The Unborn Child as a Constitutionally Protected Person

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When pro-life scholars argue that Roe v Wade should be overruled and returned to the several states and that procured abortion should be left to those states to either legalize or outlaw, they fail to mention two important items: 1) What's to stop a pregnant woman in an abortion-outlawed state from traveling to an abortion-legalized state? 2) And they are, in effect, maintaining that the legality of procured abortion is not a “rights of person” issue, but rather is a “state's rights” issue. Although in the body of this presentation I do not specifically make the following argument, the observant reader will see here that it is set forth there implicitly.

I maintain that the 5th Amendment’s due process clause (enacted in 1791), in and of itself, mandates that the Federal Government take all reasonable measures and actions to ensure that the several states, that comprise the United States, take all reasonable actions and measures to protect unborn fetuses living within their respective jurisdictions from being aborted. This argument is based on the following three (3) premises, each of which I have sufficiently established from a constitutional standpoint: 1) The case of Plyer v Doe, 457 U S 202,212 n.11 (1982) expressly affirms the proposition that every human being living within the jurisdiction of the Republic constitutes a 5th Amendment person. 2) The word person in the 5th Amendment’s due process clause must be interpreted in light of how the word person was generally and commonly understood in late 18th century America and in light of the then and there American-received English common law. The framers of the 5th Amendment’s due process

clause thought of the post-embryonic fetus living in the womb of his or her mother as no less a human person than themselves, or a walking around one, or a newborn babe feeding at his mother's breasts. Here is one of near countless such examples: 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". 3) Both the states and the Federal Government have a constitutional duty of the highest order to protect and safeguard each and every child within their respective jurisdictions (Palmore v Sidoti, 466 U S 429, 433 (1984)).

If you find yourself interested in what I have to say today, you can find more details in my new book, Roe v Wade: Unraveling the Fabric of America (2012), particularly at pages 49-54. My 1992 book, which sets forth 650 years of English common law abortion cases, along with other materials (including this presentation), is available for free download on my website: **www.parafferty.com.**

The legal analysis that I'm presenting to you is an exercise in hope. It sets forth a way or method that, to the best of my knowledge, has yet to be tried, by which to try to convince the U.S. Supreme Court to revisit or reconsider it's holdings in Roe v Wade that the human fetus does not qualify as a constitutionally protected person. This way or method is relatively very inexpensive and simple, meaning that no massive litigation is needed. Also, it can be repeated indefinitely until the Court agrees to do what it is morally obligated to do: reconsider its Roe v. Wade fetal non-person holdings.

The 5th Amendment was adopted in 1791. It operates against federal action. Its due process clause provides, in part, that "no person shall be deprived of his life without due process of law". The 14th Amendment was adopted in 1868. It incorporated this same due process clause, and operates against state action. For example, being ticketed in Yosemite (Federal) National Park constitutes federal action, while being ticketed on Highway 99 or Interstate 5 by the California Highway Patrol constitutes state action. Whoever qualifies as a 5th Amendment due process clause person qualifies also as a 14th Amendment person. In Plyer v Doe (1987) the U.S. Supreme Court cited with approval this

observation: "The 5th Amendment due process word "person" is broad enough to include every human being within the jurisdiction of the republic."

I maintain that, contrary to the Roe v Wade opinion, our Founding Fathers (the signers of the Declaration of Independence, the Framers of our Constitution, including the 5th Amendment Due Process Clause) thought of the (post-embryonic) fetus living in the womb of his mother as no less an "intact" human being (person) than the newborn babe feeding at her mother's breast, or themselves, or walking around persons, and therefore the fetus is entitled to the security for his life that the Constitution and "the rule of law" can provide. I maintain further that our Founding Fathers were of the opinion that this same "security for his life" is guaranteed equally to the pre-fetal product of human conception by virtue of the American-received English common law "fetal benefit" and "parens patriae" doctrines, which provide respectively as follows: Hall v. Hancock 1834, 32 Mass. 255, 257-58 holds that 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".

The essence of due process of law is a "meaningful" opportunity to be heard. It is personal, meaning that it attaches itself to the person or entity entitled to it. Due process dictates that both sides, or all sides, of a disputed legal issue be given a fair or meaningful opportunity to argue the issue.

In Roe v Wade the Supreme Court elected to hear and decide the question of whether Jane Roe's unborn fetus qualifies as a 14th Amendment due process clause person, and in doing so remarked expressly that if the fetus qualifies so, then a pregnant woman does not enjoy a constitutionally guaranteed, fundamental right to abort it, and stated implicitly that the states would be constitutionally required to take whatever action is reasonably needed to prevent it's mother from aborting it. The Court, in electing to decide this issue, thereby made Roe's fetus a party in Roe v Wade. The Court went

on to hold that Jane Roe's fetus does not qualify as a due process clause person.

Jane Roe's fetus was, of course, one side of the disputed legal issue of whether he qualifies as a due process clause person. However, Roe's fetus was not given a fair or meaningful opportunity to be heard since it was incapable of arguing for it's life. This could have been very easily rectified by the Court appointing a guardian ad litem to represent the interests of Jane Roe's fetus. This guardian ad litem would have then hired, or had appointed, a competent attorney to argue or defend the interest of Roe's fetus. Guardian ad litems are appointed to represent minors and other persons who are, for whatever reason, incapacitated. An example would be if an infant child is seriously injured in an automobile accident where a person running a red light hit her mother's car.

Since Roe's fetus was denied due process of law by not being given a meaningful opportunity to be heard, the Roe fetal non-person holding is, on it's face, void ab initio, meaning it is without legal effect. This means that it is not binding on the states, and that it can be attacked collaterally. A collateral attack means that a person can seek to have Roe's non-person holding declared void ab initio in a lawsuit (such as a petition to enjoin a procured abortion from occurring) in his home state, and does not have to go directly to the U.S. Supreme Court to petition to void it. See, by way of analogy, Burgett v Texas, (1967), 389 U.S.109.

Even Dred Scott, the slave, was at least given the opportunity to be heard on the question of whether or not the Constitution guarantees that he be set free from remaining a slave. Jane Roe's fetus, in Roe v Wade, was never given an opportunity to argue for it's life: not in the trial court, not in the federal court of appeal, and not in the Supreme Court.

The U.S. Supreme Court speaks and acts only through the cases it agrees to hear and to decide. It can hear only “real cases,” as opposed, say, to a proposed hypothetical case. In order for the Court to hear your case, 4 of the 9 justices must vote in favor of hearing your case. 4 justices must still agree to hear your case even if there are only 8, or 7, or 6 total justices available for whatever reason. To

prevail in your case requires a simple majority of a quorum of sitting justices. A simple majority could be as few as 4 justices, since a quorum is 6 or more sitting justices.

As I said in my opening remarks, I am here today to provide a ray of hope that our Supreme Court will agree to revisit or reconsider it's holding in Roe v Wade that the human fetus, living in the womb of his mother, does not qualify as a 5th (14th)Amendment due process clause person.

My proposal for presenting the Supreme Court with an opportunity to reconsider it's fetal non-person holding, to the best of my knowledge, has never been tried. It involves a client who is a father of an unborn child, acting as the unborn child's guardian ad litem, going into a state trial court with a petition seeking to enjoin it's mother from aborting their fetus or unborn child on the grounds that the fetus does indeed qualify as a 5th (14th)Amendment person. This is in spite of the Roe v Wade holding to the contrary, since that holding is void ab initio per Burgett v Texas.

The very nature of the relief that is being requested in my proposed petition says clearly that it's a fetal rights issue at stake, and not a state's rights issue: the petition is asking a state trial court judge to prevent an abortion from even happening (and then is asking the Supreme Court to rule that the state trial court was wrong not to enter an order granting the injunction to prevent the physician procured abortion from even taking place). That obviously has absolutely nothing to do with state's rights. In fact, it's asking the Supreme Court to tell the states that they are forbidden by the Constitution to not outlaw all abortion, and that the states must take all reasonable measures that carry a real probability to "effectively" prevent procured abortions from occurring.

I would, of course, explain to my client, the father, that there is no hope of saving his child in this instance, and that the trial court will undoubtedly deny the petition. I would then appeal the trial court's judgment denying the request for an injunction to the California Court of Appeal, which would affirm the trial court's judgment. I would then petition the California Supreme Court to hear my client's case.

Once the California Supreme Court denies a hearing, my client is now in a position to petition the U.S. Supreme Court to hear the case.

The central holding in Roe v Wade was not the court's express fetal non-person holding, but rather it's holding that a pregnant woman's interest in aborting her fetus qualifies as a fundamental or unalienable right. According to the Court, fundamental rights represent that class of rights that the English common law and American systems of law have traditionally regarded as of the very essence of the concepts of justice and ordered liberty. They are part of the very structure of society. They are "those rights...for the establishment and protection of which state governments were created to... secure". They have at all times been enjoyed by the citizens of the several states. They are "enshrined in the history and the basic constitutional documents of English-speaking peoples," and they include those rights "long recognized at the English common law as essential to the orderly pursuit of happiness by free men."

Almost by definition fundamental or unalienable rights are complimentary and never act in contradiction to each other. Thus, the Roe holding (410 U.S. 113, 152-53) that a pregnant woman enjoys a 5th (14th)Amendment (due process clause) guaranteed fundamental or unalienable right to destroy her unborn child by a physician-performed abortion holds (implicitly) also that her unborn child does not possess a fundamental or unalienable right not to be aborted by his mother, and does not qualify as a 14th Amendment person (since the 14th Amendment, and the 5th as well obviously, cannot be construed to confer upon one person a right to kill another innocent person). And so, if the Court reconsiders its express fetal non-person holding, then it will necessarily have to reconsider Roe's holding that procured abortion is a fundamental right.

What can be stated truly about the so-called fundamental right to have an abortion can be said of no other fundamental right: It is a practice that may very well consist in the killing of an intact or existing,

innocent human being (and to which the some 35 plus state fetal murder statutes attest: see Unraveling, pp. 218-219 (at note 14) and also at pp. 27-29.) No unbiased, reasonable person can say that this is not so. To maintain, as did the Roe majority justices, that a concern for whether abortion kills an intact human being can be simply arbitrarily excised from the constitutional equation of whether abortion access qualifies as a fundamental right is the equivalent of arguing that a concern for human safety can be arbitrarily excised from the building equation for a new superhighway. With that consideration removed, nothing, here, is left really to consider. And it is that judicial mindset which undoubtedly caused the Roe majority justices to commit due process error in failing to appoint constitutionally mandated legal representation to Roe's fetus in the arguing of the issue of whether he (a human fetus) qualifies as a 5th (14th) Amendment, due process clause person.

Our Constitution and state legal systems are all derived from the English common law. As observed by the Supreme Court in Smith v Alabama (1888): "The interpretation of the Constitution...is necessarily influenced by the fact that it's words are framed in the language of the English common law, and are to be read in light of its history."

The Roe majority justices would, of course, deny that their conclusion that procured abortion qualifies as a "fundamental right" was arrived at without consideration for the aborted fetus. They would have said that "we gave it the same consideration which, according to the late renowned legal scholar, Cyril Means Jr., it was given at the English common law; and we expressly acknowledged as much in our opinion in Roe v. Wade: 'our holding [that a woman has an unfettered "fundamental," constitutionally guaranteed right to procure an abortion of her non-viable fetus]...is consistent with the lenity of the [English] common law on [abortion.]'" (See Roe v. Wade, 410 U.S. at 165). The exact opposite is the truth: I have documented 650 years, from 1200 to 1850, of Primary English common law Legal authorities or precedents that prove that aborting the unborn fetus was always prosecuted as murder or as a very serious crime. Here is but one of over a hundred such documented cases. It states that what Roe held to be a "fundamental right" because it

was recognized as such at the English common law (and therefore is established as one of the most sacred of all constitutionally guaranteed rights), was in fact murder (a hanging offense) at the English common law. The case is Queen v West (1848) (20 years before the adoption of the 14th Amendment). The following quote is the trial court judge instructing the jury on the common law crime of the murder of a non-viable human fetus or human being:

> The prisoner is charged with murder: and the means stated are that the prisoner caused the premature delivery of the witness Henson, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. This, no doubt, is an unusual mode of committing murder…; but I am of the opinion, and I direct you in point of [the common] law, that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a such state that it is less capable of living [meaning that the child "became nearer to death or farther from life"], and afterward dies in consequence of its exposure to the external world [i.e., because it was aborted alive in a non-viable state], the person who, by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder.

Sir William Blackstone (1723-1788) was an English jurist whose 4 vol Commentaries is to this very day recognized as a primary authority on the English common law. A primary authority is as authoritative as a common law case. Blackstone's Commentaries (1765-1769) are often quoted as definitive of what was the common law on a particular legal point or issue. Roe v Wade's author, Justice Blackmun, quoted Blackstone in his concurring opinion in O'Bannon v TCNC (1980), 447 U.S. 773, 803 n.11: "Blackstone, whose vision

of liberty unquestionably informed the Framers of the Constitution's Bill of Rights,...wrote [in 1 Commentaries *129] that the "right of personal security consists in a person's legal and uninterrupted enjoyment of his life."

Blackstone, in no uncertain terms, has, from his grave, deemed our Constitution (which includes the Court's holdings in Roe and in Casey) as tyrannical to the highest degree (1 Blackstone Commentaries 129 (1765):

> This natural life [i.e. the life of a human being, which "begins in contemplation of law as soon as an infant is able to stir" or is organized into a recognizable human form - at which stage it receives its human or rational soul: see Unraveling, page 52 at text accompanying note 13] being, as was before observed, the immediate donation of the great creator, cannot legally be disposed of or destroyed by any individual [particularly its very own mother: see Unraveling at page 53 and text accompanying note 16 which appears on page 204]….merely upon their own authority....Whenever the Constitution of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical.

I can also demonstrate that our Founding Fathers considered the post-embryonic fetus as a human being or person no less than themselves or walking-around persons, or newborn babes feeding at their mothers' breasts. I have heavily and thoroughly documented that it was a commonly accepted opinion at the time of the 5th (14th) Amendments(s) (1791 and 1868, respectively) (See pages 50-51 of my Unraveling book.) And, in the case of Plyer v Doe in 1982, the Court quoted with approval the following observation of Justice Field: "The term person, [as] used in the Fifth Amendment, is broad

enough to include any and every human being within the jurisdiction of the republic." Justice Stevens has said that Supreme Court justices, in interpreting the text of the Constitution, "must, of course, read...[the] words [used by the framers of the Constitution] in the context of the beliefs that were widely held in the late 18th century" (Justice Paul Stevens, Address: Construing the Constitution, in 18 UC Davis L.R.1, 20 (1985).

In spite of this, there are some persons, even some pro-life constitutional lawyers and scholars, that argue that there is nothing in the wording or legislative history of the 5th (14th) Amendment(s) to indicate that their Framers meant to include the unborn post-embryonic fetus within the meaning of the word person in those two due process clauses. True enough (and the same can be said of newborn babes feeding at their mother's breasts). So, in light of the foregoing quote from Justice Stevens, is it not the burden of such persons who say that the child unborn does not qualify as a due process clause person to demonstrate that the framers of these two amendments specifically meant to exclude the child unborn as being a constitutional person? And this, of course, could never be demonstrated.

For the sake of argument, let it be supposed that the 5th Amendment (1791) provides, in part, that "all sports shall be under the jurisdiction of the Federal Sports Agency (FSA)", and that in the late 18th century in the USA croquet was played across the nation and was a widely recognized sport. And let it be supposed that in America today (2013) that croquet is hardly played at all, and is no longer considered a sport and at best is recognized as only a children's lawn game. So, Congress passes a statute, that says that croquet shall henceforth no longer be under the jurisdiction of the FSA. Is that Statute constitutional or unconstitutional?

If it is answered that it is indeed unconstitutional (because provisions of the Constitution cannot be legislated out of the Constitution in the absence of a Constitutional Amendment), then how much more so would it be serious constitutional error for the Supreme Court to rule in effect that: "notwithstanding that the post-embryonic fetus was recognized as a 5th Amendment due process clause person in 1791,

and was recognized also as one in the 14th Amendment due process clause in 1868, the fact remains, that today in the U.S.A. it is not generally agreed that the unborn post-embryonic fetus is a human being or person. Therefore, we hold that said fetus shall no longer be recognized as a constitutionally protected person".

If it is answered that the croquet statute is indeed constitutional, then would not this "yes" conclusion dictate that the seriously erroneous Supreme Court holding in Roe v Wade that the post-embryonic fetus shall henceforth "not" or no longer be recognized as a constitutionally protected person, is in fact not erroneous after all? And, if that is so, then what is to stop the Supreme Court from ruling that seriously defective newborns, illegal immigrants, useless, sickly old folks, and fanatical pro-lifers shall henceforth also be no longer recognized as constitutionally protected persons?

There are approximately 1.5 million abortions every year in the United States. If we could muster 15 fathers of unborn children, which is 1 out of every 100,000 abortions, then every year 15 such cases could be presented to the U.S. Supreme Court. And we (the pro-life fetal protection petition lawyers) will inform the Court that we will persist in filing such petitions "one bloodied, discarded fetus at a time" until the Court agrees to reconsider Roe's fetal non-person ruling, and this time around providing the fetus with a meaningful opportunity to be heard. If they ask us "Who do you think you are?" We will answer that we are the persistent widow in Luke 18:1-8. We will create a website to track these fetal-person petitions, and set forth actual court-filed fetal protection briefs. With the materials in my website, the fetal protection petitioning lawyer would not even have to leave his or her office to prepare and do the research for a fetal protection petition.

If time allows, I will talk briefly on the following:

1) Wolfgang P. Mueller's 2012 book The Criminalization of Abortion in the West (where he argues ridiculously that procured abortion was an English common law liberty.
2) English common law record keeping.
3) When the Constitution's due process clauses require that a Supreme Court Justice must disqualify him or herself from participating in the hearing of a case (See Caperton v A.T. Massey (2009), 129 S.C. 2252).
4) Whether the Roe Court's explicit holding that a procured abortion is a woman's fundamental right also constitutes an implicit holding that the fetus is not a 5th (14th)Amendment) due process clause person. If the answer, here, is yes, then the Supreme Court in reconsidering the issue of fetal person-hood would necessarily have to reconsider its Roe holding that procured abortion is a fundamental or unalienable woman's right.