 U.S. 239, 260-61 (1898).

The Court held that one of the other plaintiffs in error along with Blake, namely Hull Coal & Coke Company (a corporation), was never within the jurisdiction of the state of Tennessee. And, never being within the jurisdiction of the state, Hull Coal & Coke could not invoke the Equal Protection Clause of the Fourteenth Amendment:

> Without attempting to state what is the full import of the words, "within its jurisdiction," it is safe to say that a corporation not created by Tennessee, nor doing business there under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not, under the above clause of the fourteenth amendment, within the jurisdiction of that state.[364]

Two years later, the case was back before the Supreme Court again, this time on a writ of error brought on a motion by Blake in the Tennessee Supreme Court for a decree in conformity with the first U.S. Supreme Court opinion. In that second *Blake v. McClung* case, Justice Harlan reiterated his finding that as jurisdiction over the company was lacking in Tennessee, the Equal Protection Clause was not applicable:

> In relation to the Hull Coal & Coke Company this court held that . . . although a "person" within the meaning of the Fourteenth Amendment, . . . not being within the jurisdiction of Tennessee it could not invoke the protection of the clause forbidding the denial by a state of the equal protection of the laws to persons within its jurisdiction.[365]

Justice Harlan's opinion is in line with the Court's similar holding some twenty years before in *Pennoyer v. Neff* regarding in personam jurisdiction. *Pennoyer* is a confirmation of the legal definition of person because in personam jurisdiction has as its object "to determine the personal rights and obligations of the defendants."[366] Although *Pennoyer v. Neff* is a due process case, the Court turned the holding upon the key issue of whether the state had acquired in personam jurisdiction over a party to the underlying suit.

Justice Field, delivering the opinion in *Pennoyer*, noted all states held "that to bind a defendant personally, when he was never personally summoned or had notice of the proceeding, would be contrary to the first principles of justice."[367] Accordingly, each state allowed decisions, where

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[364] *Id.* at 261.

[365] Blake v. McClung, 176 U.S. 59, 65 (1900).

[366] Pennoyer v. Neff, 95 U.S. 714, 727 (1877) ("But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose.").

[367] *Id.* at 732.

service was deficient in some other state, to be collaterally attacked.[368] Prompting Justice Field to declare:

> But if the court has no jurisdiction over the person of the defendant by reason of his nonresidence, and, consequently, no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice,—it is difficult to see how the judgment can legitimately have any force within the State.[369]

Then, Justice Field recounted that the federal courts, prior to the Fourteenth Amendment, likewise allowed such cases to be collaterally attacked, taking their cue from the state courts.[370] Yet, this changed significantly with the enactment of the Fourteenth Amendment and such cases involving a personal claim, wherein one party was not personally served, could thereby be attacked directly:

> Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.[371]

Hence, jurisdiction has played a key part in both due process and equal protection jurisprudence: a state rendering judgment against a person, without first acquiring personal jurisdiction over him, is a violation of due process; and, conversely, if a state cannot exercise in personam jurisdiction over a person, there can be no claim of a denial of equal protection "to any person within its jurisdiction."

In addition to those cases that have denied equal protection due to lack of jurisdiction, there is the converse line of case law that has applied the Equal Protection Clause where jurisdiction has been found (instead of found

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[368] *Id.* ("In several of the cases, the decision has been accompanied with the observation that a personal judgment thus recovered has no binding force without the State in which it is rendered, implying that in such State it may be valid and binding.").

[369] *Id.*

[370] *Id.* at 732-33, which states:

> Be that as it may, the courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the State courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them.

[371] *Id.* at 733.

wanting). The beginning of this line of cases can be traced to the 1885 case of *Yick Wo v. Hopkins*.[372] In *Yick Wo v. Hopkins* the Court held that aliens, although neither "born or naturalized" citizens, were nevertheless persons under the Fourteenth Amendment and thereby afforded protection from an unjust state law. In *Yick Wo*, Justice Matthews made this declaration:

> The fourteenth amendment to the constitution is not confined to the protection of citizens. It says, "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.[373]

The holding in *Yick Wo v. Hopkins* that aliens, residing within a state's jurisdiction, although neither "born or naturalized" citizens, were persons under the Fourteenth Amendment is without controversy. Thirteen years after *Yick Wo*, the Court considered another case turning precisely on the application of the word "jurisdiction" in the Fourteenth Amendment, *United States v. Wong Kim Ark*.[374] In that case the question before the Court was whether a person born in the United States to alien parents was a citizen.[375] The Court held such persons born in the United States to be citizens by means of the first clause of the Fourteenth Amendment.[376]

In reaching this holding, the Court once again delved into the meaning of the phrase "within the jurisdiction of the United States" and observed:

> The decision in *Yick Wo v. Hopkins*, indeed, did not directly pass upon the effect of these words in the fourteenth amendment, but turned upon subsequent provisions of the same section. But, as already observed, it is impossible to attribute to the words, "subject to the jurisdiction thereof" (that is to say, of the United States), at the beginning, a less comprehensive meaning than to the words "within its jurisdiction" (that is, of the state), at the end of the same section; or to hold that persons, who are indisputably "within the jurisdiction" of the state, are not "subject to the jurisdiction" of the nation.
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> It necessarily follows that persons born in China, subjects of the emperor of China, but domiciled in the United States, having been adjudged, in *Yick Wo v. Hopkins*, to be within the jurisdiction of the state, within the meaning of the concluding sentence, must be held to be subject to the

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[372] Yick Wo v. Hopkins, 118 U.S. 356 (1885).
[373] *Id.* at 369.
[374] United States v. Wong Kim Ark, 169 U.S. 649 (1898).
[375] *Id.* at 705.
[376] *Id.* at 702-03.

> jurisdiction of the United States, within the meaning of the first sentence of this section of the constitution; and their children, "born in the United States," cannot be less "subject to the jurisdiction thereof."[377]

Accordingly, *Ark* also stands for the proposition that "jurisdiction," as it is used regarding both the federal and state governments in the Fourteenth Amendment, means within the boundaries of the applicable government entity, either federal or state. What is more, since the *Roe* decision, the Supreme Court explicitly affirmed and expounded on this concept of equal protection belonging to any person within the state's jurisdiction in *Plyler v. Doe*.[378]

In *Plyler*, the Court held a Texas statute unconstitutional under the Fourteenth Amendment's Equal Protection Clause which sought to deny public education for children who were not "legally admitted" into the United States. In its own defense, the state of Texas came up with a technical argument—they sought to deny the application of the Equal Protection Clause to undocumented aliens as they were not lawfully "within its jurisdiction," their presence within the state being unlawful. Justice Brennan, writing for the Court, explained their argument:

> Appellants seek to distinguish our prior cases, emphasizing that the Equal Protection Clause directs a State to afford its protection to persons within its jurisdiction while the Due Process Clauses of the Fifth and Fourteenth Amendments contain no such assertedly limiting phrase. In appellants' view, persons who have entered the United States illegally are not "within the jurisdiction" of a State even if they are present within a State's boundaries and subject to its laws.[379]

The Supreme Court strongly rejected the state's argument because the Appellants essentially arguing that the phrase "within its jurisdiction" was intended to be a phrase of limitation, making the application of the Equal Protection Clause more limited than the Due Process Clause:

> We have never suggested that the class of persons who might avail themselves of the equal protection guarantee is less than coextensive with that entitled to due process. To the contrary, we have recognized that both provisions were fashioned to protect an identical class of persons, and to reach every exercise of state authority. . . .
>
> In concluding that "all persons within the territory of the United States," including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government, we reasoned from the understanding that the Fourteenth Amendment was designed to

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[377] *Id.* at 696-97.
[378] Plyler v. Doe, 457 U.S. 202 (1982).
[379] *Id.* at 211.

> afford its protection to all within the boundaries of a State. [Citing *Wong Wing*[380] and *Plyler v. Doe*[381]] Our cases applying the Equal Protection Clause reflect the same territorial theme.
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> "Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders."[382]

In addition, Justice Brennan pointed out that the phrase "within its jurisdiction," far from being words of limitation, were intended to be words of inclusion. The Court was decidedly against the idea of the Fourteenth Amendment allowing for any type of outlaws or castes:

> There is simply no support for appellants' suggestion that "due process" is somehow of greater stature than "equal protection" and therefore available to a larger class of persons. To the contrary, each aspect of the Fourteenth Amendment reflects an elementary limitation on state power. To permit a State to employ the phrase "within its jurisdiction" in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure

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[380] Wong Wing v. United States, 163 U.S. 228, 238 (1896), states:
And in the case of *Yick Wo v. Hopkins*, 118 U.S. 369, 6 Sup. Ct. 1064, it was said: "The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws." Applying this reasoning to the fifth and sixth amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guarantied by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.

[381] *Plyler*, 457 U.S. at 212 n.11, which states:
In his separate opinion, Justice Field addressed the relationship between the Fifth and Fourteenth Amendments:

> The term 'person,' used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.... The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar - in face of the great constitutional amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Wong Wing v. United States, 163 U.S., at 242-43 (concurring in part and dissenting in part).

[382] *Plyler*, 457 U.S., at 211-13 (quoting Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 350 (1938).

> that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection.[383]

Then, after a discussion of the congressional debate on the Fourteenth Amendment,[384] Justice Brennan concluded that the phrase "within its jurisdiction" was satisfied by a person's "presence within the State's territorial perimeter" regardless of whether entry was lawful.[385]

No doubt, "[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."[386] Yet, not to apply the Equal Protection Clause to all persons within a state's jurisdiction would defeat the very purpose of the Equal Protection

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[383] *Id.* at 213.

[384] *Id.* at 214-15, which states:

Although the congressional debate concerning § 1 of the Fourteenth Amendment was limited, that debate clearly confirms the understanding that the phrase "within its jurisdiction" was intended in a broad sense to offer the guarantee of equal protection to all within a State's boundaries, and to all upon whom the State would impose the obligations of its laws. Indeed, it appears from those debates that Congress, by using the phrase "person within its jurisdiction," sought expressly to ensure that the equal protection of the laws was provided to the alien population. Representative Bingham reported to the House the draft resolution of the Joint Committee of Fifteen on Reconstruction (H. R. 63) that was to become the Fourteenth Amendment. CONG. GLOBE, 39th Cong., 1st Sess., 1033 (1866). Two days later, Bingham posed the following question in support of the resolution:

> "Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? Is it not essential to the unity of the Government and the unity of the people that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?" *Id.*., at 1090.

Senator Howard, also a member of the Joint Committee of Fifteen, and the floor manager of the Amendment in the Senate, was no less explicit about the broad objectives of the Amendment, and the intention to make its provisions applicable to all who "may happen to be" within the jurisdiction of a State:

> "The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, *whoever he may be*, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. *This abolishes all class legislation* in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.... It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction." *Id.*, at 2766 (emphasis added).

[385] *Id.* at 215.

[386] *Id.* at 213.

Clause.[387] Accordingly, the broadest interpretation of the phrase "within its jurisdiction" is required—"the simple fact of his presence within the State's territorial perimeter."[388]

Consequently, a state exercise of in personam jurisdiction over an unborn person is just another way of stating that the state exercised "authority to pass upon his personal rights and obligations."[389] Ergo, a state exercise of in personam jurisdiction over an unborn person demonstrates that an unborn child qualifies as "any person within its jurisdiction" under the Fourteenth Amendment's Equal Protection Clause. Be that as it may, Blackmun's opinion in *Roe* sufficiently establishes the fact that the unborn were treated as persons under all the facets of law directly applied to them. Again, consider Justice Blackmun's words:

> In areas *other than* criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. That rule *has been changed in almost every jurisdiction*.... Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem.[390]

Here Justice Blackmun implicitly admitted that unborn children were persons under then existing state criminal, prenatal tort[391] and property law.

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[387] *Id.* at 213.

[388] *See In re* Slaughter-House Cases, 83 U.S. 36 (1872) (Swayne, J., dissenting):

> By the language "citizens of the United States" was meant all such citizens; and by "any person" was meant all persons within the jurisdiction of the State. No distinction is intimated on account of race or color. This court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it. The protection provided was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes, and *conditions* of men.

Id. at 128-29 (emphasis added).

[389] Pennoyer v. Neff, 95 U.S. 714, 727, 732 (1877).

[390] *Roe*, 410 U.S. at 161-62 (emphasis added).

[391] Furthermore, "the traditional rule of tort law [that] denied recovery for prenatal injuries" was not actually traditional. That is to say, Justice Oliver Wendell Holmes, Jr.'s holding in *Dietrich v. Northampton*, 138 Mass. 14 (1884) had no direct precedent under the common law. *See* Torigian v. Watertown News Co. Inc., 352 Mass. 446, 447 (1967), which states:

> In *Dietrich v. Northampton*, 138 Mass. 14 (1884), this court in an opinion by Holmes, J., held that where a mother, between four and five months advanced in pregnancy, gave birth prematurely to an infant who survived for only a few minutes, there was no right of recovery for the death in an administrator in an action based on prenatal injury. The view was expressed (page 17) that the child was not a "person" within the meaning of the predecessor of G. L. c. 229, § 2. The decision, which presented the issue for the first time in this country, was based principally on the lack of supporting precedent at the time.

Id.; Amann v. Faidy 114 N.E.2d 412, 416 (Illinois 1953) ("It has been said that Justice Holmes,

Clearly, the states held the power to recognize unborn children as persons under their municipal law, and exercised that power. The Court in *Roe* admitted that unborn children were persons, but not in "the whole sense." This "finely carved" distinction[392] is the epitome of "caste-based and invidious class-based legislation,"[393] and stands in contradiction to the jurisprudence of the Supreme Court.

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unable to find any precedent for the action for prenatal injuries, believed that the common law afforded no remedy, whereas a more accurate statement, according to SALMOND, TORTS, 346 (10th Ed., Stallybrass, 1945), would have been that there was no English authority on either side of the question."). Damasiewicz v. Gorsuch 79 A.2d 550, 560-61 (Maryland 1951) states:

> [Holmes] based it upon a common law which had no positive existence, but is derived from an isolated statement by Lord Coke, which is itself modified in the same sentence by the suggestion that the law in many cases has consideration for the unborn child by reason of the expectation of its birth.... On the contrary, it would appear that, is so far as there was any common law on the subject, the right would be recognized under the general theory, *ubi jus ibi remedium*. ....
>
> The law itself deals with rights, and since we now know that a child does not continue until birth to be a part of its mother, it must follow that as soon as it becomes alive it has which it can exercise.

Id.

Justice Blackmun made the claim in *Roe* that though "some States" allowed wrongful death actions for stillborn children, it was merely to "vindicate the parents' interest." *Roe*, 410 U.S. at 162. This claim was refuted by an article Justice Blackmun cited in footnote 64, *Annotation, Action for Death of Unborn Child*, 15 A.L.R. 3d 992 (1967). *Roe*, 410 U.S. at 162 n.64. This article reveals that the majority of states that decided the issue allowed for such wrongful death actions. *See* Roden, *Prenatal Tort Law and the Personhood of the Unborn Child: A Separate Legal Existence*, 16 ST. THOMAS L. REV. 207, 247-70 (2003).

[392] *Weber*, 406 U.S. at 169.

[393] An inquiry might be made asking to what extent the Fourteenth Amendment would offer proactive protection from the mother's private action in having an abortion, i.e. the private killing of an unborn person without the overt involvement of the state. At the very least, it would seem that states would be prohibited from licensing abortionists. Lombard v. Louisiana, 373 U.S. 267, 283 (1963) (Douglas, J., concurring) ("There is no constitutional way, as I see it, in which a State can license and supervise a business serving the public and endow it with the authority to manage that business on the basis of apartheid, which is foreign to our Constitution."). Also, "wrongful acts" cannot be protected "by some shield of state law or state authority." Civil Rights Cases, 109 U.S. 3, 17 (1883); *see* United States v. Guest, 383 U.S. 745 (1966), and the "Mississippi Burning" case United States v. Price, 383 U.S. 787 (1966). Additionally, "The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 197 n.3 (1989). Besides equal protection under the Fourteenth Amendment, Congress could directly outlaw abortion under the Commerce Clause, such as it did with the Partial-Birth Abortion Ban Act of 2003. Gonzales v. Carhart, 550 U.S. 124 (2007). Finally, as the status of African Americans and other minorities has been improved by their personhood under the Fourteenth Amendment, so too would the status of unborn persons.

XI. Unborn Children Are Treated As Persons Eligible for Federal Entitlements.

> When a woman is delivered, or declares herself with child, of a bastard, and will by oath before a justice of peace charge any person having got her with child, the justice shall cause such person to be apprehended, and commit him till he gives security, either to maintain the child, or appear at the next quarter sessions to dispute and try the fact.[394]
>
> – William Blackstone

Consonant with the foregoing recognitions under the law of unborn children's personhood, Congress has granted unborn children equal protection rights to Social Security Child's Survivor Insurance benefits[395] if they meet relationship and dependency requirements under the Social Security Act.[396] As Judge Posner recounted in *Bennemon ex rel. Williams v. Sullivan*[397]:

> In 1965 . . . Congress had broadened the rights (theretofore slight) of illegitimate children under the social security statute, creating the legal structure that we apply today. . . .
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> [I]f the child is illegitimate, he must squeeze himself into one of a limited set of niches, and if he can't, then he gets no benefits even if there is little doubt that the deceased wage earner was the child's biological father, which is the case here. The niches are: eligibility to inherit under the law of the pertinent state (in effect deferring to state policy on the rights of illegitimate); a written acknowledgment of parenthood by the deceased wage earner or a judicial determination to that effect; or a determination by the Social Security Administration that the deceased was the parent and, *at the time of his death*, was either living with the child or "contributing to the child's support."[398]

Posner explained that although the minimum level of support to qualify for benefits varied among the federal circuits,[399] the test was always based on the level of support at the time of the father's death. The Social Security Administration explained its policy in a Senate Report by stating that the program was "intended to pay benefits to replace the support lost by a child when his father" died.[400]

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[394] 1 COMMENTAIRES 446 (1st ed.).
[395] 42 U.S.C. § 402(d) (2010),
[396] 42 U.S.C. § 416(h) (2010).
[397] Bennemon ex rel. Williams v. Sullivan, 914 F.2d 987 (7th Cir. 1990).
[398] *Id.* at 989 (quoting §§ 416(h)(2)A), (3)(C)(i), (ii)) (emphasis added).
[399] *Id.* at 990.
[400] *Id.*

Yet, no federal court of appeals held unborn illegitimate children not to be "persons" under the Social Security Act prior to *Weber*.[401] Four years before *Roe*, in *Wagner v. Finch*,[402] the Northern District court of Texas granted the Secretary of Health, Education and Welfare's motion for summary judgment contending that the claimant posthumous illegitimate child, Donna, was not the "child" of the "insured individual as that term is defined by the Social Security Act."[403] The Fifth Circuit Court of Appeals reversed, noting:

> Medically speaking, Donna was *viable from the instant of conception onward*. . . . Had her father not been killed *shortly after she was conceived* and two weeks before his planned marriage to her mother, there would be no question of the child-claimant's right to benefits. . . . The fact that a worker dies before the birth of a child already "in being" is no legal or equitable reason to prohibit that child from benefits.[404]

In the years after *Roe*, but before *Casey*, a rule developed in the federal system regarding illegitimate posthumous children, that the support by the father for the unborn child need only be "commensurate" with the unborn child's needs at the time of death.[405] Yet, in *Orsini ex rel. Orsini v. Sullivan*, even when the Eleventh Circuit denied benefits for a posthumous illegitimate child who "had only been conceived one week prior to"[406] her father's death, it was not because the unborn child was not a person. In Orsin, dependency could not be established through support at the time of death because the parents lived apart and each was "employed and self-supporting."[407] The argument was made that the pertinent provisions of

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[401] The federal courts had recognized the rights of unborn children in areas other than federal entitlements. In the District of Columbia, a medical malpractice suit was allowed for prenatal injuries. Bonbrest v. Kotz, 65 F. Supp. 138, 140 (1946) ("From the viewpoint of the civil law and the law of property, a child *en ventre sa mere* is not only regarded as human being, but as such from the moment of conception—which it is in fact."). In another case from the District of Columbia, an unborn child was held to be a "person" under the District's wrongful death statute. Simmons v. Howard University, 323 F. Supp 529, 529 (D.D.C. 1971) ("The increasing weight of authority supports the proposition that a viable unborn child, which would have been born alive but for the negligence of defendant, is a 'person' within the meaning of the wrongful death statute."). In South Carolina, a federal court allowed a claim for prenatal injuries under the Federal Torts Claims Act. Sox v. United States, 187 F. Supp. 465 (E.D. S.C. 1960).

[402] Wagner v. Finch, 413 F.2d 267 (5th Cir. 1969).

[403] *Id.* at 267.

[404] *Id.* 268-69 (emphasis added).

[405] Adams v. Weinberger, 521 F.2d 656, 660 (2nd Cir. 1975); Doran v. Schweiker, 681 F.2d 605, 607-09 (9th Cir. 1982); Parsons for Bryant v. Health and Human Services, 762 F.2d 1188, 1191 (4th Cir. 1985); Wolfe v. Sullivan, 988 F.2d 1028, 1028 (10th Cir. 1993).

[406] Orsini ex rel. Orsini v. Sullivan, 903 F.2d 1393, 1395 (11th Cir. 1990).

[407] *Id.* at 1394.

the Social Security code violated the Fifth Amendment's equal protection component of its due process clause.[408] The specific objection was that some illegitimate child had to prove dependency upon the deceased parent, while legitimate and other illegitimate children were presumed to be dependant upon the deceased parent.[409] The court could have dismissed this argument altogether by holding such unborn children were not persons in the first place, but instead, the Orsini Court found *Mathews v. Lucas*[410] controlling. In *Mathews*, Justice Blackmun wrote an opinion upholding such statutory presumptions of dependency as being "justified by *administrative convenience.*"[411] By thus relying on *Mathews*, the *Orsini* court did not reach its decision because the unborn illegitimate child did not have equal protection standing; rather, it was that her equal protection challenge failed on substantive grounds.

In *Bennemon ex rel. Williams v. Sullivan*,[412] Judge Posner characterized the illegitimate child's claim as one of *inheritance*, which he asserted would have been "laughable" under the common law.[413] However, the very reason *Bennemon* and cases like it ended up in federal court was because the illegitimate child failed to qualify under the *inheritance* "niche," the criteria for which was determined by the state's statutes.[414] And, as Posner explained, since *Mathews v. Lucas*, it was very difficult, if not impossible, to successfully argue such state inheritance statutes were unconstitutional.[415] Alternatively, the claimants in these cases were utilizing the support "niche;" the litmus test being the level of support the child received from the father at the time of the father's death. In essence, the child claims a survivor interest in the father's support.

So, it is of some importance that an illegitimate child had a right of support from his father under the common law. Even though there were no rights of inheritance,[416] the common law courts held the child to have a right of support from his father, as evidenced by the introductory quote to this section from Blackstone.[417] Consequently, as under the common law an

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[408] *Id.* at 1397.

[409] *Id.*

[410] Mathews v. Lucas, 427 U.S. 495 (1976).

[411] Orsini ex rel. Orsini v. Sullivan, 903 F.2d 1393, 1397 (1990) (quoting *Mathews*) (emphasis added).

[412] Bennemon ex rel. Williams v. Sullivan, 914 F.2d 987 (7th Cir. 1990).

[413] *Id.* at 988.

[414] *Id.* at 989.

[415] *Id.* at 991.

[416] 1 COMMENTARIES 447 (1st ed.) ("I PROCEED next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody.").

[417] 1 COMMENTARIES 446 (1st ed.), which states:

> LET us next see the duty of parents to their bastard children, by our law; which is principally that of maintenance....
>
> THE method in which the English law provides maintenance for them is as follows. When

illegitimate child had a claim to support from its father, with the advent of survivorship statutes it may be reasoned that an illegitimate child would correspondingly have a surviving claim to support from his deceased father. Accordingly, federal law in this regard comports quite nicely with the common-law duty parents owed their illegitimate children.

Additionally, the entitlement of unborn children to Social Security benefits is even more significant in light of *Goldberg v. Kelly*,[418] wherein the Court held that recipients of government welfare benefits had Fourteenth Amendment Due Process protection of those benefits. "Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and *our Posterity*.'"[419]

Conclusion: Which Stare Decisis?

> Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound, we are obliged to reexamine the question.[420]
>
> – Chief Justice William Rehnquist

In his dissent in *Planned Parenthood v. Casey*, the late Chief Justice Rehnquist quipped, "*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality."[421] This article has sought to reveal that *Roe* was nothing more than a mere façade to begin with. Beginning with the Colonial American case of *Lessee of Ashton v. Ashton*,[422] and the immediate post-revolutionary American cases *Commonwealth v. Bathsheba Spooner*[423] and *State v. Arden*,[424] the

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a woman is delivered, or declares herself with child, of a bastard, and will by oath before a justice of peace charge any person having got her with child, the justice shall cause such person to be apprehended, and commit him till he gives security, either to maintain the child, or appear at the next quarter sessions to dispute and try the fact. But if the woman dies, or is married before delivery, or miscarries, or proves not to have been with child, the person shall be discharged: otherwise the sessions, or two justices out of sessions, upon original application to them, may take order for the keeping of the bastard, by charging the mother, or the reputed father with the payment of money or other sustentation for that purpose. And if such putative father, or lewd mother, run away from the parish, the oversees by direction of two justices may seize their rents, goods, and chattels, in order to bring up the said bastard child.

[418] Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970).

[419] *Id.* at 265 (emphasis added).

[420] Planned Parenthood v. Casey, 505 U.S. 833, 955 (1992) (Rehnquist, C.J., dissenting).

[421] *Id.* at 954.

[422] *Lessee of Ashton v. Ashton*, 1 U.S. 4 (1760). *See also* DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 211-28 (2006) (an examination of criminal abortion in the American colonies).

[423] Commonwealth v. Bathsheba Spooner, 2 AM.CRIM.TRIALS 175 (1778).

[424] State v. Arden, 1 Bay 487 (1795).

development of the legal personality of unborn children in America has been demonstrated.[425] From that beginning, the whole of hornbook and black letter law of the state and federal governments came to testify to the personhood of the unborn child when the *Roe* opinion was argued.

The states have historically held the power to recognize unborn children as persons under their municipal law, and did so exercise that power. Accordingly, per *Erie R. Co. v. Tompkins*, the Supreme Court has bound itself and the federal courts to the states' interpretation of their own laws as "There is no federal general common law."[426] *Erie* was a watershed case, and it has diligently been adhered to under the policy of stare decisis.[427] Accordingly, Blackmun's erroneous reinterpretation of state municipal law regarding the personhood of unborn children was without constitutional foundation.[428]

Given the recognition of unborn children as persons by the states under their municipal law, applying the Equal Protection Clause of the Fourteenth Amendment to unborn persons is unavoidable—"[N]or shall any State... deny to any person within its jurisdiction the equal protection of the laws."[429] As the Court clearly stated in *Plyler v. Doe*, "[T]he Fourteenth Amendment was designed to afford its protection to all within the boundaries of a State."[430]

It has also been shown that the Supreme Court had previously given judicial recognition of the due process rights of unborn persons in *McArthur v. Scott*[431] and their equal protection rights in *Weber v. Aetna Casualty & Surety Co*.[432] Likewise, it has been shown that the Supreme Court recognized the due process protection for the life of the unborn child, whose mother was convicted of a capital crime, in *Union Pacific R. Co. v. Botsford*.[433] This is a due process protection that continues to exist under state common law, as well as state and federal statutory law. Hence, the logic of *Roe v. Wade* fails in every manner. Moreover, the Court admitted that the unborn were persons,[434] yet denied their personhood on the wholly unsubstantiated and contrived criteria that the unborn are not "persons in the whole sense."[435]

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[425] *Ashton*, 1 U.S. (1 Dall.) at 4.

[426] Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[427] *See* Eisenstadt v. Baird, 405 U.S. 438, 442 (1972); Groppi v. Wisconsin, 400 U.S. 505, 507 (1971); Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959).

[428] *Roe*, 410 U.S. at 162 ("In short, the unborn have never been recognized in the law as persons in the whole sense.").

[429] U.S. CONST. amend XIV, § 1.

[430] Plyler v. Doe, 457 U.S. 202, 212 (1982).

[431] McArthur v. Scott, 113 U.S. 340 (1884).

[432] Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

[433] Union Pacific R. Co. v. Botsford, 141 U.S. 250 (1891).

[434] *Roe*, 410 U.S. at 162.

[435] *Id.*

In addition to the substantive irregularities of the *Roe v. Wade* opinion, the Court failed to fulfill its procedural due process duty to appoint a guardian ad litem to represent the interests of unborn persons before it. This fundamental violation of the most basic principal of justice renders *Roe* and its progeny "the constant instruments of fraud and oppression."[436] Conclusively, *Roe* is at odds with "historical understanding and practice,... the structure of the Constitution, and... the jurisprudence of [the Supreme] Court."[437]

That the Court continues to uphold *Roe* is a constancy of inconsistency—an oxymoron resulting from innumerable non sequiturs. In the final analysis, *Roe v. Wade* was not just "wrongly decided."[438] In terms of substantive law, its findings are clearly erroneous, and justice requires that it be overturned. In terms of procedural law, *Roe* is a nullity—absolutely void as against unborn persons[439]—*coram non judice*,[440] and the law of the land compels its negation.

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[436] Pennoyer v. Neff, 95 U.S. 714, 726 (1877).

[437] Printz v. United States, 521 U.S. 898, 905 (1997).

[438] Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992) ("To overrule prior law for no other reason than that would run counter to the view, repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.").

[439] McArthur v. Scott, 113 U.S. 340, 404 (1884).

[440] Insurance Co. v. Bangs, 103 U.S. 435, 439 (1880); *Pennoyer*, 95 U.S. at 732.

Addendum

Uses of the Phrase "Potential Life" and Its Synonyms: *Roe* through *Casey*

"Potential life"

Roe v. Wade, 410 U.S. 113, 150, 154, 156, 163 (1973); Doe v. Bolton, 410 U.S. 179, 197 (1973); *id.* at 221 (White, J. dissenting); Beal v. Doe, 432 U.S. 438, 457, 461 (1977) (Marshall, J., dissenting); Colautti v. Franklin, 439 U.S. 379, 406 (1979) (White, J. dissenting); Harris v. McRae, 448 U.S. 297, 316, 324, 325, (1980); *id.* at 327, 328 (White, J., concur); *id.* at 341, 344, 346 (Marshall, J., dissent); *id.* at 351, 351 n.3, 352, 352 n.4 (Stevens, J., dissent); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 461, 466, 474 (1983) (O'Connor, J., dissenting); Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 500 (1983) (Blackmun, J., concurring and dissenting); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 759 (1986); *id.* at 784, 784 n.* (Burger, J. dissenting); Webster v. Reproductive Health Services, 492 U.S. 490, 516 n.14 (1989); *id.* at 528, 530 (O'Connor, J., concurring); *id.* at 536 n.* (Scalia, J., concurring); *id.* at 541, 547 n.7, 552, 555, 556 (Blackmun, J., concurring and dissenting); *id.* at 569 (Stevens, J., concurring and dissenting); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 871, 872, 875, 876, 877, 878, 882, 887, 898 (1992); *id.* at 914, 915 n.3, 916, 918 (Stevens, J., concurring and dissenting); *id.* at 925, 929, 934 (Blackmun, J., concurring and dissenting); *id.* at 949, 952, 973 (Rehnquist, C.J., concurring and dissenting).

"Potentiality of life"

Roe v. Wade, 410 U.S. 113, 162 (1973).

"Potentiality of human life"

Roe v. Wade, 410 U.S. 113, 162, 164 (1973); Beal v. Doe, 432 U.S. 438, 461 (1977) (Marshall, J., dissenting); Harris v. McRae, 448 U.S. 297, 324 (1980); *id.* at 330n.3, (Brennan, J., dissenting); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 428 (1983); *id.* at 453 n.1, 459 (O'Connor, J., dissenting); Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 482 (1983); *id.* at 499 (Blackmun, J., concurring and dissenting); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 784 (1986) (Burger, J., dissenting, quoting Roe); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 871, 876, 879 (1992);

id. at 929 (Blackmun, J., concurring and dissenting); *id.* at 946 (Rehnquist, C.J., concurring and dissenting); *id.* at 982 (Scalia, J., concurring and dissenting).

"Potential future human life"

Roe v. Wade, 410 U.S. 113, 170 (1973) (Stewart, J., concurring).

"Potentially able to live outside the mother's womb"

Roe v. Wade, 410 U.S. 113, 160 (1973); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 63, 64 (1976); Colautti v. Franklin, 439 U.S. 379, 387 (1979); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 454 n.1 (1983) (O'Connor, J., dissenting).

"Life or potential life"

Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J. dissenting); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 92 (1976) (White, J., concurring and dissenting); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 852, 870 (1992).

"Life or potential life of the fetus"

Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J. dissenting).

"Potential life of the fetus"

Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 93 (1976) (White, J., concurring and dissenting); Beal v. Doe, 432 U.S. 438, 460 (1977) (Marshall, J., dissenting); Maher v. Roe, 432 U.S. 464, 472, 478 (1977); *id.* at 489 (Brennan, J., dissenting); Colautti v. Franklin, 439 U.S. 379, 386, 387 n.7 (1979); Harris v. McRae, 448 U.S. 297, 313, 324 (1980); *id.* at 329 (Brennan, J., dissenting); H.L. v. Matheson, 450 U.S. 398, 435 (1981) (Marshall, J., dissenting); Webster v. Reproductive Health Services, 492 U.S. 490, 516 n.14 (1989); *id.* at 541 (Blackmun concurring and dissenting); *id.* at 562 (Stevens concurring and dissenting); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 949, 974 (1992) (Rehnquist, C.J., concurring and dissenting).

"Potential human life"

Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 61 (1976); *id.* at 93 (White, J., concurring and dissenting); Beal v. Doe, 432 U.S. 438, 461

(1977) (Marshall, J., dissenting); Harris v. McRae, 448 U.S. 297, 313 (1980); *id.* at 350 (Stevens, J., dissenting); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 420 n.1 (1983); *id.* at 454 n.1, 460, 461, 461 n.8 (O'Connor, J., dissenting); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 828, 831 (1986) (O'Connor, J., dissenting); *id.* at 794, 795 n.4 (White, J., dissenting, quoting Roe); Webster v. Reproductive Health Services, 492 U.S. 490, 515, 516, 516 n.14, 519, 520 521 (1989); *id.* at 528 (O'Connor, J., concurring); *id.* at 544, 545 n.6, 546, 549, 553, 554, 555 n.10 (Blackmun, J., concurring and dissenting); *id.* at 562 (Stevens, J., concurring and dissenting); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 914, 915 (1992); *id.* at 932 (Blackmun, J., concurring and dissenting); *id.* 989, 992 (Scalia, J., concurring and dissenting).

"Future life of the fetus"

Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 93 (1976) (White, J., concurring and dissenting).

"Capability (capable) of meaningful life outside the womb"

Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 63 (1976); *id.* at 99,100 (White, J., concurring and dissenting); Colautti v. Franklin, 439 U.S. 379, 406 n.1 (1979) (White, J. dissenting); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 428 (1983); Webster v. Reproductive Health Services, 492 U.S. 490, 516 n.14 (1989); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 930 (1992) (Blackmun, J., concurring and dissenting).

"Potentiality of meaningful life"

Colautti v. Franklin, 439 U.S. 379, 387 (1979).

"Potential for human life"

Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting).

"Potential life of the unborn child"

Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 428 (1983); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 974 (1992) (Rehnquist, C.J., concurring and dissenting).

"Potential life postviability"

Webster v. Reproductive Health Services, 492 U.S. 490, 531 (1989) (O'Connor, J., concurring).

"Potential life of a viable fetus"
Webster v. Reproductive Health Services, 492 U.S. 490, 544 (1989) (Blackmun, J., concurring and dissenting).

"Potential life of an embryo"

Webster v. Reproductive Health Services, 492 U.S. 490, 569 (1989) (Stevens, J., concurring and dissenting).

"Fetus' potential human life"

Webster v. Reproductive Health Services, 492 U.S. 490, 553 (1989) (Blackmun, J., concurring and dissenting); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 933 (1992) (Blackmun, J., concurring and dissenting).

"Life or potential life of the unborn"

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 870 (1992).

"Fetal life or potential life"

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 876 (1992).