

## Cellulose Persons and Other Straw Men

Gregory J. Roden

You might be surprised to learn that the right to abortion also serves to secure our First Amendment right to free speech, at least in the view of one writer, Professor Ronald Dworkin. As the professor spins it, “If a *state* could declare trees to be persons with a constitutional right to life, it could prohibit publishing newspapers or books in spite of the First Amendment’s guarantee of free speech, which could not be understood as a license to kill.”<sup>1</sup> You see, if the states had the *power* to declare fetuses “persons,” then there would be no stopping the states from impairing our constitutional rights “by adding new persons to the constitutional population”—trees, for example; cellulose persons. Having propped up this straw man, Dworkin then knocks it down, “Once we understand that the suggestion we are considering has that implication, we must reject it. If a fetus is not part of the constitutional population under the national constitutional arrangement, then *states* have *no power* to overrule that national arrangement by themselves declaring that fetuses have rights competitive with the constitutional rights of pregnant women.”<sup>2</sup>

Justice John Paul Stevens found Dworkin’s arguments to his advantage in his separate opinion in *Planned Parenthood v. Casey*; he quoted the above to support his affirmation of the *Roe v. Wade* opinion. Stevens restated Justice Harry Blackmun’s claim in *Roe* that unborn children were not persons “within the language and meaning of the Fourteenth Amendment.” Stevens repeated Blackmun’s allegation that unborn children had only “*contingent* property interests.” And he also reasserted Blackmun’s further declaration that “the unborn have never been recognized in the law as persons in the *whole* sense.” Stevens ended with the clincher, “no Member of the Court has ever questioned this fundamental proposition.”<sup>3</sup> This latter claim has even been reiterated by some who are otherwise pro-life to dissuade other pro-lifers from pressing for personhood. Yet, these assertions are wrong in fact and theory.

Let’s start with the “cellulose person” argument. We need first consider the origin of federal power. In its early decisions, when the Court was not so far removed in time from our nation’s founding, it was common knowledge that the federal Constitution was derived from the sovereign states,<sup>4</sup> who in turn received their power of government from the people.<sup>5</sup> Our federal

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government is one of limited, enumerated powers—powers granted to it from these states.<sup>6</sup> Logically then, the federal government could receive from the states only the powers the states had to give.

Herein lies an inherent contradiction with the cellulose-person argument: If the federal government has a power, then the states must likewise have the same power currently, or have held said power at one time.<sup>7</sup> So, to argue that 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. The analysis then becomes an inquiry into whether the states have granted all, part, or none of their power in this particular area to the federal government. Where then in the Constitution do the states grant the federal government the power to declare who is or who is not a person? The answer is nowhere—not even in part. Consequently, this power is still retained by the states under the Tenth Amendment: “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.”

Looking at it from another perspective, 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, that have the primary duty to protect those unalienable rights. As the Court stated in *U.S. 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 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*.<sup>8</sup>

Consequently, we ought to look to the states to see if they held unborn children to be persons with justiciable rights.

The method of looking to the states to see if they concede legal rights to the unborn as persons was an approach used by Blackmun in *Roe*.<sup>9</sup> Blackmun noted that the unborn had legal rights under criminal, tort, wrongful-death, and property law, although—in examining these areas of the law—Blackmun disingenuously denigrated the status of the unborn under them. This deception allowed Blackmun to conclude that unborn children were not “persons in the whole sense.” However, the articles and cases Blackmun cited do not support his conclusion. Quite to the contrary, the articles and cases actually show how unborn children were treated as persons under criminal,<sup>10</sup> tort,<sup>11</sup> wrongful-death,<sup>12</sup> and property law<sup>13</sup> at the time *Roe* was decided. Ergo, the

*Roe* holding that unborn children were not persons is a false conclusion born of false premises.

So much for the *factual* inaccuracy of Blackmun's argument. Let's turn to the *logical method* he employed. The logical form of Blackmun's argument can be illustrated by the following:

**Minor Premise:** Unborn children are not persons under state criminal, tort, wrongful-death, and property law.

**Conclusion:** Unborn children are not persons.

In logic, this is known as an enthymeme; it is missing the Major Premise—an axiom that is accepted as true and is the basis for the argument. An enthymeme assumes the Major Premise is obvious and so the reader can provide it. In this instance, the Major Premise ought to read something like this: "State treatment of the legal rights of unborn children is determinative of their personhood." Without such a Major Premise, Blackmun's argument would be as faulty in logical *theory* as its Minor Premise and Conclusion are faulty in *fact*.

The state laws regarding criminal, tort, wrongful-death, and property law have been referred to as "municipal law" by the Supreme Court. The state municipal law concerns the rights of life, liberty, and property, which, as the Court has said, "include all civil rights that men have."<sup>14</sup> The states have always had the power to enact municipal law and kept that power after the enactment of the Fourteenth Amendment. As the Court stated in the *Civil Rights Cases* (1883):

[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.<sup>15</sup>

As opposed to the broad swath of state municipal law concerning the rights of state citizenship, the federal rights and privileges of national citizenship are rather limited. The Court has listed some of these rights in the past: "the right to pass freely from state to state; the right to petition Congress for a 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."<sup>16</sup> As none of these rights ordinarily pertain to the circumstances of unborn children, we should not expect any federal case law holding unborn children to possess these national rights and privileges.

So when Blackmun made a superficial examination of the Constitution in *Roe* and held “the use of the word [person] is such that it has application only postnatally,”<sup>17</sup> this was a red herring, given the limited scope of substantive rights of national citizenship. Blackmun does not even get any points for originality; he borrowed this argument from the general counsel for NARAL, Cyril C. Means Jr.<sup>18</sup> Of course, Blackmun omitted the Preamble to the Constitution from his analysis, which clearly proclaims that 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 Tranquillity, provide for the common defence, 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.

With all of this in mind, let us review Section 1 of the Fourteenth Amendment. The second sentence of it reads:

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.

The Fourteenth Amendment concerns the municipal law of the states, and it operates only as a “redress against the operation of state laws . . . when these are subversive of the fundamental rights specified in the amendment.”<sup>19</sup> So when Blackmun stated in *Roe* that the test of personhood was whether “the fetus is a ‘person’ within the language and meaning of the Fourteenth Amendment,” logically the phrase “language and meaning of the Fourteenth Amendment” refers to the body of state municipal law, the very subject of the amendment.

It is of no small importance that the text of the Equal Protection Clause refers to “*any* person within *its* jurisdiction”; “its” referring to the state. The Supreme Court has consistently held that “the Fourteenth Amendment was designed to afford its protection to *all* within the boundaries of a State,”<sup>20</sup> as the Court confirmed in *Plyler v. Doe*. This is true of both equal protection and due process. Furthermore, states are prohibited by the Court from using the phrase “within its jurisdiction” to exclude any “subclasses of persons” from the protective umbrella of the Fourteenth Amendment.<sup>21</sup> Any truthful examination of state municipal law shows unborn children to be persons within their jurisdiction. Yet, Blackmun summarized his disingenuous examination of personhood under municipal law with this: “In short, the unborn have never been recognized in the law as persons in the whole sense.”<sup>22</sup>

The phrase “persons in the whole sense” was never used by the Court before *Roe*.<sup>23</sup> Blackmun did not offer an explanation for the term nor did he provide any citations to support the use of the phrase.<sup>24</sup> It can only mean he created a subclass of persons to which the Fourteenth Amendment does not apply. By doing so, he “undermined the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment.”<sup>25</sup>

Instead of an honest inquiry into personhood under state municipal law, Blackmun utilized a logical fallacy to redirect the investigation: “The appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.”<sup>26</sup> Blackmun was referring to the fact that during the second oral-argument hearing, when asked, the assistant attorney general for the state of Texas, Robert C. Flowers, could not cite such a case. Here Blackmun employed the logical fallacy, *argumentum ad ignorantiam*. The logic fails because the premise that Mr. Flowers could not cite such a case regarding personhood (under the time pressure of oral argument), does not mean there are no such cases. In fact, there are many.

**S**urely the test for being a “person within the meaning of the Fourteenth Amendment” is not the existence of a prior Supreme Court case explicitly stating so. Such a circular argument is the logical equivalent of a dog chasing its tail. As the Fourteenth Amendment has no definition of who is a person, every Supreme Court decision dealing with a particular class of persons for the first time, and holding them to be within the scope of the Fourteenth Amendment, necessarily reaches beyond this circular logic. That is to say, the Court has never been hindered from holding that certain classes of people are persons under the Fourteenth just because they had not been previously held to be so. In *Yick Wo v. Hopkins* (1885)<sup>27</sup> the Court held that aliens, although neither “born or naturalized” citizens, were nevertheless persons under the Fourteenth Amendment; and in *Plyler v. Doe* (1982)<sup>28</sup> the Court held illegal aliens to likewise be so protected.

As the Court stated in *Holden v. Hardy*, “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.”<sup>29</sup> Thus, there was no case in the history of the United States that allowed for the deprivation of *life* of a “natural person,”<sup>30</sup> a human being, without due process, or denied equal protection of the right to *life*, on the basis that he was not “a person within the meaning of the Fourteenth Amendment”—at least until *Roe v. Wade*.

Accordingly, we look to see if unborn children were held to be *natural* persons under the municipal law of the states.

All one need do to discover an enormous wealth of case law holding unborn children to be natural persons is to read the cases and articles Blackmun cited supposedly to support his opinion in *Roe*. Let's look at a case from Mr. Flowers's home state of Texas. The first Texas case is *Nelson v. Galveston, H. & S. A. Ry. Co.*,<sup>31</sup> an action by a posthumous child seeking recovery for his father's death under a wrongful-death statute. Gustave Nelson was born five-and-a-half months after his father's death and his mother, as his next friend, brought suit on his behalf under the statute. The defendant claimed "that at the time of the death of the plaintiff's father, on the 25th April, 1882, the plaintiff was not in being, was unborn and unknown, and an unheard-of quantity, having no legal existence, and no right of action for the injuries complained of."<sup>32</sup> The court rejected this argument, recounting "Lord Hardwicke, discussing the same question [in *Wallis v. Hodson* (1740)], held that a child in the mother's womb is a person *in rerum natura*, and that by the rules of the civil and common law 'she [the child] was, to all intents and purposes, a child, as if born in her father's life-time.'"<sup>33</sup>

The Supreme Court of Texas then made note of the "many old English cases" that held unborn children were understood to be included in the term "children born" under probate and property law. Using these principles, the court reasoned:

Had the expression "surviving children" been used in a will in the same connection as in the statute, and had it been for the benefit of the posthumous child to take, under the authorities cited it would be held to apply to him. . . . We conclude, therefore, that it was manifestly the purpose of the legislature to give the right of action, in a case like the present, to all of the surviving children of the deceased. We think, also, that the plaintiff in this case, although unborn at the time of his father's death, was *in being*, and one of his surviving children.<sup>34</sup>

*Nelson v. Galveston* employed two phrases to denote the unborn child as a natural person: that the child was "in being," and "a person *in rerum natura*."<sup>35</sup> Black's Law Dictionary defines *in rerum natura* as "In the nature of things; in the realm of actuality; in existence."<sup>36</sup> As the Supreme Court of Massachusetts stated in *Hall v. Hancock*, "Lord Hardwicke says, in *Wallis v. Hodson* . . . that a child *en ventre sa mere* is a person *in rerum natura*, so that, both by the rules of the civil and common law, he is to all intents and purposes a child, as much as if born in his father's lifetime."<sup>37</sup>

The common law, of England and as adapted by the states, has always held unborn children to be natural persons for the purposes of property law, using the phrases "in being" or "in esse." An example of this is the Rule

Against Perpetuities, which disallows transfers of property that do not vest within the life of a natural person “in being,” plus 21 years afterwards. With regards to family transfers, the Rule essentially allows transfers to children and to grandchildren, as grandchildren are necessarily conceived within the life of the child of the person making the transfer. Accordingly, the Rule recognizes children in the womb, “*en ventre sa mere*,” as natural persons. The U.S. Supreme Court recited the Rule approvingly in *McArthur v. Scott* (1884):

To come within the rule of the common law against perpetuities, the estate, legal or equitable, granted or devised, must be one 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.<sup>38</sup>

One article Blackmun referred to in *Roe* makes this bold declaration: “The state of the law in American courts is fairly well summed up in *In re Holthausen's Will*, 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.’”<sup>39</sup> The common-law Latin phrase for this concept is *posthumus pro nato habetur*, meaning, “A posthumous child is regarded as born-before the death the father.”<sup>40</sup> Again from *Hall v. Hancock*:

[A] child is to be considered *in esse* at a period commencing nine months previously to its birth, and where there is not evidence to rebut the presumption, it is conclusive. We are also of the opinion, that the distinction between a woman being pregnant, and being quick with child, is applicable mainly if not exclusively to criminal cases; and that it does not apply to cases of descents, devises and other gifts; and that, generally, a child will be considered in being, from conception to the time of its birth, in all cases where it will be for the benefit of such child to be so considered.<sup>41</sup>

Yet this last quote raises a key question: What about the quickening standard and the criminal law? Let's look at another Texas case, this one cited directly by Blackmun in *Roe*: *Gray v. State*. This case involved the review of M. E. Gray's indictment under a Texas statute for producing the abortion of a child. The indictment was tested to see if it complied with state statutes, and the court examined the common law before doing so (and affirming the conviction):

A careful review of the authorities indicates that at [English] common law 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.<sup>42</sup>

First, let's not allow one subtlety escape our eye. Note how the word "abortion" is used. It is used as a name for a crime, as one would use murder, rape, assault, robbery, etc. This was a common use of "abortion," even the Supreme Court utilized the word "abortion" in this fashion.<sup>43</sup>

Second, we see that it was alleged that, under English common law, terminating a pregnancy was not criminal prior to quickening (cases such as *Rex v. Eleanor Beare*,<sup>44</sup> holding abortion to be criminal prior to quickening, notwithstanding). But, after quickening—after the unborn child starts to move—it was criminal under the English common law.

Third, the Court of Criminal Appeals of Texas asserts that most of the state courts did not follow the quickening rule and held abortion to be criminal "at any time after conception." Even Blackmun's *Roe* opinion notes two state cases that held abortion to be criminal post-conception rather than post-quickening.<sup>45</sup> Obviously, the states were free to change the English common law as they saw fit. After all, the states won the War of Independence and earned their sovereignty on the battlefield.<sup>46</sup> So too, the states were free to replace the common law in part or completely, and most of them did so with regard to abortion, holding it to be criminal at any time after conception, as Blackmun noted in footnote 2 of *Roe*.

Yet, as the states have sole jurisdiction over the criminal law,<sup>47</sup> how did Blackmun justify overturning these laws in *Roe*? Blackmun imposed a contrived understanding of the English common law upon the states. Blackmun posited a theory under which abortion, even after quickening, was not criminal under the English common law. Blackmun derived this theory from the alleged scholarship of NARAL's counsel, Cyril Means, and NARAL's founder, Lawrence Lader. Blackmun then fixed his theory of the English common law upon the states, even though all the state case law he cited held abortion to be criminal at least after quickening.<sup>48</sup> As Blackmun announced in *Roe*: "In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law."<sup>49</sup> Blackmun concluded, "It now appear[s] doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus."<sup>50</sup>

This is perhaps the most radical constitutional deviation contained in *Roe*. As the Court had always maintained, "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."<sup>51</sup> And, as the states are free to change or reject the common law,<sup>52</sup> the Supreme Court defers to the states for its interpretation of their law. The Supreme Court has always rejected the idea

that the English common law was to be fixed upon the states like a “straight jacket.”<sup>53</sup> One year before the *Roe* opinion, the Court reaffirmed this rule, “This construction of state law is, of course, binding on us.”<sup>54</sup> As the states have sole jurisdiction over their municipal law, and they were and are free to adopt, interpret, amend, or dismiss the English common law, the *Roe v. Wade* opinion is more than just a study in logical fallacies, it *is* a logical fallacy.

In deference to state municipal law, the Supreme Court upheld the rights of unborn children in two cases prior to *Roe*. In *McArthur v. Scott*, the Court upheld the property rights of unborn persons acquired by inheritance under Ohio law.<sup>55</sup> And, in *Weber v. Aetna Casualty & Surety Co.*, the Court upheld an unborn person’s rights to Louisiana workmen’s compensation benefits accruing at the death of his father in a Fourteenth Amendment Equal Protection case.<sup>56</sup> Likewise, the federal courts have routinely upheld the rights of unborn persons to Social Security Child’s Survivor Insurance benefits. In another case from the state of Texas, *Wagner v. Finch*, the Fifth Circuit Court of Appeals reversed a Northern District Court of Texas decision that a posthumous illegitimate child, conceived shortly before her father’s death, was not the “child” of the “insured individual as that term is defined by the Social Security Act.” In its reversal, the Court of Appeals declared, “We 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.”<sup>57</sup>

Moreover, there are some limited jurisdictional instances wherein the federal government has the ability to enact municipal laws, such as in the District of Columbia. Here too the federal law has mirrored state law in recognizing the rights of unborn children as persons. The federal courts have held unborn children to be persons for recovery due to prenatal torts in the District of Columbia,<sup>58</sup> under the District of Columbia’s wrongful-death statute,<sup>59</sup> and for prenatal injuries under the Federal Torts Claims Act.<sup>60</sup>

In all of these Supreme Court and federal cases, the courts have fulfilled their duty to protect the vested rights of unborn persons. As Chief Justice John Marshall stated in *Marbury v. Madison*: “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.”<sup>61</sup> On the other hand, where a court fails to grant the fundamental right of representation to any party whose rights are being decided upon, that case is void for lack of due process. The applicable Latin maxim is *coram non iudice*, and this was the basis for

the Court's decision in *McArthur v. Scott*.<sup>62</sup> Since the Court denied a motion for a guardian ad litem to join in the arguments in *Roe*,<sup>63</sup> so too should *Roe v. Wade* be considered null and void by this rule of law per *McArthur v. Scott*.

It is more than ironic that some pro-life advocates are dismissive of unborn children's personhood because the state original jurisdiction over municipal law prevents the federal government from being able to enact municipal law for the states.<sup>64</sup> Adding to the irony, the idea that state municipal law is irrelevant to understanding the term "person" was originally proposed by the general counsel for NARAL, Cyril Means: "Whatever one or more of the several states of the United States may choose to do, either with their legal rules or with their legal nomenclature, is of no federal constitutional significance."<sup>65</sup> This is an especially incongruous argument when it is remembered that the very subject matter of the Fourteenth Amendment is the municipal law of the states.

The object of the Fourteenth Amendment is to give the federal government the ability to regulate state municipal law when that municipal law becomes "subversive of the fundamental rights specified in the amendment."<sup>66</sup> Consequently, the phrase "within the language and meaning of the Fourteenth Amendment" must necessarily pertain to the municipal law of the states. This being understood, the historical fact that the states treated unborn children as persons under their municipal law is of great "federal constitutional significance," despite the protestations of NARAL. There can be no other valid conclusion than that a "fetus is a 'person' within the language and meaning of the Fourteenth Amendment."

#### NOTES

1. Ronald Dworkin, "Unenumerated Rights: Whether and How *Roe* Should be Overruled," 59 *U.Chi.L.Rev.* 381, 401 (1992) (emphasis added).
2. *Ibid.* (emphasis added).
3. *Planned Parenthood v. Casey*, 505 U.S. 833, 913-14 (1992).
4. *Federalist*, No. 32:  
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 (emphasis added).
5. *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.")
6. *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, 457-458 (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.")

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7. *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.”).
8. *U.S. v. Cruikshank*, 92 U.S. 542, 553 (1875) (emphasis added).
9. *Roe v. Wade*, 410 U.S. 113, 161 (1973).
10. Gregory J. Roden, “*Roe* Revisited: A Grim Fairy Tale,” 30 *Human Life Review*, no. 2, 49 (Spring 2004) (hereinafter “*Roe* Revisited”); Roden, “*Roe v. Wade* and the Common Law: Denying the Blessings of Liberty to our Posterity,” 35 *UWLA Law Review* 212 (2003).
11. “*Roe* Revisited”; Roden, “Prenatal Tort Law and the Personhood of the Unborn Child: A Separate Legal Existence,” 16 *St. Thomas L. Rev.* 207 (2003).
12. *Ibid.*
13. Roden, “Unborn Children as Constitutional Persons,” 25 *Issues in Law & Medicine* \_\_\_\_\_ (forthcoming 2010), Gregory J. Roden, “Unborn Persons, Incrementalism, & the Silence of the Lambs,” 33 *Human Life Review*, no. 4, 22 (Fall 2007).
14. *Civil Rights Cases*, 109 U.S. 3, 13 (1883)
15. *Ibid.* 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.
16. *Twining v. State of New Jersey*, 211 U.S. 78, 97 (1908).
17. 410 U.S. at 157.
18. See 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, 401-410 (1971) [hereinafter “*The Phoenix*”].
19. *Civil Rights Cases*, 109 U.S. 3, 11 (1883).
20. *Plyler v. Doe*, 457 U.S. 202, 212 (1982) (emphasis added).
21. *Ibid.* at 213.
22. 410 U.S. at 162.
23. From a case cited elsewhere by Blackmun, in which the Court of Appeals of New York stated: “But unborn children have never been recognized as persons in the law in the whole sense.” *Byrn v. New York City Health & Hospitals Corp.*, 31 N. Y. 2d 194, 286 N. E. 2d 887 (1972). The only citation the Court of Appeals used to justify this conclusion was an article by NARAL’s counsel, Cyril Means. Means, “The Phoenix.”
24. And after *Roe*, the only time it was used at all was when Justice Stevens quoted from *Roe* in his separate opinion in *Planned Parenthood v. Casey*, 505 U.S. 833, 913 (1992) (Stevens, J., concurring in part and dissenting in part).
25. *Plyler v. Doe*, 457 U.S. 202, 213.
26. 410 U.S. at 157.
27. *Yick Wo v. Hopkins*, 118 U.S. 356 (1885).
28. *Plyler v. Doe*, 457 U.S. 202 (1982).
29. *Holden v. Hardy*, 169 U.S. 366, 389-90 (1898). Still, the Court looks to substantive state law to ascertain the persons to whom the national general principles of justice apply. *E.g. McArthur v. Scott*, 113 U.S. 340, 392-404 (1884).
30. The term person includes both natural and artificial persons: *e.g.* “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.,” *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*, pp. 1478-79, Third Edition [1944], Revised with addenda (1955).

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31. *Nelson v. Galveston, H. & S. A. Ry. Co.*, 78 Tex. 761, 14 S.W. 1021 (1890) (cited in W. Prosser, *The Law of Torts*, 336 n.20 (4th ed.), see *Roe*, 410 U.S. at 161-62, n.63, n.64, n.65).
32. *Nelson v. Galveston*, 14 S.W. at 1022.
33. *Ibid.*
34. *Ibid.* at 1023 (emphasis added).
35. In *Leal v. C. C. Pitts Sand and Gravel, Inc.*, 419 S.W.2d 820 (Texas 1967), the Supreme Court of Texas granted a right of action under the state's wrongful-death statute, on behalf of a viable child, six to seven months of gestation, as a "person," who suffered injuries in a motor-vehicle accident, was born prematurely, and died two days later.
36. *Black's Law Dictionary*, 714 (5th ed. 1979).
37. *Joseph Hall, Judge of Probate v. John Hancock*, 32 Mass. 255, 258; 1834 Mass. LEXIS 13, 6; 15 Pick. 255, 258 (1834).
38. *McArthur v. Scott*, 113 U.S. 340, 381-82 (1884) (emphasis added). The Rule was also cited with approval in *Hopkins v. Grimshaw*, 165 U.S. 342, 355 (1897).
39. Louisell, "Abortion, The Practice of Medicine and the Due Process of Law," 16 *U. C. L. A. L. Rev.* 233, 236 (1969), citing *In re Holthausen's Will*, 175 Misc. 1022, 26 N.Y.S.2d 140 (Sur. Ct. 1941), a decision which in turn contains numerous case citations.
40. *Ballentine's Law Dictionary: Latin Phrases-Maxims*, 379 (1916), *Bouvier's Law Dictionary*, 2154 (8th ed. 1914). See *Shone v. Bellmore*, 75 Fla. 515, 78 So. 605 (1918).
41. *Hall v. Hancock*, 32 Mass. 255, 257-58; 1834 Mass. LEXIS 13, 5; 15 Pick. 255, 257-58 (1834).
42. *Gray v. State*, 77 Tex. Cr. R. 221, 223-24 (1915) (see 410 U.S. at 136 n.27).
43. *U.S. v. Holte*, 236 U.S. 140, 145 (1915).
44. See <http://www.abortionessay.com/files/beare.html> (last visited April 15, 2009); Gregory J. Roden, "Roe's Abortion Mythology," 31 *Human Life Review*, no. 4, 65 (Fall 2005).
45. 410 U.S. at 136 n.27: "*Contra, Mills v. Commonwealth*, 13 Pa. 631, 633 (1850); *State v. Slagle*, 83 N.C. 630, 632 (1880)."
46. Yet, even before the War of Independence, the colonies held even pre-quickening abortions to be criminal. J. Dellapenna, *Dispelling the Myths of Abortion History*, 220 n.283 (Carolina Academic Press 2006) (citing *Commonwealth v. Lambrozo*, 53 *Md. Archives* 387-91 (1663); *Commonwealth v. Brooks*, 10 *Md. Archives* 464-65, 486-88 (1656)).
47. See *United States v. Morrison*, 529 U.S. 598 (2000) (Congress may not regulate noneconomic, violent intrastate crime); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426 (1821) (Marshall, C.J.) ("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.").
48. *Roe*, 410 U.S. at 135 n.27.
49. *Ibid.* at 138.
50. *Ibid.* at 136.
51. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).
52. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65-68 (1996) (Justice Souter, with whom Justice Ginsburg and Justice Breyer joined, dissenting) ("Virtually every state reception provision, be it constitutional or statutory, explicitly provided that the common law was subject to alteration by statute. 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.' 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.")
53. *Twining v. State of New Jersey*, 211 U.S. 78, 101 (1908).
54. *Eisenstadt v. Baird*, 405 U.S. 438, 442 (1972).
55. *McArthur v. Scott*, 113 U.S. 340 (1884).
56. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) ("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.")
57. *Wagner v. Finch*, 413 F.2d 267 (5th Cir. 1969).
58. *Bonbrest v. Kotz*, 65 F. Supp. 138 (1946).
59. *Simmons v. Howard University*, 323 F. Supp. 529 (1971).
60. *Sox v. United States*, 187 F. Supp. 465 (1960).
61. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).
62. *McArthur v. Scott*, 113 U.S. 340, 404 (1884) ("[A] decree annulling the probate of a will is not

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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.”)

63. *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971), *cert. denied* 409 U.S. 817 (1972).
64. The Fourteenth Amendment’s municipal-law restriction prohibits federal legislation that outlaws purely private wrongs “unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings.” *Civil Rights Cases*, 109 U.S. 3, 17 (1883). This has led to an argument that the states would still be free to allow abortion, falling under the category of a “private wrong,” even if unborn children were given full protection as persons. Yet, such “wrongful acts” cannot be protected “by some shield of state law or state authority.” *Ibid.*; see *United States v. Guest*, 383 U.S. 745 (1966), and the “Mississippi Burning” case *United States v. Price*, 383 U.S. 787 (1966). Moreover, “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). This equal protection could be effected by pro-life groups reporting any suspected abortuaries to state authorities; any inaction of state authorities to prosecute the abortionists could then be taken up by the Justice Department. Going further, “Congress is clothed with direct and plenary powers of legislation over the whole subject . . . as in the regulation of commerce . . . among the several states.” *Civil Rights Cases*, 109 U.S. 3, 18 (1883). Besides the Fourteenth Amendment Equal Protection of the class of unborn persons, 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). A full answer to this argument is beyond the scope of this article. Suffice it to say, the assertion that the status of unborn children would not be improved by recognition of their personhood is to argue that the status of African Americans and other minorities has not been improved by their personhood under the Fourteenth Amendment, which is contradicted by history.
65. See Means, *The Phoenix*, at 404. Incredibly, Means goes on to state:  
The question is not . . . 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.  
*Ibid.* at 409.
66. *Civil Rights Cases*, 109 U.S. 3, 11 (1883).