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Justice Antonin Scalia
C/O Supreme Court of the United States
U.S. Supreme Court Building
1 First Street Northeast
Washington, D.C. 20543

Dear Justice Scalia:

You say that the right to life guaranteed by the 5th (14th) Amendments' due process clauses is limited to "walking-around persons", and that "there is nothing in the legislative history of those two amendments that gives any indication that their framers intended the post-embryonic fetus (let alone the pre-post-embryonic fetus) to be included within the meaning of the word person in those two due process clauses." True enough. But the same can be said of the newborn babe feeding at her mother's breasts. And no reasonable person would claim that the newborn babe does not qualify as a person here.

I can, and indeed, I have already proved through "primary" legal authority (see www.parafferty.com) each of the following two (2) propositions: 1) at the English common law the post-embryonic human fetus was recognized as an "intact" human being or person, and 2) our Founding Fathers, the Signers of the Declaration of Independence, and the Framers of our Constitution recognized and thought of the post-embryonic human fetus as an intact human being or human person no less than themselves, or walking-around ones or newborn babes feeding at their mothers' breasts. And if these two (2) propositions are true, then the question here is: Is there anything in the legislative history of the Fifth Amendment's due process clause indicating that its Framers intended "to certainly exclude" the post-embryonic human fetus as a due-process clause recognized person. The answer here is, of course, a resounding "no"! Or, do you deny the validity of this observation of that most liberal of all justices, Justice Paul Stevens: Supreme Court Justices in interpreting the Constitution, "must, of course, read the words [used by the framers of the Constitution] in the context of beliefs that were widely held in the late 18th century". (Justice Paul Stevens, Address: Construing the Constitution, 18 UC Davis L.R. 1, 20 (1985))? So, quit superimposing upon a late 18th century legislative mentality on fetal personhood your parochial 21st century mentality on fetal personhood.

Charles Leslie, in his Treatise of the Word Person p. 14 (1710), observed that a fetus or man becomes "a *Person* by the Union of his Soul and [formed] Body...This, is the acceptance of

a person among men, in all common sense and as generally understood." Similarly, Walter Charleton, a fellow of the Royal College of Physicians, in his Enquiries into Human Nature p. 378 (1699), observed "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." This union was then understood to occur at "fetal formation" (and not at "quickening" which is the pregnant woman's initial perception of the movement of her fetus). This understanding was not based on any religious belief, be it Catholic, Protestant, theistic, or otherwise, rather on the opinion or teaching of Aristotle as set forth in his Historia Animalium (Lib. 7, C.3, 4:583). That most celebrated American physician, Benjamin Rush (1745-1813), a founding father and signer of the Declaration of Independence, in his Medical Inquiries p. 10 (1789), observed: "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 1755 Dictionary of the English Language defined "quick with child" (as in "pregnant with a live child") as "the child in the womb after it is perfectly formed".

I assure you that all that was ever in dispute here was whether or not the pre-post-embryonic human person is properly not considered or recognized as an intact human being or person. Charles Morton, a one-time president of Harvard College, in his Compendium Physicae p. 146 (1680) (the science textbook used by Harvard college students from 1687 to 1728), stated:

> Here a question may be moved: at what time the soul is infused? It has been formerly thought not to be till the complete organization of the body … And here the law of England [i.e., 21 Jac. (Jas) 1, c.27 (1623/24), and reproduced online at www.parafferty.com: click on Roe v. Wade: The Birth of a Constitutional Right (1992) and scroll through pp. 475-482] … condemns not the whore who destroys her [bastard] child for murther unless it appears that the child was perfectly formed … Upon this supposal: that till then there is no union … of soul and body; but indeed it seems more agreeable to reason that the soul is infused [at] … conception.

For our purposes, it matters not, here, whether Morton's foregoing position is true. Our Founding Fathers were undoubtedly of the opinion or mentality that the pre-post-embryonic human being or person should be recognized "as if" it is already an intact human being or person. See, e.g., Hall v. Hancock (1834), 32 Mass. 255, 257-58: at the English common law the unborn child – whether an actual one or only a potential one – is generally considered to be "in being [in post-natal existence] … in all cases where it will be for the benefit of such child to be so considered", and Palmore v. Sidoti (1984), 466 U.S. 429, 433 (by virtue of the doctrine of parens patriae "the State … has a duty of the highest order to protect … children").

You should also know that Roe's fetal non-person holding is "void ab initio" (within the meaning of Burgett v. Texas (1967), 389 U.S. 109) because Jane Roe's fetus was not given a due-process-mandated meaningful opportunity to defend itself against the allegation that it does not qualify as a due process person. (No guardian ad litem, and no counsel were appointed, here, to represent Jane Roe's fetus.) Even Scott the slave in Dred Scott was given the opportunity to

argue that he possesses a constitutionally guaranteed right to be relieved of his status as a slave. The fact, that the State of Texas argued (albeit, incompetently to the very material detriment of Jane Roe's fetus) that the fetus is a due process clause person, is no constitutionally recognized substitute for due process of law which is always "personal" to the one entitled to it. In any event, and as the Roe opinion expressly acknowledged, Texas had a material conflict of interest (See Roe v. Wade, 410 U.S. 113, 158 at fn. 54.)

The following observation of Hannah Arendt is the most fitting and accurate description of the Supreme Court's actions in Roe and Casey: "The power of the modern state [including one of its arms, such as its highest court] makes it possible for it to turn lies into truth by destroying the facts which existed before, and by making new realities to conform to what until then had been ideological fiction."

In Roe, the Court destroyed the historical fact that procured abortion was always criminally prosecuted at the English common law, and then created a false historical reality that procured abortion was recognized there (at common law) as a woman's liberty. The Roe Court then went on to create the following as facts from a Roe trial court record that was void of any of these facts:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psycho-logical harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

The Roe Court's "fetal-scapegoating" or parading of "potential horribles" facing a woman denied access to procured abortion violated a fundamental rule of appellate review as articulated in Hammond v. Schappi, 275 U.S. 171-173, 1927: "Before any of the questions suggested, which are both novel and of far-reaching importance are passed on by this Court, the facts essential to their decisions should be definitely found by the lower courts upon adequate evidence."

The central principle of rule "by the rule of law" is "ascertainable legal standards". The central question of modern constitutional law is the legal standard for determining whether an asserted interest or right qualifies as a "fundamental right". The Roe opinion held that access to procured abortion is a woman's fundamental right. Yet, there is no person under God's good sun who can demonstrate what legal standard was employed by the Court in Roe to conclude that procured abortion qualifies as a fundamental right. (The same is equally true relative to Roe's holding that the state's admittedly legitimate interest in safeguarding conceived unborn human life is "non-compelling" until fetal viability.) Hence, one may reasonably maintain that Roe v. Wade has initiated the ruination of constitutional law by rejecting rule "by the rule of law".

Do you remain unconvinced that the unborn human fetus qualifies as a 5th (14th) Amendment due process clause person? Well then, let's see you try and constitutionally justify a vote to uphold constitutionally the statute posed in the following hypothetical constitutional issue:

> Suppose that a "federally" condemned woman was impregnated by her prison guard eight (8) weeks to the day before her scheduled 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 scheduled date of execution. Suppose also that the condemned woman does not request a stay of execution until the birth of her child, but that an obstetric ultrasound or dating scan confirms the existence in her womb of a live, walnut-size, formed fetus. Finally, suppose that the "sole" (I repeat: "sole") issue before the Court is whether a federal statute, which bars, without exception (other than the exception of the person's inability to appreciate that his or her death is imminent), all reprieves, violates the Fifth Amendment's due process clause (enacted in 1791), in that the condemned woman's live fetus qualifies as a Fifth Amendment, due process clause person. Who would argue to uphold the statute barring the granting of a fetus's petition for a stay of his mother's execution?

Rest assured Justice Scalia that I can explode to beyond "kingdom-come" any justification you would employ to uphold the constitutionality of the statute set forth in the foregoing hypothetical. If you doubt that I can, then see Philip A. Rafferty, Roe v. Wade: Unraveling the Fabric of America (2012/13) at pp. 50-54. I sent to you (and to each of your fellow justices) a copy of that book. If you can't find it in the Supreme Court's library, then you might try looking in one of the Court's waste baskets. ☺

Finally, you should know also that the only hope for the salvation of your position affirming fetal non-personhood is that persons who should know better continue (at their peril) ignoring what I have written on affirming fetal personhood.

Sincerely,

Philip A. Rafferty

/sp

Cc: Justice Samuel A. Alito
Justice Anthony M. Kennedy
Justice Stephen G. Breyer
Chief Justice John G. Roberts, Jr.
Justice Ruth Bader Ginsburg
Justice Sonia Sotomayor
Justice Elena Kagan
Justice Clarence Thomas