

Constitutional Fetal Personhood: Short Form of Silver Bullet Revised

It is undisputed by lawyers, judges, justices, law professors, and constitutional law scholars and experts that the United States Supreme Court (USSC) is constitutionally forbidden absolutely, and in all cases and situations, to write out of the Constitution any person or class of persons protected by the due process clauses of the 5th and 14th Amendments. The unborn child is such a person; and he was written out of the Constitution by Roe v Wade. I will very easily prove as much on Roe's "own grounds", and not at all on my own mine grounds. The USSC may or may not (and it doesn't) have the constitutional authority to write into those clauses persons not otherwise included there, such as our beloved pets; but that court certainly may not write out of those clauses a person already in them. Notwithstanding Roe v. Wade, I will prove to a reasonable moral and constitutional certainty that there is no question but that the unborn human fetus is indeed a 5th and 14th Amendment due process clause person. First up is the easy way to prove so:

Suppose that a federally condemned woman was impregnated by her prison guard eight weeks before her date of execution, and that the dirty deed was uncovered through a DNA analysis of semen contained in a used prophylactic found in her bedding on the eve of her execution. Suppose further, that the condemned woman does not petition for a stay of execution until the birth of her child, but that an obstetric ultrasound, or a fetal dating scan confirms the existence in her womb of a live, walnut-size newly formed fetus. Finally, suppose that the sole issue before the court is whether a federal statute, which bars, without exception (other than the exception of a person's inability to appreciate that his death is imminent) all reprieves, violates the Fifth Amendment's due-process clause (1789/1791), in that the condemned woman's fetus qualifies as a person there.

Who would argue to uphold the statute barring the granting of the fetus' petition for a stay of his (her) mother's execution, so that he or she may live life just as do you and yours? Planned Parenthood would argue so; but the arch-pro-choice ACLU would not.

Now is presented the hard way to prove constitutional fetal personhood. This way complies with all the various methods of constitutional interpretation employed by all nine justices in the USSC's 5-4, 2nd Amendment gun rights case of D. C. v Heller (2008) 554 U.S. 570, wherein this observation is put forth (quoting U.S. v. Sprague (1931) 286 U.S. 716, 731): The words and phrases of the Constitution "were used in their (then: 1789/1791) normal and ordinary meaning." To say that our Founding Fathers valued gun possession worthy of constitutional protection, but not so the unborn fetus living in the womb of his mother is beyond extraordinary. Retired Supreme Court Justice Paul Stevens, widely recognized as one of the most liberal justices ever to sit on the USSC, in his Address: Construing the Constitution, 18 UC Davis L.R. 1, 20 (1985), observed: Supreme Court justices, in interpreting the text of the Constitution, "must, of course, try to read...[the] words [put forth there] in the context of

beliefs that were widely held in the [late] eighteenth century." One such widely held belief at that time was that an intact human person comes into his existence just as soon as he achieves fetal formation in the womb of his mother. So, a formed fetus (*i.e., a human embryo that has acquired a human shape*) must be deemed as a Fifth Amendment due process clause protected person (and therefore also as a Fourteenth Amendment protected such person, since the Fourteenth Amendment's due process clause, which was duplicated from the 5th Amendment due process clause, necessarily incorporates all of the 5th Amendment due process clause case authorities and interpretations). See, by way of analogy- and one fully applicable here, Penry v. Lynaugh, 492 U.S. 302, 330 (1989): "At a minimum, the Eighth Amendment prohibits punishment considered cruel and unusual at the time the Bill of Rights was adopted." (Contrary to a near universal belief, *quicken*ing played no role whatsoever in the prosecution of procured abortion or unborn child-killing at the pre-nineteenth century English common law.) Charles Leslie, in his Treatise of the Word Person (1710), p. 7, observed that a fetus or man becomes "a Person by the Union of his Soul and [formed] body...is the acceptance of a person among men in all common sense and as generally understood." This same widely held and accepted belief was noted also by Walter Charleton, a fellow of the Royal College of Physicians, in his Enquiries into Human Nature (1699), p. 378, "That the life of man doth both originally spring, and perpetually depend from the intimate conjunction and union of his reasonable soul with his body, is one of those few assertions in which all Divines [theologians] and natural philosophers [scientists] unanimously agree." And so said Benjamin Rush (1745-1813), foremost recognized eighteenth century American physician, founding father, and signer of the Declaration of Independence (1776), in his Medical Inquiries (1789), p. 42" "No sooner is the female ovum thus set in motion, and the fetus formed, then its capacity of life is supported." Samuel Johnson, in his A Dictionary of the English Language (1755) (vol. 2, sub. tit: *quick*) defined *quick with child* as "the child in the womb after it is perfectly formed." George Mason, in his A Supplement to Johnson's English Dictionary (1801) (sub. tit.: *quick*) defined "with *quick with child*" as "pregnant with a live child."

The great problem, here, is not that the Roe v Wade majority justices, in rejecting constitutional fetal personhood, committed the most egregious error and gross injustice in the history of Anglo-American law. The great problem is that the consequences of this grave injustice seem too enormous (the destruction of some sixty (65) plus millions of constitutional persons), so as to admit the error, Man's capacity to deceive himself (or to be deceived) in the name of humanity transcends humanity. And so said W.H. Auden: "Everything turns away quite leisurely from the disaster."