An Enhanced Amicus Brief in *Dobbs*

The authors filed a Brief as amici curiae in Dobbs v Jackson Women's Health Organization, *on July 29, 2021. The present paper follows the Brief's template with minor amendments and some substantial supplementations to its argument that the unborn are entitled to 14th Amendment protection as constitutional persons.*

Roe conceded that if, as Texas there argued, "the fetus is a 'person' within the language and meaning of the Fourteenth Amendment," the case for a constitutional right to abortion "collapses."[1] But then the Court hurdled over text and history to an error-strewn denial that unborn human beings are persons under the Amendment.

Scholarship exposing those errors clears the ground for a reexamination of Texas's position in *Roe*. While recalling that scholarship, this brief sheds fresh light on the Amendment's original public meaning, focusing on common-law and pre-Civil War history (including primary material) that previous scholarship has not adequately noted or explored. That history proves that prohibitions of elective abortions are constitutionally obligatory because unborn children are *persons* within the original public meaning of the Fourteenth Amendment's Due Process and Equal Protection Clauses.

SUMMARY OF ARGUMENT

The originalist case for holding that unborn children are persons is *at least* as richly substantiated as the case for the Court's recent landmark originalist rulings.[2] The sources marshalled in such decisions—text, treatises, common-law and statutory backdrop, and early judicial interpretations—here point in a single direction.

First, the Fourteenth Amendment, sustaining and going beyond the Civil Rights Act of 1866, guaranteed equality in the fundamental rights of persons—including life and personal security—as these were expounded in Blackstone's *Commentaries* and leading American treatises. The *Commentaries*' exposition *began* with a discussion (citing jurists like Coke and Bracton) of unborn children's rights as persons across many bodies of law. Based on these authorities and on landmark English cases, state high courts in the years before 1868 declared that the unborn human being throughout pregnancy "is a person" and hence, under "civil and common law," "to all intents and purposes a child, as much as if born."[3]

From the earliest centuries at common law, (1) elective abortion at any stage was to "no lawful purpose," and functioned as an inchoate

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[1] *Roe v. Wade*, 410 U.S. 113, 156-57 (1973); *see also Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 779 (1986) (Stevens, J., concurring). Both *Roe* and Texas overlooked a three-judge district court majority's cogent defense of fetal constitutional personhood in *Steinberg v. Brown*, 321 F. Supp. 741, 746-47 (N.D. Ohio 1970).

[2] *See*, *e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

[3] *Hall v. Hancock*, 32 Mass. (15 Pick.) 255, 257-58 (1834).

felony for felony-murder purposes, and (2) post-"quick-with- child" (or perhaps post-"quickening") elective abortion was an *indictable* offense. (And contrary to *Roe*'s potted history, the sources show that the common law's concern was to protect the child's life, not simply to outlaw procedures dangerous to the mother.[4]) By 1860, the "quick with child" and/or "quickening" line(s) for indictments had been abandoned in a majority of states, because science had shown that a distinct human being begins at conception. Such obsolete limits to the common law's criminal-law protection of the unborn had been swept away in this cascade of statutes in almost three-quarters of the states leading up to the Amendment's ratification.

In the 1880s, this Court reckoned corporations "person[s]" under the Equal Protection and Due Process Clauses. The rationale—combing the Blackstonian understanding of persons (as natural or artificial) with a canon of interpretation first expounded by Chief Justice Marshall and central to originalism today—itself blocks any analytic path to excluding the unborn. Indeed, the originalist case for including the unborn is much stronger than for corporations.

These textual and historical points show that among the legally informed public of the time, the meaning of "any person"—in a provision constitutionalizing the equal basic rights of persons—plainly encompassed unborn human beings.

Second, the only counterarguments by any Justice—and by the sole, widely discredited legal-historical writer cited in *Roe*—rest on groundless extrapolations and plain historical falsehoods subsequently exposed in scholarship that has never been answered.

Finally, acknowledging unborn personhood would be consistent with preserving the nation's long tradition of deference toward state policies treating feticide less severely than other homicides, and guarding women's rights to pressing medical interventions that may cause fetal death. Nor would recognizing the unborn require unusual judicial remedies. It would restore protections deeply planted in law until their uprooting in *Roe*.

ARGUMENT

I. Unborn Children are Constitutional Persons Entitled to Equal Protection of the Laws.

The Fourteenth Amendment bars States from depriving "*any person* of life" "without due process of law" or denying "to *any person*" "the

[4] *See infra* n. 50.

equal protection of the laws."[5] It was adopted against a backdrop of established common-law principles, legal treatises, and statutes recognizing unborn children as persons possessing fundamental rights.[6]

A. The Common Law Considered Unborn Children To Be Persons.

Authoritative treatises—including those deployed specifically to support the Civil Rights Act of 1866, which the Fourteenth Amendment aimed to sustain and enhance[7]—prominently acknowledged the unborn as persons. Leading eighteenth-century English cases, later embraced in authoritative American precedents decades before ratification, declared the general principle that unborn humans are rights-bearing persons from conception. And even before a nationwide wave of statutory prohibitions of abortion in the mid-nineteenth century, the common law firmly regarded abortion as an offense from the moment—supposed to have been established by science—when there emerged a new individual member of the human species, a human being.

1. Foundational treatises

Blackstone's *Commentaries*, expressly teaching that unborn human beings are rights-bearing "persons," contributed enormously to the term's shared legal meaning in 1776-91 and 1865-68. Little wonder that when House Judiciary Committee Chairman James F. Wilson introduced the Civil Rights Act of 1866, he said:

> [T]hese rights … [c]ertainly … must be as comprehensive as those which belong to Englishmen…. Blackstone classifies them … as follows: 1. The right of personal security ... great fundamental rights ... the inalienable possession of both Englishmen and Americans ....[8]

Wilson was quoting Blackstone's *Commentaries*' first Book, "Of the Rights of Persons," and its first Chapter, "Of the Absolute Rights of Individuals." Wilson observed approvingly that the leading American treatise on common law—Kent's *Commentaries*—explicitly adopted

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

[6] *Cf. Heller*, 554 U.S. at 605–16 (interpreting original public meaning based on ratification-era treatises, antebellum case law, and Civil War-era legislation).

[7] Congress, though not limiting itself to this purpose, drafted the Fourteenth Amendment to sustain the Act of 1866. *See* Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1391 (2018).

[8] CONG. GLOBE, 39th Cong., 1st Sess. 1118 (March 1st, 1866).

Blackstone's categorization of these rights and description of them as "absolute"—natural to human beings.[9]

Blackstone's analysis, presented as uncontroverted and familiar to Wilson's listeners in Congress, begins with the "right of personal security"—"a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health ...." And Blackstone's unfolding of this right of persons opens, *immediately* after Wilson's quotation, with *two paragraphs* about the rights of the unborn:

> 1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb.[10]

This paragraph continues with two sentences about a shift or ambiguity in *criminal law* about homicide and abortion, addressed

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[9] *Id.* at 1118 col iii; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *123 ("[A]bsolute rights" are those that "would belong to their persons merely in a state of nature, and which every man is entitled to enjoy[.]"). (Blackstone uses "man" synonymously with "human being.") In this usage, rights are called *absolute* because *not conditional* either upon recognition and specification by positive law (whether common law or statute, or Civil or other laws), or upon relationships entered into with other individuals: *id.* The Amicus Brief of the United States 22 rightly acknowledges the unequalled primacy of these pages of Blackstone as demonstrating the rights recognized "[a]t the Founding," precisely as "absolute rights" vested in persons "by the immutable laws of nature" – citing pages *120, *125 and *130, but significantly omitting *129.

Present in the background is the fact rightly recorded in the Amicus Brief of the American Historical Association and the Organization of American Historians at 7:

> Blackstone's "works constituted the preeminent authority on English law for the founding generation." Alden v. Maine, 527 U.S. 706, 715 (1999). James Wilson, who crafted the preamble to the U.S. Constitution, quoted and endorsed Blackstone's words in his seminal lectures of 1790: "In the contemplation of law, life begins when the infant is first able to stir in the womb." James Wilson, Natural Rights of Individuals (1790)..., reprinted in 2 The Works of James Wilson 316

[10] BLACKSTONE, *supra* note 9, at *129-30. Nothing in Blackstone or Coke, Hawkins and other classic writers on the common law suggests that the phrase "able to stir" meant "felt by the mother to stir," as the Amicus Brief of the American Historical Association and the Organization of American Historians asserts at 5 (opening paragraph of its Argument) and *passim*, erroneously stating: "At common law, as explained by authorities such as Coke and Blackstone, life was deemed legally to begin only when a pregnant woman sensed the fetus stirring in her womb." Nothing would have been easier to say, but Coke, Blackstone and the others neither say nor imply it. From Bracton through the American founding era, common-law criminal law fixed its attention almost entirely on the unborn child's formation and animation, its life as a distinct individual, and its consequent *ability* to move or stir, not on the mother's usually later experiences of the child's making its presence felt by its stirring *See infra* nn. 28, 33, 40.

below.[11] Then comes Blackstone's second paragraph on unborn children's rights:

> An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It[12] 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.[o13]

These paragraphs merit close attention. The first paragraph's first sentence concerns:

- the natural right of a living individual possessing human nature.[14] Blackstone here points to natural realities calling for legal embodiment, including through
- a doctrine of English common-law criminal law. It is not the only or even the most important doctrine these paragraphs recall to illustrate the rights of the unborn, but it is mentioned immediately given the section's topic, the right to *life*—and what may be inferred from its treatment of natural realities "in contemplation of law."

This last phrase, in Blackstone, signals legal fictions:[15] here a legal doctrine's treatment of the infant's ability "to stir in the womb"[16] as the start of life for some purpose. By following this first paragraph on the criminal law's narrow, defendant-protective conception of homicide

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[11] *See infra* section I.A.3.a, pp. 12-15 and section II.C.2.b, pp. 37-39.

[12] Blackstone uses "it" of born children as well as unborn. *See* BLACKSTONE, *supra* note 9, at *301 ("…the child, by reason of its want of discretion…").

[13] *Id.* at *129-30 (some footnotes omitted). Footnote [o] reads, translated: "Those who are *in utero* are understood in Civil law to be in the real world [*in rerum natura esse*], when it is a matter/question of their benefit" (citing Justinian's *Digest* 1.5.26, save the last five words, which in fact give the gist of 1.5.7). Blackstone has cut two words to universalize the principle, which had read: "in *almost* the whole [*toto paene*] of the Civil law."

[14] *See id.* at *133 ("This natural life" "cannot legally be disposed of or destroyed by any individual…merely upon their own authority.")*.*

[15] *See*, *e.g.*, *id.* at *270 ("in contemplation of law [the King] is always present in court"). Legal fictions are found on a spectrum ranging from legally stipulated definitions close to ordinary-language conceptions of natural or other realities, through more or less technical and artificial terms of art, to outright contra-factual (fictive) propositions of law such as the one just quoted. See further III.C. *infra*, pp.28-37, 47-48..

[16] For the phrase, not then a legal term of art, *see infra* note 27.

(requiring a "stir[ring]," perhaps partly for evidentiary reasons) with a paragraph sketching laws *free* from artificial constraints (benefitting all unborn humans), Blackstone hints that the law of personal rights accommodates more than one "contemplation of law" and may be refined.

"Person" can mean (1) a natural reality signified in our civilization by Boethius's definition ("an individual substance of a rational nature"), closely corresponding to the sense used in this foundational *Commentaries* text,[17] or (2) a social role signified by the term's root meaning *mask* or *assumed identity*—in which sense the law can deem anything a person (rights-bearing unit).

The Fourteenth Amendment uses "any person" (without qualifiers) paradigmatically in the first sense. Yet the Court, since the 1880s,[18] has also included corporations within "any person" because the meaning of "person"—in the then-prevailing linguistic-conceptual framework of a legally educated public brought up on the *Commentaries*—linked under "the Law of Persons" (*the* topic of the whole of 1 *Commentaries*) both natural and artificial persons.[19]

Blackstone's second paragraph on unborn persons' rights states an even more pervasive common-law doctrine (construing common law broadly to include established equitable principles). Also essential to the legal context and meaning of "any person" in the 1868 Clauses, this doctrine treats the unborn as rights-bearing persons *from conception*, in many fields besides criminal law.

2. English and early state court cases

The leading case of *Hall v. Hancock*,[20] which cited many English cases, formulated this doctrine thirty-two years before the debates on the Civil Rights Act of 1866. The Massachusetts Supreme Judicial Court ruled unanimously, *per* Chief Justice Shaw:

> [A] child is to be considered *in esse* [in being] at a period commencing nine months previously to its birth.... [T]he distinction between a woman being pregnant, and being quick with child, is applicable mainly if not exclusively to criminal cases [and] does not apply to cases of descents, devises and other gifts; and … a child will be considered in being, from

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[17] *See* BLACKSTONE, *supra* note 9, at *130 (citing Coke for "reasonable creature"); *id.* at *300 (using that phrase for human being or person).

[18] *See infra* section I.B.2.

[19] *See, e.g.*, *id.* at *123, *467.

[20] 32 Mass. (15 Pick.) 255 (1834).

> conception to the time of its birth in all cases where it will be for the benefit of such child to be so considered....
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> Lord *Hardwicke* says, in *Wallis v. Hodson*,[21] … that a child *en ventre sa mere* is a person *in rerum naturâ*, so that, both by the … civil and common law, he is to all intents and purposes a child, as much as if born in the [testator's] lifetime....
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> *Doe v. Clarke*[22] is directly in point[,] stat[ing] as a fixed principle that, wherever [it] would be for his benefit, a child *en ventre sa mere* shall be considered as absolutely born.[23]

This doctrine about the real and legal personhood of the unborn *from conception* was enunciated by an esteemed state chief justice not as a technical rule for one purpose but as a "fixed principle" "to all intents and purposes": The unborn is "a child, as much as if born" and "is a person *in rerum naturâ.*"[24] The Georgia Supreme Court, too, in 1849, expressly applied that principle, paraphrasing Hardwicke and Shaw.[25]

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[21] (1740) 26 Eng. Rep. 472, 2 Atk. 114, 116.

[22] (1795) 126 Eng. Rep. 617; 2 H. Blackstone 393.

[23] 32 Mass. at 257-58.

[24] *See in rerum natura*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("In the nature of things; in the realm of actuality; in existence."). The idiomatic sense in these contexts often approximates to "in the ordinary world," for instance, the "world" outside the darkness and anonymity of the womb, where the child is in "a world of its own," even its sex unknown to all, and unable to communicate or be communicated with even in a rudimentary fashion.

Hardwicke LC's parallel decision in *Millar v. Turner* (1748) 27 Eng. Rep. 971, 1 Vesey Sr 85, shows how these cases correct the inference, adverse to the unborn, that might be drawn from Coke's statement (3 Inst. 50; *infra* n. 38) that children are accounted *in rerum natura* when born alive. Hardwicke cites 3 Inst. 50 to support his statement that an unborn child "is considered as *in esse*… the destruction of him is murder; which shows the laws [*sic*] considers such an infant as a living creature." *Millar*, 1 Vesey Sr at 86. The deliberate doing of the destructive act, though completed while the child in *in utero,* is murder ,subject only to a condition subsequent: that the child be living, however temporarily and unviably, when delivered.

[25] *Morrow v. Scott*, 7 Ga. 535, 537 (1849) (posthumous child's share in estate on intestacy). Following 1 COMM. *130, Kent, Hardwicke in *Wallis* and *Clarke*, and Shaw in *Hall v Hancock*, the supreme court quotes from the latter the rule that "in general, a child is to be considered as *in being*, from the time of its conception, where it will be for the benefit of such child to be so considered," and adds: "This rule is in accordance with the principles of justice, and we have no inclination to innovate upon it, or create exceptions to it. Let the judgment of the Court below be reversed."

Given this general but pointed principle,[26] and the doctrinal architecture of Blackstone's *Commentaries* and thus of American legal education for the century preceding 1868, the original public meaning of "any person" in the fundamental-rights-regarding Equal Protection Clause included living preborn humans.

3. The unimportance of quickening

This conclusion is not undermined by the (limited, shifting, under-determinate, and ultimately transient) relevance at common law of a child's being "quick" or "quickened."

a. Before 1849

Archaic views of human generation held sway down into the mid-nineteenth century. Such views mostly supposed that generation involved an unformed fleshy mass undergoing successive "formations" (receptions of new forms—vegetable, animal, etc.) until it was differentiated enough, at around six weeks, to receive a distinctly human form. Such *animation* by a rational soul (*anima*[27]) was supposed to make it a *human* organism. This misperception, despite scientific advances, plagued the public (making "quick" and "quicken"[28]

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[26] *See Botsford v. O'Conner*, 57 Ill. 72, 76 (1870) (holding that a child *en ventre sa mere* is a "person" who "must have an opportunity of being heard, before a court can deprive such person of his rights"); *see also Wallis*, 26 Eng. Rep. at 473; *Beale v. Beale* (1713) 24 Eng. Rep. 353; 1 P. Wms. 244.

[27] Scientists into the seventeenth century relied on Aristotle, *Historia Animalium* 7.3.583b (cited by *Roe* in its muddled footnote 22) for the view that, at approximately 40 days (at least for males) this mass becomes articulated *and* the first fetal movement occurs. (So too Blackstone's "able to stir in the womb.") Bracton probably held the view Aquinas contemporaneously articulated in *Summa contra Gentiles* II c. 89, summarized in JOHN FINNIS, AQUINAS: MORAL, POLITICAL AND LEGAL THEORY 186 (1998): it takes about six weeks for generation to yield a body sufficiently elaborated (*complexionatum*) and organized (*organizatum*) for animation (receiving the rational, human soul).

[28] Crucial in fomenting if not initiating the confusion was *Rex v. Phillips* (1811) 3 Camp. 73, 77, 170 Eng. Rep. 1310. This seems to have been the first reported case of an indictment under that section of the 1803 English statute 43 Geo. III c. 58 which made abortion of a woman quick with child a **capital offence**. The medical witnesses, significantly, "differed as to the time when the foetus may be stated to be quick, and to have a distinct existence," and the woman swore "that she had not felt the child move within her before taking the [abortifacient] medicine, and that she was not then quick with child." The medical witnesses, despite their own (differing) medical views, "all agreed that **in common understanding,** a woman is not considered to be quick with child till she has herself felt the child alive and quick within her, which happens with different women in different stages of pregnancy, although most usually about the fifteenth or sixteenth week after conception." The trial judge, Lawrence J., said that this was the interpretation that must be put on the

ambiguous) until the mid-nineteenth century. Uncertainty led some courts to leave reform of common law abortion offenses to legislatures.[29] But this did not affect the *legal* question whether prenatal humans—*whenever* science showed they existed—were "person[s]" entitled to life and security. *All along, they have been*, as proven by courts' and lawmakers' swift extensions of protection as general opinion caught up with science.[30]

The historical legal field is illuminated by distinguishing three distinct senses of "quick(en)":

> i. "quick with child" meant *pregnant*[31]—from pregnancy's start, conception—but was also sometimes used interchangeably with having
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> ii. "a quick child" (a *live child*), understood to emerge when an embryo had developed enough to receive a rational animating principle (soul) and so had *become* a truly human individual.

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words *quick with child* **in the statute**; and as the woman in this case had not felt the child alive within her before taking the medicine – he directed an acquittal." The full account of the case in JOHN. A. PARIS & JOHN FONBLANQUE, 3 MEDICAL JURISPRUDENCE 86-90 (1823) (a treatise cited by counsel for the appellant in *Hall v Hancock*) is followed immediately by the comment (90): "It cannot be necessary here to repeat that the popular idea of quick or not quick with child is founded in error." An edition of Campbell's Nisi Prius reports including *Phillips* was published in New York and Charleston, South Carolina, in 1821.

[29] *Infra* note 49.

[30] *Infra* section I.A.3.b.

[31] *See R v. Wycherley* (1838) 173 Eng. Rep. 486, 8 C. & P. 263 (approved in FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 457 (2d ed. 1852)). Even *Wycherley*, however, having emphasized the primacy of sense i (as to a capitally-condemned pregnant woman's right to reprieve during pregnancy), confuses sense ii with iii. Bracton had stated the reprieve principle in terms of pregnancy: "If a woman has been condemned for a crime and is **pregnant**, execution of sentence is sometimes deferred after judgment rendered until she has given birth." 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 429 (Thorne trans., 1968) (emphasis added). On such a "plea of pregnancy," the charge to the jury of matrons came to be expressed as determining whether the condemned was "quick with child," and in Blackstone's view the question evidently was not whether the mother or child had quickened in sense 3, but whether the child was quick in sense 2 such that, without reliance upon the mother's testimony or the use of ultra-sound or even a stethoscope, they could determine that there was present a ***living* (not dead)** child. *See* Blackstone, 4 COMM. 395: "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 stayed..." (emph. added). Hale, perhaps an outlier on this matter, had stated that that the jury of matrons must find the condemned woman "with child of a quick child," and at the very end of the discussion of the peculiar case where she is mistakenly found to be in that condition but later becomes pregnant Hale indicates, in Latin, that the *foetus* is *vitalis* usually about 16-18 weeks though as medical opinions indicate it may be significantly earlier: 1 HISTORY OF THE PLEAS OF THE CROWN 368-369 (1743).

This term applied—in Bracton's mid-thirteenth century, Coke's early seventeenth,[32] and the educated opinion of Blackstone's time—from the sixth week of pregnancy.[33]

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[32] *See* Coke's contemporary WILLIAM SHAKESPEARE, LOVE'S LABOURS LOST (c. 1593), V.ii.669-70, 673-4: "Fellow Hector, she is gone! She is **two months** on her way!... She's **quick**; the child brags in her belly already. 'Tis yours." (emphasis added). CRYSTAL & CRYSTAL, SHAKESPEARE'S WORDS: A GLOSSARY & LANGUAGE COMPANION 358 (2002), *quick*: pregnant, with child; 490: *on one's way*: pregnant.

[33] *See, e.g.*, *Embryo*, EPHRAIM CHAMBERS, CYCLOPAEDIA (1728) (defining "embryo" as the beginning of an "animal" before it has "received all the Dispositions of Parts necessary to become animated: which is supposed to happen to a Man on the 42nd day"); *see also, id.*, *Animation*: "*Animation*, signifies the informing of an animal Body with a Soul. Thus, the Foetus in the Womb is said to come to its *Animation* when it **begins to act as a true Animal**; or after **the Female that bears it is quick**, as the common way of Expression is. See FOETUS. The **Common opinion is that this happens about 40 days after conception**. But *Jer. Florentinus*, in a Latin treatise, *Homo Dubius, Sive de Baptismo Abortivorum*, shows this to be very precarious." Since Florentinus's cited treatise argued embryologically that children are fully human persons as from conception, Chambers is warning readers that the "common opinion" presupposed by Bracton and Coke may move, under pressure of evidence, toward recognizing animation/personhood from conception.

Probably the most available source of popular information (and misinformation) about the child's ante-natal formation, in the period 1684 to c. 1840 was the pseudonymous work misleadingly entitled *Aristotle's Masterpiece*, first published in London in 1684 and going into hundreds of editions on both sides of the Atlantic. Early American editions usually resemble ARISTOTLE'S COMPLETE MASTERPIECE...DISPLAYING THE SECRETS OF NATURE IN THE GENERATION OF MAN, 44-46 (Worcester [Mass.] 1795), near-identical to pp. 43-44 of the same title printed in London in 1702:

> *How the Child ... groweth up in the Womb of the Mother, after Conception.* ... As to the formation of the child, it is to be noted, that after coition the seed lies warm in the womb for **six days** without any visible alteration... In **three days** after it is altered from the quality of thick milk or butter, and it becomes blood, or at least resembles it in colour, nature having now begun to work upon it. In the **next six days** following, that blood begins to be united into one body, grows hard, and becomes a little quantity, and to appear a round lump. And as the first creation of the earth was void, and without form, so in this creating work of divine power in the womb, **this shapeless embrio** lies like the first mass [*scil.* of the universe]. But **in two days after**, the principal members are formed by the plastic power of nature... **Three days after** the other members are formed... **Four days after that,** the several members of the whole body appear, and as nature requires, they conjunctly and separately do receive their perfection. And so in the appointed time, the whole creation hath that essence which it ought to have in the perfection of it, receiving from God **a living soul,** therewith putting into his nostrils **the breath of life**. Thus have I shown the whole operations of nature in the formation of the child in the womb,... By some others more briefly, but to the same purpose, the forming of the child in the womb of its mother is thus described; **three days** in the milk, **three days** in the blood, **twelve days from the flesh**, and **eighteen the members**, and **forty days afterward**s the child is inspired with life, being endued with an immortal living soul.
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> *Thus purest blood to seed's first turned, and then*
> *Nature converts it into blood again:*
> *Of which a formless form soon after's made,*
> *Such power by nature is thereto conveyed:*
> *But by degree it into form does grow,*

iii. "quicken*ing*" (a "quickened child", etc.), from the pregnant woman's perception of a shift in the uterus's position or her child's movements, sometime between the twelfth and the twentieth week (or not at all), but normally about the fifteenth or sixteenth week.

With this clarification, we return to the two sentences earlier left aside in the *Commentaries*' first paragraph on the rights of the unborn:

> For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one 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[34]

And all its parts distinguished are, that so
It may to a living soul united be,
And lay a claim to immortality.
Whilst mean time the anxious mother's cares
Increase, as does the burden which she bares;
For as it grows it wants a larger room,
And is uneasy in the too strait womb;
At last, to quit its dark recess, it ventures,
And into an unknown light world it enters.

The original 1684 (pp. 18-19) and 1698 (pp. 10-11) London editions had given a somewhat different account, less widely circulated or reproduced in America, in which the "perfect and absolute child" is held to have been formed and animated by the 30th day after intercourse, in the case of males, and the 42nd or 45th day for females; and then at 3 months (males) or 4 months (females) the child begins to "stir, kick and tumble in the womb, so that the motion is plainly perceived."

[34] As to the shift from the "ancient law" (stated in Bracton) to the "present" law (stated by Coke): C'Zar Bernstein, *Fetal Personhood and the Original Meanings of "Person"* 26 Tex. Rev. L. & Pol. _ (2022) (forthcoming: SSRN) asserts (69) that by this shift "the unborn were removed from the category of persons in being, and were therefore outside the protection of the law against homicide." But there is no trace of shift from "the unborn are not existing persons" to "the unborn are persons;" rather, the shift is in legal opinion about the degree of safely cognizable injustice involved in acts lethally impacting on the child *in ventre sa mere*, whether acts of strangers to whom the child was invisible, or of the mother involved intimately with it. Bernstein's claim about the shift is refuted also by a leading work intermediate between Coke and Blackstone, Hawkins, 1 PLEAS OF THE CROWN 80, where abortion is treated in the chapter on Murder:

> *Sect.* 15. As to the third Point, *viz.,* Who are **such Persons by killing of whom a Man may commit Murder**; it is agreed, that the malicious Killing of any Person, whatsoever Nation or Religion he be of, or of whatsoever Crime attainted, is Murder. *Sect.* 16. And it was anciently holden, that the causing of an Abortion by giving a Potion to, or striking, a Woman big with Child was Murder: but at this Day, it is said to be a great Misprision only, and not Murder, unless the Child be born alive, and die thereof, in which Case it seems clearly to be Murder, notwithstanding some Opinions to the contrary.

There is in Hawkins (like the other classical common-law authorities) not the slightest suggestion that unborn children were shifted from being – as "anciently holden" – "Persons by killing of whom a Man may commit Murder" to being non-persons. Rather, with the changed liability-rule, they were persons in a new liability-

homicide or manslaughter.[o] But at present it is not looked upon in quite so atrocious a light,[35] though it remains a very heinous misdemeanor.[p36]

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category: persons by killing of whom a man commits murder if – however long after his malicious actions – they succumb from his actions after living outside the womb for however short a time, while if they do not live outside the womb the doer of those same actions is guilty of a lesser but still near-capital "great misprision" (less than capital felony but more than misdemeanor)

In other classic common-law authorities, this sub-category of persons, a sub-category forged in tandem with the newly nuanced liability rule, is marked by saying that they are not persons *in rerum natura* (literally, "in the nature of things," idiomatically more like "in 'reality'," meaning the visibly shared world, the ordinary world) or *in esse* (same meaning idiomatically; literally, "in being/existence"). Keeping these phrases in the foreign tongue signalled the presence of a fiction deployed in service of the moral and/or pragmatic judgment that justice would be better served by introducing the acknowledgement of appropriate difference in the severity of the crime and its fitting scale of punishment, and the matching sub-category of persons: rational creatures like the rest of us, but not yet sharing our public world, publicly distinct from and partly inter-dependent with their mothers, who are persons whom one can point to and name.

[35] American editions, based on Edward Christian's, here insert a note stating that if the child is born alive and dies from the abortion it will be murder, and those who administered the potion or advised the woman to take it will be liable as accessories before the fact to the same punishment. See for example the 1822 and 1860 editions mentioned *infra* n.36, or the 1818 edition by publishers in Boston, Philadelphia, Baltimore, Washington City, and Georgetown, D.C.

[36] BLACKSTONE, *supra* note 9, at *129-30. (From the 2nd edition, one year after the first, and thereafter in Blackstone's lifetime – including the first American edition, Boston 1774 – the last sentence reads: "But Sir Edward Coke doth not look upon this Offence in quite so atrocious a light, but merely as a heinous misdemeanour." But in American editions such as the second American edition, Boston 1799, the 1822 New York edition, or George Sharswood's many editions e.g. Philadelphia 1860, it reads: "But the modern law doth not look on this offence in quite so atrocious a light, but merely as a heinous misdemeanor.").

It seems that Blackstone almost immediately decided that he would not articulate the modern position in his own voice until he came to treat homicide in vol. 4, where he deals with the whole matter not as a misdemeanor but, more serious, "a great misprision," and makes no reference to the quickness or otherwise of the unborn child: 4 COMM. *198 (which is in the context of [*176] c.14, Of Homicide; [*188] III. Felonious homicide,.. the killing of a human creature, of any age or sex, without justification or excuse; [*194] 2...deliberate and wilful *murder*): "In order also to make the killing murder, it is requisite also that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which the whole day upon which the hurt was done shall be reckoned the first.[fn. 1 Hawk. P.C. 79.] Further, the person killed must be '*a reasonable creature in being, and under the king's peace,*' at the time of the [*198] killing. Therefore to kill an alien, a Jew, or an outlaw who are all under the king's peace and protection, is as much murder as to kill the most regular-born Englishman; except he be an alien enemy in time of war. [fn. 3 Inst. 50. 1 Hal. P.C. 433.] **To kill a child in its mother's womb is now no murder, but a great misprision**; **but if the child be born alive** but dieth by

The first sentence's footnote quotes a line from Bracton in Latin[37]; the second's cites a passage in Coke's *Institutes* quoting the same line from Bracton.[38] That line plainly addresses "quick"-ness in the *second*

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reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be **murder** in such as administered or gave them. [fn.: 3 Inst. 50. 1 Hawk. P.C. 80. But see 1 Hal. P.C. 433.]."

"Misprision" is explained at *115: "Misprisions (a term derived from the old French *mespris*, a neglect or contempt) are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon: and it is said, that a misprision is contained in every treason and felony whatsoever; and that, if the king so please, the offender may be proceeded against for the misprision only.[fn: ....1 Hal. P.C. 374. 1 Hawk. P.C. 55, 56.]."

[37] BRACTON, *supra* note 31, at 341 (bk. 3 c. 21) ("If one strikes a pregnant woman or gives her poison in order to procure an abortion, if the foetus is already formed or quickened, and especially if it is quickened [*si puerperium jam formatum vel animatum fuerit, et maxime si fuerit animatum*], he commits homicide."). Thorne's "quickened" was a most hazardous translation because of that word's ambiguity; a clearer translation of *animatum* is simply, if not "ensouled" (*anima* = soul), then "animated" (as in Travers Twiss's 1879 translation of Bracton). (On the meaning and reference of "animation" still in the 18th century, see Chambers CYCLOPAEDIA, *supra* n.33.) Reliance on Thorne's "quickening," along with inattention to the underlying Latin and disregard of the ambiguity of "quick(ening)", led the Court in *Roe* into stark and very damaging error: *see infra* pp. 44-45.

"Infant [in the womb]" or "[unborn] child" would be a better translation of *puerperium*; Bracton's contemporary, Aquinas, uses *puer* (child/infant), *puerperium* and *fetus* almost interchangeably, deploying the former two when he wants to focus on the humanness of the unborn infant (as Coke, Hale, Hawkins and Blackstone all will, almost invariably speaking of the unborn as "infant" or "child.") Thus in *Summa Theologiae* III q. 68 a.11c: baptizing the mother does not baptize the unborn child, "...both because the soul of the child/infant [*anima pueri*] is distinct from the soul of the mother; and because the body of the animated infant/child [*puerperii animati* already is formed [*formatum*], and as a result is distinct from the body of the mother."

[38] The footnote here reads: "3 Inst. 50." That passage of Coke's *Institutes*, from the chapter on murder and the section about who can be murdered ("*Reasonable creature, in rerum natura*"), and summing itself up by quoting in Latin the identical Bracton passage later quoted by Blackstone, reads: "If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder: but if the childe be born alive, and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive. ... And so horrible an offense should not go unpunished. And so was the law holden in Bracton's time, *Si aliquis qui mulierem praegnantem percusserit, vel ei venenum dederit, per quod fecerit abortivum, si puerperium jam formatum fuerit; et maxime si fuerit animatum, facit homicidium*. [trans.: Anyone who strikes a pregnant woman, or gives her a poison by which he induces abortion, commits homicide if the infant/fetus was already formed, and especially if it was animated/ensouled.] And herewith agreeth Fleta..."

By appealing to Bracton's proposition, Coke emphasizes that when he says that "it," the "child" with which the woman was "quick"/pregnant, is, when born alive, "accounted a reasonable creature, *in rerum natura,*" he means that it is

sense—a supposedly not-yet-human entity's change (by animation) into a human organism.[39] So both Coke and Blackstone effectively taught that abortions were common-law heinous misdemeanors from the sixth week of pregnancy.[40]

Roe contradicts this, launching its discussion of the common law by citing Coke and Blackstone for its claim that "[i]t is undisputed that at common law, abortion performed *before* 'quickening'—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense."[41] False. Again, Coke and Blackstone cited only Bracton, who was referring to a living child, animated by a human form or soul, months before the mother would feel "recognizable movement" around the "16th to the 18th week."

Roe, later in the Court's opinion, returned to Bracton and, by relying on an English translation while ignoring the Latin, made one of its most

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counted/treated as having been alive and *in rerum natura* at the time when the lethal act was done to it, that is, when it was unborn (at any stage of pregnancy when it was sufficiently formed to be capable of being injured in a manner reliably detectable after its live birth). For just as murder at common law is committed if the victim dies within a year and a day of the murderous act (lethal act done with malice aforethought), and thus that act, when done, *was the murder*, subject to a condition subsequent (that the victim dies within a year and a day), so too here: if the child is born alive and provably succumbs from pre-natal injuries done with lethal intent, **the murder was committed *then,* before the child's birth** – "at the time of the battery" – **subject to a condition subsequent**: that the child survive until after (however soon after) birth. Coke (and his successors such as Hale, Hawkins and Russell), relying on Bracton and *Fleta*, simply made explicit that the rule declared in *Sims* (*infra* n. 104) included the case of ingesting abortifacients:

[39] *See infra* pp.16 and 44.

[40] Further compelling evidence that the standard pre-1800 common legal understanding of "quick with child" was not dependent on a mid-pregnancy, maternally-felt "quickening" is Blackstone's treatment of the plea of pregnancy in stay of execution: "the judge must direct a jury of twelve matrons or discreet women to inquire 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 stayed generally till the next session..." 4 COMM. *395. So she is quick with child if the special jury can detect fetal *life*. (The problem of the dead fetus, not to mention that of the mole or tumor, has a large part in the evidentiary caution that made successful prosecution for elective abortion difficult whatever the stage of gestation at which the unlawful acts charged were done.). *See* also Hawkins, 2 PLEAS OF THE CROWN 464 (1721), where the final sentence of the discussion of the plea is: "Also it is said both by *Staundforde* and *Coke*, that a Woman can have no Advantage from being found with Child unless she be found quick with Child." The footnote to this sentence cites ten authorities (treatises and abridgements), but the only two quotations are: "it is expressly said, that the Inquiry was whether the Woman were *enseint* with a Live Child or not" and "'tis said only, That the Woman was found *enseint* or pregnant."

[41] *Roe* at 113 n.27.

damaging errors. Having correctly observed (405 U.S. at 133-134) that early common law focussed on formation and animation as defining the time from which abortion would be homicide, and that there were uncertainties about when the completion of formation by animation occurred, the Court lurched into stark error:

> Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80-day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point.

But Bracton spoke only of formation and animation. "Quickening" is just the term unhappily chosen by Samuel Thorne for Bracton's *animatum*.[42] So *Roe*'s claim that Bracton was providing a resolution to uncertainties about "animation" by opting to focus on something else (or on some other term), "quickening," is simply absurd. And the absurdity gives *Roe* an illegitimately easy way into ignoring sense (2) of "quick" and giving sense (3) and the 15-16-week stage an illegitimate primacy or monopoly in its picture of the common law.

A leading American case *cited by Roe* made clear both the ambiguity absurdly dissolved by *Roe*, and the continuing high significance of Bracton and sense (2). Relying on Bracton-Coke-Blackstone – indeed, quoting the Bracton sentence in full (in Latin) – Chief Justice Shaw for the Supreme Judicial Court of Massachusetts held in *Commonwealth v. Parker* that indictments for abortion must aver that the woman "was quick with child," but *explicitly declined to hold* that this means she has "felt the child alive and quick within her."[43]

It is no answer to cite *State v. Cooper*[44] in support of *Roe*'s generalization that the common-law offense required perceptible

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[42] The absurdity of the argument *Roe* is developing here is only compounded by the fact that its footnote n. 23 quotes, besides Thorne, the more literal Twiss translation, "if formed and animated, and especially if it is quickened."

[43] 50 Mass. (9 Metcalf) 263, 267 (March Term, 1845; facts charged, and trial, 1843). Massachusetts had made the question moot (for future litigation) on January 31 by a statute prohibiting any attempt to "procure the miscarriage of a woman." An Act to Punish Unlawful Attempts to Cause Abortion, ch. 27, 1845 MASS. ACTS 406. The judgment, at 267, alludes in passing to *Hall v Hancock*, in which the common-law rule reaffirmed in *Parker* was foundational in the unsuccessful argument (of Metcalf) for the appellant defendant, and was dealt with by Shaw CJ thus: "We are also of 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 until the time of its birth, in all cases where it will be for the benefit of such child to be so considered." *supra* n. 4 at 257-258.

[44] 22 N.J.L. (2 Zab.) 52, 54 (1849).

movement. It is true that New Jersey's high court, after holding that abortion involves a woman "quick with child," appeared to take sides (though it was not in issue) on when this occurs, answering: "when the embryo gives the first physical proof of life, no matter when it first received it."[45]

Yet *Cooper*'s framing of the question about "offenses against the person"—as concerning when a human child is "in esse" (in being)—itself tells in favor of the principle that a prenatal human individual warrants protection from its first moment of existence (a principle *Cooper* acknowledges the evidence for and does not rebut).[46] And *Cooper* made clear that it neither contested that a new human life begins before the mother perceives movement,[47] nor questioned the other legal protections for children at those early developmental stages.[48] It also explicitly chose to leave reform to the legislature,[49] and New Jersey lawmakers promptly abolished the distinction between pre-

[45] *Id.* at 53-54.

[46] The court, quoting Bracton's line, rightly admitted that it "at first view might seem to favor a different conclusion." Then, assuming precisely what is here in dispute (the sense of "quick with child"), the court appealed to "the unanimous consent of all authorities, that that offence [of homicide(!)] could not be committed unless the child had quickened." *Id.* at 54. The court (*id.,* at 57) relies on *Commonwealth v Parker* while failing to note that on the very point for which the New Jersey court is arguing, the Massachusetts court declined to state an opinion. Thus throughout its argumentation the New Jersey court begs the very question left open by *Parker* and *assumed* precisely what needed to be demonstrated, *viz.* that "quick with child" at common law meant "with sense (3) quickened child" rather than "with live child" or perhaps even "with child").

[47] *Id.* ("It is not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception.... *In contemplation of law*, life commences at the moment of quickening.").

[48] *Id.* at 56-57. But it entirely fails to acknowledge the authoritative statements of principle, collected in *Hall v Hancock*, undergirding those protections. The handling of authorities is uncertain throughout; for example, Blackstone, 4 COMM. 395 is cited (57) to support the claims that "quick with child" and "with quick child" are synonymous, that both phrases "import that the child had quickened in the womb," and that that was when "the life of the infant, in contemplation of law, had commenced." In fact, though Blackstone there treats "quick with child" and "the child was quick" as equivalent, he does use "quickened" or "quickening," and seems mst concerned with the question whether the child is or alive ("quick") rather than dead: see *supra* nn. 31 and 40.

[49] *Id.* at 58 (finding "legislative enactments" "far better" on "this ... debatable" matter, when courts must give "the accused" the benefit of "reasonable doubt").

and post-"quickening" and extended prohibition of this "offense against life" to begin when a woman is "pregnant with child"—*i.e.*, conception.[50]

b. Antebellum and ratification eras

The high-water mark of treating quick*ening* (felt movement) as relevant was the early nineteenth century[51]; by the last third, that line was virtually gone as it was always destined to be—denounced by the medico-legal treatises as groundless because formation and animation occur at conception.[52] The same treatises also regarded the old Bracton-Coke-Blackstone version of "quick with child" (around six weeks) as equally ridiculous.[53] With modern scientific embryology, that

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[50] Act for the Punishment of Crimes (1846, s. 103 Supp., enacted March 1st 1849 n(Session Laws 1849, po.199); *State v Murphy* 27 N.J.L. 112, 114 (1859): "The statute... was contemporaneous with that decision {*Cooper*]. An examination of its provisions will clearly show that the mischief designed to be remedied by the statute was the supposed defect in the common law developed in the *State v Cooper*." Against *Roe*'s faulty history, *Cooper* itself clearly confirmed that common law protected the child's right long before "viability," *no later* than the perception of movement four or five months before birth, during which time any "act tending to its destruction" was an indictable offense, a homicide. Note that the Chief Justice, stating the opinion of the court in *Murphy* (having himself promoted the reforming statute in the legislature ten years earlier), says (*id.*) – with some roughness of phrasing – that the common law was defective in that it was concerned entirely with the life of the unborn child, *not the health of the mother*; so the statute, by contrast, treats the acts of the abortionist as having the same degree of culpability whether or not they harm or kill the child, whether or not "it has quickened," and so also whether or not the mother had actually ingested the abortifacient supplied by the appellant defendant abortionist; the degree of culpability and applicable scale of punishment under the statute is affected only if the mother dies. (In fact, of course, the 1849 legislation was very much concerned with the life of the child, too: as noted in the text above, offenses under it were committed only if the woman was in fact "then pregnant with child.")

[51] Many of the early reforming state statutes referred to a woman "quick with child"; many others referred to her being pregnant with "an unborn quick child."

[52] *See, e.g.*, T.R BECK & J.B. BECK, 1 ELEMENTS OF MEDICAL JURISPRUDENCE 464-66, 468 (12th ed. Philadelphia, 1863) ("[N]o 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.... [W]e must consider those laws which exempt from punishment the crime of producing abortion at an early period of gestation, as immoral and unjust."); WILLIAM GUY, PRINCIPLES OF MEDICAL JURISPRUDENCE 133-34 (1st Am. ed. 1845) ("[T]he absurd distinction formerly made between women quick and *not* quick is done away with…").

[53] BECK & BECK, *supra* note 52, at 466-468 (calling the six-week criterion "absurd," "injurious," and "wholly unsupported by argument or evidence," and going on to denounce as "no less absurd" the "popular belief" and laws, including English and, implicitly, American law, "denying to the foetus any vitality until after the time of quickening" by "'consider[ing] life not to commence before the infant is able to stir in its mother's womb,'" and declaring (against *both* understandings of

Bracton test was compelled, by its own rationale, to recognize personhood from conception even in the cramped, defendant-solicitous criminal law.[54] Thus, the influential and widely circulated 1803 textbook *Medical Ethics* explained that "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."[55]

What these treatises taught about the unborn—many describing their destruction as murder or indistinguishable from infanticide[56]—was vigorously promoted and re-asserted in professional medical associations, legal education, and state legislatures. The American Medical Association in 1859 dismissed the fiction "that the foetus is not alive till after the period of quickening" and urged correction of any "defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth as a living being."[57]

The leading American treatise on criminal law mocked the pegging of legal protection to felt quickening and effectively buried the Bracton-Coke quickening-as-animation criterion. *Wharton's Criminal Law*, from its first edition in 1846, argued that the criminal law of offenses against unborn persons should be aligned with the law of property, guardianship and equity[58] as expounded in cases such as *Hall v. Hancock*, adopting authoritative English equity precedents, which recognized unborn rights at *all* stages of development.

"quick/quickening") that non-perception of "motions" is "no proof whatever that such motions do not exist.").

[54] *Cf.* FINNIS, *supra* note 27, at 186 (explaining why, had Aquinas "known of the extremely elaborate and specifically organized structure of the sperm and the ovum ... and the [embryo's] typical, wholly continuous self-directed growth and development ... from the moment of insemination of the ovum," he would have located "personhood {*personalita*s: ScG IV c. 44 n.3}" at conception).

[55] THOMAS PERCIVAL, MEDICAL ETHICS 135-36 (Chauncey D. Leake ed., 1975) (1803); quoted by Ohio's 1867 senate committee, *infra* n. 75 at 233.

[56] *See* BECK & BECK, *supra* note 52; JOHN KEOWN, ABORTION, DOCTORS, AND THE LAW 23-24, 38-39, 179-80 (1988) (citing treatises).

[57] *Roe*, 410 U.S. at 141 (citing 12 TRANSACTIONS OF THE AMERICAN MEDICAL ASSOCIATION 73-78 (1859)).

[58] WHARTON, *supra* note 31, at 308 (1846); 2 WHARTON at 653 (6th ed. 1868) ("It has been said that [abortion] is not an indictable offence ... unless the mother is *quick* with child, though such a distinction, it is submitted, is neither in accordance with medical experience, nor with the principles of the common law. The civil right of an infant in *ventre sa mere* are equally respected at every period of gestation."); *see also* J.P. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 386 (2d ed. 1858) (re (reviewing cases and preferring the view that abortion is indictable at common law without allegation that the mother was quick with child).

Thus, by 1866 Chief Justice Tenney of the Maine Supreme Court could accurately report that "the [quickening] distinction ... has been abandoned by jurists in all countries where an enlightened jurisprudence exists in practice."[59]

c. Constants

Whatever the confusions about "quick" and "quickening," the common law indisputably, always and everywhere, made any attempted abortion a serious indictable offense from *at least* 15 weeks (give or take three). Virtually unanimous legislative,[60] professional, and public support for this part of the nation's tradition of ordered liberty, *and then* for following the science and removing the temporal limit in the criminal law's protection, has been extensively documented by scholars since *Roe* and *Casey*.[61] This confirms that "any person" in the fundamental-rights-regarding Equal Protection and Due Process Clauses includes all unborn human beings.

So does the fact that, while prevailing (though not universal[62]) nineteenth-century common law made only post-"quickening" abortion indictable, the common law *always* regarded pre-quickening abortion as "an action without lawful purpose," as Chief Justice Shaw mildly put it in 1849,[63] such that abortions (however skilfully performed) that accidentally cause the consenting mothers' death constituted murders. Even pre-quickening abortion was always a kind of inchoate felony for

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[59] 5 TRANSACTIONS OF THE MAINE MEDICAL ASSOCIATION 38 (1869).

[60] *See infra* section I.B.1.

[61] *See* JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 213-28 (2006) (concluding "that English law regarding abortion was fully received in the [American] colonies, and that the purported 'common law liberty to abort' is a myth"); *see also id.* 263-451 (for all aspects from Independence down to c. 1900).

[62] Limitation to post-"quickening" attempts and abortions was rejected by the courts in Pennsylvania and Iowa. *See Mills v. Commonwealth*, 13 Pa. 631, 632-33 (1850); *State v. Moore*, 25 Iowa 128, 135 (1868).

[63] *Parker*, 50 Mass. at 265. Hale puts it more straightforwardly: the abortifacient is given "*unlawfully to destroy the child within her*, and therefore he, that gives a potion to this end, must take the hazard, and if it kill the mother, it is murder." *R v. Anonymous* (1670), *reported and endorsed in* 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 429-30 (1736) (emphasis added); the passage is cited by Blackstone to verify his own statement, in which abortion is his third example of felony-murder: "And if one intends to do another felony, and undesignedly kills a man, this is murder....And so, if one gives **a woman with child** a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it." 4 COMM. 200-201.

felony-murder purposes,[64] as well as always constituting the *actus reus* with *mens rea* for the crime of murder subject to a condition subsequent: that the child die, however soon, after being born alive.[65]

And all along, every involvement in elective abortion was unlawful in the broader sense that was signaled by its liability to other legal penalties. Contracts for elective abortion services were void for illegality; any place used for elective abortion or for "offering medicines to destroy a child"[66] was liable to summary closure as a disorderly house, on pain of criminal penalty for non-compliance; advertising or publicly offering abortion services so described was criminal per se or a conspiracy *contra bonos mores*. The "openness" with which abortions were available in some places throughout the relevant era, an openness vaunted by pro-choice modern scholars, was analogous to the openness with which other criminal or unlawful practices were available and even respectable among some classes in some areas: to take an extreme case, of the open visitations by the Ku Klux Klan at some times and places, or at the other end of the spectrum, the availability in many places of pornography or forbidden drugs, or of alcohol under local or national prohibition.

B. Antebellum Statutes and Post-Ratification Precedents

1. State abortion statutes

The Union in 1868 comprised 37 States, of which 30 had statutory abortion prohibitions.[67] Most were classified as defining "offenses against the person,"[68] with 28 applying before *and* after quickening.[69]

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[64] That is clearly stated by Blackstone: *see* the previous footnote.

[65] That too is clearly stated by Blackstone: *see* n. 36 *supra*, quoting 4 COMM. 198, which cites Coke, 3 *Inst.* 50, and Hawkins to the same effect, and like the abortion quasi-felony murder of the mother was not questioned by any American authority.

[66] HAWKINS, 1 PLEAS OF THE CROWN (6th ed. 1788) 262.

[67] *See* James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 33 (1985).

[68] *See id.* at 48.

[69] *See id.* at 34. In Nebraska and possibly Louisiana the statutory prohibition did not at that time extend to abortion by use of instruments. The various shifting arguments made by Aaron Tang, *The Originalist Case for an Abortion Middle Ground* to the effect that "28" here should read "16" are refuted in all their strongly different versions from Sep. 13 to Sep. 30, 2021 by the authors of this Brief in *Indictability of Early Abortion c. 1868*. The latter identifies over 50 serious historical errors in the relevant 40 pages of Tang's many-times revised article; the replies he has incorporated in his latest revision, on October 11, contest none of the 50+ identified errors directly, accept many of our charges silently, indefensibly ignore many, confess to a couple, and replace some abandoned errors with new ones awaiting yet another

And Congress, legislating for Alaska and the District of Columbia shortly after ratification of the Fourteenth Amendment, referred to unborn children as "person[s]."[70]

Many such statutes were adopted or strengthened within a year or two of the Amendment's ratification, as in New York,[71] Alabama,[72] and Vermont.[73] In Florida, Ohio, and Illinois, the very legislatures ratifying the Amendment also banned abortion at all stages.[74] About a month after ratifying the Amendment, Ohio's senate committee concluded that given the "now ... unanimous opinion that the foetus in utero is alive from the very moment of conception," "no opinion could be more erroneous" than "that the life of the foetus commences only with quickening, that to destroy the embryo before that period is not child murder."[75]

Thus, state legislators not only viewed these laws as consistent with the Fourteenth Amendment, but also—like any legally informed reader—would have understood equality of fundamental rights for "any person" to include the unborn. In relation to none of the state legislative proceedings to reform the common law of abortion, beginning at latest in New York's 1829 statute and running through to 1883 (when the 43rd of the states to do so prohibited abortion at all stages) has any suggestion been recorded that any legislator considered that these statutes were abolishing a common-law right or liberty possessed by women since colonial times (as alleged by Cyril Means and *Roe*, and now even more recklessly by Professor Aaron Tang (*see* n. 69

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refutation. (These counts do not include the territories of Washington (1854), Colorado (1861), Montana (1864), Idaho (1864) and Wyoming (probably 1864, alternatively 1869), which from the aforesaid dates had statutes criminalizing abortion at all stages of gestation.)

[70] Act of Jan. 19, 1872, 1872 D.C. ACTS 26-29; Act of Mar. 3, 1899, ch. 429, tit. 1, ch. 2, § 8, 30 STAT. 1253-54 (1899).

[71] *See* Act of Apr. 28, 1868, ch. 430, 1868 N.Y. LAWS 856-68; Act of May 6, 1869, ch. 631 1869 N.Y. LAWS 1502-03.

[72] *See* Act of Feb. 23, 1866, 1866 ALA. PEN. CODE, tit. 1, ch. 5, § 64, at 31 (*codified* ALA. CODE § 3605 (1867)).

[73] *See* Act of Nov. 21, 1867, no 57, 1867 VT. ACTS 64-66.

[74] *See* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3 §§ 10-11, ch. 8, §§ 9-11, 1868 FLA. LAWS 64, 97; Act of Feb. 28, 1867, 1867 ILL. LAWS 89; Act of Apr. 13, 1867, 1867 OHIO LAWS 135-36.

[75] 1867 OHIO SEN. J. APP'X 233. Yet the law proposed by the committee and enacted by the legislature aligned with none of the three elements in *Roe*'s notion (at 157 n. 54) that acknowledging and acting on the personhood of the unborn requires that the woman be treated as a principal or accomplice, that abortion be punished as murder, and that it be prohibited even when medically necessary to save the life of the mother.

supra), but only in muted, somewhat chastened form by the present Historians' brief for the respondents in this case).

2. Precedent Interpreting the Fourteenth Amendment: The Case of Corporations

The original public legal meaning of "persons" encompassed *all* human beings. On this, the legal meaning fixed by treatises and cases was confirmed by rapid mid-1800s expansions of prenatal protections. And—even apart from the latter evidence—under the *Dartmouth College* principle giving legal meaning primacy over drafters' motivating concerns, the inclusion of children *in utero* could not have been blocked except by wording (easily available, but neither proposed nor adopted) such as "any person wherever born."

The plain legal meaning and sweep of a constitutional provision "is not to be restricted" by the "existing" problem it was "designed originally to prevent."[76] So declared Justice Field, riding circuit in *Santa Clara County v. Southern Pacific Railroad Co.*, and later affirmed by this Court in its holding that corporations are persons under the Due Process and Equal Protection Clauses. Field quoted Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*:

> It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to ... say that, had this particular case been suggested, the language would have been so varied as to exclude it.... The case being within the words of the rule, must be within its operation....[77]

As Marshall had explained in *Dartmouth College*, it may be–

> more than possible, that the preservation of rights of this description was not particularly in the view of the framers.... But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established [absent] plain and strong reason for excluding it[.][78]

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[76] 18 F. 385, 397 (C.C.D. Cal. 1883) (Field, J.), *aff'd*, 118 U.S. 394 (1886).

[77] *Id.* (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 644-45 (1819) (Marshall, C.J.)).

[78] *Dartmouth College*, 17 U.S. at 644.

The plain and original meaning of the constitutional text extended to the case, though its application had not been envisaged.[79] (Nor was there any "sentiment delivered by its contemporaneous expounders, which would justify us in making" any exception.[80]) This principle remains an axiom of constitutional (especially originalist) interpretation today.[81]

Here it controls. As a matter of plain original meaning to educated lawyers, just as the college charter considered by Marshall fell under the Contract Clause, and the railroad considered by Field was a "person" under the Equal Protection Clause, so too, but *more* certainly, prenatal humans are "persons" under the Clause, whether or not its drafters and ratifiers specifically had that in mind.[82]

Inclusion of the unborn is *more* certain because of their foregrounding in the discussion of fundamental rights to life and security in Blackstone's *Commentaries*, the formative text for educated lawyers of 1776-89 and 1866-68 (in Congress and nationwide), invoked in introduction of a civil rights bill prefiguring or supported by the Amendment.[83]

Given the evil they aimed to cure, the Amendment's ratifiers may not have subjectively had in mind that the Equal Protection Clause would affect established antebellum Union rules and institutions at all.[84] But if a state in, say, 1870 had legislated to permit all elective

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[79] *Id.* at 645.

[80] *Id.*

[81] *See, e.g.*, *McDonald*, 561 at 787 (rejecting argument that "the scope of the Second Amendment right is defined by the immediate threat that led to the inclusion of that right in the Bill of Rights").

[82] *See* Michael S. Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 23 n.34 (2013) (The unborn should be held to enjoy constitutional protection "for the same interpretive methodological reason that corporations properly can be understood as legal persons—that that was the conventional term-of-art legal usage, and thus bears heavily on what the legal meaning of the term 'person' was at the time[.]") (emphases omitted).

[83] *See supra* section I.A.

[84] That reasoning synthesizes the judicial rationale of several restrictive assumptions about the Equal Protection Clause between 1871-88. *See, e.g.*, *Ins. Co v. New Orleans*, 13 F.Cas. 67, 1 Woods 85 (C.C.D. La. 1871) (corporations not Fourteenth Amendment persons); *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139 (1872) (females and practice of law); *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 133 (1873); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1872); *Strauder v. West Virginia*, 100 U.S. 303, 304 (1879); *The Civil Rights Cases* 109 U.S. 3 (1883); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 188 (1888) (Fourteenth Amendment concerned only with protecting any class "singled out as a special subject for discriminating and hostile legislation").

abortions, the reasonable ratifier would have agreed that the Amendment's *terms* entitled guardians *ad litem* to obtain equitable relief for unborn children. This could have been denied only on some Fourteenth-Amendment-limiting theory—*e.g.*, of the Amendment's race-specific motivating goals—long and rightly rejected by this Court.

II. *Roe* and *Casey's* Arguments Against Fetal Personhood Are Unsound.

A. Justice Stevens' defense in *Casey* has absurd implications.

Since *Roe*, the only Justice to defend *Roe*'s denial of constitutional personhood—Justice Stevens—clung to a single plank: *Roe*'s claim that unborn children's right to guardians *ad litem* to protect their property interests is no recognition of personhood because those interests are not perfected until birth.[85]

This plank is no affirmative case, merely a response to one counterargument, and still it fails—attempting to drum up a constitutional principle from one narrowly stated[86] sub-constitutional technical rule[87] while ignoring others reflecting the principle declared

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For example, litigants fighting discrimination against women appealed to the Amendment's first sentence but never its Equal Protection Clause. That is inexplicable except based on early assumptions about that Clause's application that would also have blocked early appeals to the Clause by those seeking to bolster fetal protections. These blocking assumptions, when articulated by courts, proved to concern not the meaning of "any person" but the import of "deny ... the equal protection of the laws." They were soon rejected. Under the corrected understanding of "equal protection," plus the public meaning that the Clause's "any person" phrase always had, the Clause protects the unborn against state laws permissive of elective abortion.

[85] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 912-13 (1992) (Stevens, J., concurring and dissenting in part).

[86] The *vesting* of rights often counts at least as much as their "perfecting." The present procedural rights of unborn children to have guardians *ad litem*, like their substantive right to receive income, get an injunction against waste, or to *parens patriae* or other protection against their mothers (or the mother's representatives) (*see* n. 90 *infra*), are rights each sufficiently vested ("perfected") to serve the child's interests appropriately and in seamless continuity with the substantive rights as he or she enjoys them after birth and eventually after infancy.

[87] Also unavailing is *Roe*'s reliance on a defunct tort doctrine rejecting liability for prenatal injuries. Justice Holmes invented that doctrine well after the Amendment's ratification, in *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 16 (1884), based on the fictions that the unborn child is "not yet in being" and so is merely "part of the mother." (State and federal courts gradually exposed those fictions until 1953, when New York's appellate court followed the "clear[]" "biological" reality "that separability

by Blackstone and Shaw, and by the Lord Chancellors whose rulings they cited: The unborn child "is a person *in rerum naturâ*" under "the civil and common law" and "to all intents and purposes[.]"[88]

Thus, the child *in utero* has had substantive rights to receive income or get an injunction against waste, sufficiently vested to serve her seamlessly through birth and infancy.[89] Then there are the vested rights of the unborn, enforced by courts against their parents' competing rights-claims, in *parens patriae* cases ordering blood transfusions, etc.[90] These civil rights to life—which could hardly override parental rights unless the unborn were themselves persons—had to be ignored by *Roe* and verbally denied[91] by Justice Stevens. Likewise the convictions, now as then, for violations of unborn children's right to life as enforced in feticide laws.[92]

B. *Roe*'s grounds are utterly untenable.

Roe's counterarguments merit no deference, *Roe* having disqualified itself from constitutional-settlement status by refusing to appoint a

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begins at conception." *Kelly v. Gregory*, 125 N.Y.S. 2d 696, 697 (App. Div. 1953). By 1971 Prosser could write that almost all jurisdictions have allowed recovery for pre-viability injuries. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 337 (4th ed., 1971). He had approvingly called rejection of Holmes's fictions "the most spectacular abrupt reversal of a well-settled rule in the whole history of the law of torts." *Id.* § 56, at 354 (3d ed. 1964). A.A. White, The Right of Recovery for Prenatal Injuries, 12 LA.L.REV. 383 (1951) (just before the Holmes doctrine sank beneath the waves) surveys various insufficient policy or precedential reasons for the doctrine's denial of liability (denial that the unborn infant was a person in the eyes of the law), and shows that "the courts denying recovery for prenatal injuries have not effectively escaped the implications for tort law of the recognition by the criminal law and other fields of the civil law of the infant's prenatal existence." (399), a recognition induced by physical/physiological facts (394-400).

[88] *Hall*, 32 Mass. at 257-58.

[89] *See id.* at 258.

[90] *See Raleigh Fitkin-Paul Morgan Mem'l Hosp. & Ann May Mem'l Found. v. Anderson*, 201 A.2d 537, 538 (N.J.), *cert denied* 377 U.S. 985 (1964); *see also* Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 844-48 (1973) (collecting cases); *ex parte Phillips*, 287 So.3d 1179, 1251-1253 (Ala.), Parker J. spec. conc. (2018) (collecting cases).

[91] "Thus, as a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life." [footnote omitted]. *Casey*, n. 78 at 913.

[92] *See generally* Gerard V. Bradley, *The Future of Abortion Law in the United States*, 16 NAT'L CATH. BIOETHICS Q. 633 (2016).

guardian *ad litem* or hear the contemporaneous Illinois appeal involving an unborn child so represented[93]—and its points fail anyway.

Roe produced three reasons not to recognize unborn humans as persons. Its textual reason, that "person" as used elsewhere in the Constitution gave no "assurance" of "pre-natal application," was concededly inconclusive, and in fact proves too much.[94] Its pragmatic reason was so implausible that it was framed in questions, not propositions.[95] And its historical reason was a cluster of gross errors drawn solely from two articles by Cyril Means. (No other writer on legal history was cited.) His first article, written while he was general counsel of National Abortion Rights Action League, had been refuted.[96] The second was so recent that no scholar had gotten to examine its sources, and so flawed that it was known to "fudge" the history even by counsel for Jane Roe who cited it.[97] Once scrutinized, its sources crumbled, as did *Roe*'s consequent assertion of a historic "right to terminate a pregnancy."[98]

History "disposes of any claim that abortion was a 'common law liberty,'"[99] a preposterous claim whose putative support is disproven not least by the common law and statutory history above. And *Roe*'s astonishing "doubt[]" that post-quickening abortion was "ever firmly

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[93] *Doe v. Scott*, 321 F. Supp. 1385, 1387 (N.D. Ill. 1971); *see also* John D. Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment Personhood, and the Supreme Court's Birth Requirement*, 4 S. ILL. U.L.J. 1, 8-9 (1979).

[94] *Roe*, 410 U.S. at 157. Notably, no use gives any indication of *when* one becomes a person or entails that one becomes a person only at birth. *See* Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539, 550-52 (2017). And any reading excluding the unborn from personhood because most uses of "person" cannot apply to them (voting, becoming President, and so forth) applies *a fortiori* to corporations, yet the Court from 1886 has unflinchingly included them within equal protection and due process guarantees for "any person."

[95] It asked how to square unborn personhood with not penalizing the mother, or with penalizing abortion less severely "than the maximum penalty for murder." *Roe*, 410 U.S. at 157 n.158. *But see* Craddock, *supra* note 94, at 562-66.

[96] *See* GERMAIN GRISEZ, ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS 382-92, 395, 434 (1970)

[97] A 1971 memorandum circulated among Roe's legal team said Means's "conclusions sometimes strain credibility" and "fudge" the history but "preserve the guise of impartial scholarship while advancing the proper ideological goals." DELLAPENNA, *supra* note 61, at 143-44, 683-84.

[98] *Roe*, 410 U.S. at 140-41.

[99] DELLAPENNA, *supra* note 61, at 1056; *see also id.* at 336, 351-54, 374-75, 409-10 n.175.

established as a common law crime"[100] contradicts the precedents and authorities since before Bracton in the 1200s. Means's attempt to explain away those precedents, repeated by *Roe*,[101] was soon refuted, not least by original records underlying the inaccurate printed accounts used by Means.[102]

Finally, *Roe* uncritically reported Means's view that "Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law."[103] That case, *R v. Sims*, actually *disproves* the charge. For there it was was not Coke as prosecuting or intervening Attorney General but the King's Bench itself that authoritatively stated the unborn-child-protective principles at issue, the evidential considerations, and the corresponding "born alive" rule.[104] Coke's *Institutes* in the passage recalled by Blackstone (and depreciated by Means and *Roe*) did no more than restate the *Sims* rule so as to include all cases in which either the mother or someone else acts so as to kill the unborn child (quickened in sense 3 or not). Provided the child survived to be born alive, however briefly alive, it was to be counted as having been "a reasonable creature, *in rerum natura*" at the time when the lethal act was done, an act therefore rightly judged murder. In other words, the lethal act when done was murder subject to a condition subsequent: that the child be born alive. To repeat: the foundation for imposing this condition subsequent was, *Sims* had ruled, an evidential one.

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[100] *Roe*, 410 U.S. at 136.

[101] *Id.* at 135.

[102] DELLAPENNA, *supra* note 61, at 146-50; *see also id.* 134-43.

[103] *Roe*, 410 U.S. at 136 n.26.

[104] (1601) Gouldsb. 176, 75 Eng. Rep. 1075, 1076. Chief Justice Popham and Fenner J. authoritatively stated the rule that it is murder to strike a woman "great with child" (pregnant) if the child is born living but succumbs from injuries that can "be proved" to have been caused by the battery with a view to causing a miscarriage; and that **the reason why it is not murder unless the child is born alive is simply evidential: "for if it be dead born, it is no murder, for *non constat* [it is not provable] whether the child were living at the time of the battery or not, or if the battery were the cause of the death."** The Court of King's Bench went on to emphasise this evidential rationale of the rule, by observing that "when it is born living, and the wounds appear in his body, and then he die, the Batteror may be arraigned of murder, **for now it may be proved whether these wounds were the cause of the death or not,** and for that if it be found, he shall be condemned."

C. In Founding- and Ratification-era legal thought, constitutional status as a Person transcended narrow doctrines and legal fictions

1. The example of Pound

The attempt by Justice Stevens to narrow the constitutional-level understanding of "any person" by appeal to technical rules or doctrines inverts the logic of constitutional thought, by inverting the thoughts of Founding- and Ratification era constitution-makers and ratifiers about the framework of legal thought and of the legal system, a framework they considered to be exemplified, in broad and solid terms, by Blackstone's *Commentaries*, deeply based as these were not only on caselaw, statutory developments and classic treatises but also on prior attempts such as Matthew Hale's[105] to grasp the system of English law as a whole.

An analogous inversion is exemplified by Roscoe Pound's ambitious legal-theoretical treatment of persons and legal personality in his final magnum opus, JURISPRUDENCE.[106] Pound's discussion is full enough to make clear the doctrinal or analytical incoherence that results from giving doctrines and fictions priority over realities such as the continuous identity of an individual person both before and after birth, notwithstanding birth's reasonable social and legal importance.

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[105] M. HALE, ANALYSIS OF THE LAW 1–4 (1713, the first edition: Hale died 1676): "*The Analysis of the Law*. Sect. 1. Of the Civil Part of the Law (in general). The Civil Part of the Law concerns, 1. Civil Rights or Interests... Now all Civil Rights or Interests are of Two Sorts: 1. *Jura Personarum,* or Rights of Persons... The Civil Rights of Persons are such as do either, 1. Immediately concern the Persons themselves:... As to the Persons themselves, they are either, 1. Persons Natural; Or 2. Persons Civil or Politick, *i.e.* Bodies Corporate. Persons Natural are consider'd Two Ways: 1. Absolutely and simply in. themselves... In Persons Natural, simply and absolutely considered, we have these several Considerations, *viz.* 1. The Interest which every Person has in himself...1*st*, The Interest which every Person has in himself principally consists in Three Things, *viz.* 1. The Interest he has in the Safety of his own Person. And the Wrongs that reflect upon that, are , 1. Assaults... And all Persons are (presum'd) able in either...Taking or Disposing...which [persons] by Law are not disabled: and those that are so disabled come under the Title of *Non-ability*, though that Non-ability is various in its Extent, *viz*., To some more, to some less (as in the several instances following):... 4. Infants: here of the Non-ability of Infants. ..." The *Oxford Dictionary of National Biography* entry for Hale (2004) says: "[Hale's] *Analysis*...was borrowed by William Blackstone with minimal modification and therefore provides the structure of Blackstone's *Commentaries*." On Blackstone's own *Analysis* as derivative from Hale's and forerunner of the *Commentaries*, see J. Finnis, *Blackstone's Theoretical Intentions*, 12 Natural Law Forum 63-83 at 64-67 (1967).

[106] R. POUND, 4 JURISPRUDENCE ch. 25 (1959).

In sec. 127, BEGINNING AND TERMINATION OF LEGAL PERSONALITY, Pound commences with the seemingly authoritative proposition: "Beginning of natural legal personality is conditioned by birth. The Romans held, and this has been adhered to ever since, that this means complete separation of a living being from the mother." There follows a page of references to various relevant points of difference between classical Roman law and later German, French, Spanish and other doctrines or enactments. After two dozen lines of this we read: "At common law the requirement is that the child be born alive." But the only authority cited to verify this is "Coke, Third Inst. (1644) 50."[107]

At this point it is obvious that Pound's discussion of "persons" in law has miscarried: a technical rule of criminal law *about murder*, established in 1601 and related by Coke in a paragraph about murder without the slightest theoretical pretension, is being treated as if it were (or made manifest) a general principle of law and building-block of juristic thought. Pound's misuse of Coke is refuted by Blackstone's treatment of the unborn across the whole sweep of the law in 1 COMM. *129-130, examined *supra*. at pp. 5–7 and 11–14.

One page further on, he suddenly admits that Roman law had a rival principle, opposite to the *not a person until birth* principle he had canonised:. Now he says: "unborn children are in almost every branch of the civil law regarded as clearly existing"! Pound discusses technical exemplifications of this, but makes no effort to reconcile it with the position (principle? rule? doctrine? definition?) announced without qualification at the beginning.

Pound gets to the truth of the matter when he broadens his discussion of persons and personhood, to engage with human realities, benefits and harms, not mere jigsaw pieces of old (and mostly foreign) legal rules and maxims:

> In the United States down to the Civil War, the free negroes in many of the states were free human beings with no legal rights. They were not property. But they could scarcely be called legal persons.[ ] At common law there was civil death – loss of legal personality in one naturally alive.
>
> [ ] ...
>
> But there came to be a steady expansion of legal personality, a recognition of the human being as a moral and so a legal unit and extension of legal capacity, so that in the era of natural law legal personality was thought of as an attribute of the individual human being. The human being had certain qualities whereby he was

[107] For the text of 3 Inst. 50 see n. 38 *supra*. Pound's footnote cites seven other English precedents on related points of detail, and further cases illustrative of a dispute or difference between Kentucky and older and newer English views.

> naturally entitled to have certain things and do certain things and so was the subject of natural and therefore legal rights.

Pound does not pause to note that this is part of the thought crystallized in the Constitution and the Fourteenth Amendment. Instead he goes straight on:

> With the natural-law basis eliminated, there remained for analytical jurisprudence the definition [of person]: "A subject of legal rights and duties."[ ][108]

And on the following page:

> ...analytical jurisprudence has had to take account of idiots, **unborn children,** babes in arms, in Roman law children under seven years, and those lunatics whose mental disease inhibits exercise of will. **All these are commonly accounted natural persons and certainly would today be legal persons.**

In short: the part of Pound's work on persons that is of constitutional relevance is the part where natural realities are acknowledged as informing the law's most fundamental (constitutional) building-blocks and prescriptions, not the part where axioms articulating legal fictions adopted in former legal systems or former doctrines of our own system are taken to be truths of legal philosophy.

2. A recent attempt to avoid the conclusions of this Brief

C'Zar Bernstein's forthcoming article "Fetal Personhood and the Original Meanings of 'Person'"[109] argues that an originalist interpreter, considering the original meaning of "person" in the Constitution must choose between the original "ordinary meaning" and the original "common-law meaning." The former provides a route to acknowledging that the unborn are within the meaning of "any person" in the Fourteenth Amendment (which would, in Bernstein's view, be the better solution in terms of policy or justice). But that route is blocked if the appropriate original meaning is the common-law meaning, which Bernstein seeks to identify across about 40 pages, mostly concerning "the Born-Alive Rule" in criminal law, law of torts, and succession: in all three areas (though not with certainty in the law of succession), the rule excludes fetuses from the scope of "person." Investigating the article's treatment of the material can shed light on the argument

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[108] Ibid. pp. 193-194.

[109] *Supra* n. 34.

advanced in this Brief, and the failure of the article's good faith critique of fetal personhood provides reassurance of the solidity of the Brief's position.

The case for holding that unborn children are persons within the original meaning of the Fourteenth Amendment **does not look to either of Bernstein's alternatives.** On the one hand, it does not inquire after an unfocussed "ordinary meaning" or "ordinary understanding," or "ordinary-language public meaning," though it agrees in the result of Bernstein's inquiry: person in the Fourteenth Amendment refers to any "'member of the human species,' a category that includes the unborn." The better focus of inquiry is into the meaning of "person" that was shared or "ordinary" among legally informed members of the drafting and ratifying legislatures, when they were considering documents intended for legal, including constitutional text, sub-constitutional legislation, and related judicial and administrative usage, neither excluding nor focussing upon the understanding of their electorates and the media they shared with them. In the case of the word "person," the legally informed members of the relevant bodies were thoroughly familiar with the highly prominent use of the term to structure the treatises foundational to their entire formation as students and in many cases practitioners of law.

On the other hand, however, that foundational usage of "persons" as a primary building-block in the thought and discourse of the *Commentaries* cannot be rightly understood as "the common-law meaning of 'person'." For:

1. **There is and was no single common-law meaning of "person," no common-law definition of "person,"** but rather a variety of rules and stated principles identifying the categories of persons that are the subjects or objects of specific rules and doctrines, which have been shaped and adopted to do justice as conceived by judges, practitioners and treatise-writers (with constant reference to corrective legislation) at particular periods. These justice-seeking rules and principles draw major distinctions between the born and the unborn, a line-drawing appropriate in principle, in view not only of the uncertainty that used to prevail insuperably until birth about whether the unborn human entity was one, two or many, alive or dead, a creature of a rational nature or a hydatidiform mole, or male or female, but in view also of the social significance of the attitudes and customs that have their root in that change from darkness and uncertainty to the daylight of the visible, ordinary world. Some of the law's justice-seeking rules do not count the unborn among their objects or subjects, but other rules – those essential to preserving the basic interests of the

unborn at least prior to birth – do or should (on the rights-theory of our Constitution) count the unborn the same as or very much like other persons.

2. **The drafting and ratifying community did not consider themselves bound to particular common-law judgments**, **rules and doctrines**, where these collided with their own judgments about justice and practicality. The common law's criminal-law protection of the unborn was very widely regarded as profoundly unsatisfactory because not fully adequate to relevant truths about persons, that is, about human beings precisely as objects of the law's protection.

a. *Common-law succession rules*

Bernstein forces the common-law rules and doctrines onto a procrustean bed, in which personhood is never attributed to the unborn until they are born alive, at which point it is attributed to them *by a fiction* as having been enjoyed prior to birth. For example:

> In the succession context, there are two legal fictions. First, the legal fiction that the unborn do not exist. Second, the legal fiction that persons already born were born before they were in fact born. This second fiction – the relation of birth back to conception – was necessary only because the first fiction existed and so is evidence of the lack of legal personality of the unborn at common law.

This way of speaking is starkly opposed, as a way of formulating the common law's rules, to the formulations deployed in 1 *Commentaries* *129-130 and in *Hall v Hancock*. **Bernstein's article never mentions *Hall v Hancock***, though it wrestles with some of the cases and dicta collected in Shaw's judgment there.[110] The opposition

[110] On Bernstein's understanding of the "common-law meaning" of "person, and the related common-law rules," the following six indented and enumerated propositions (the whole set of relevant propositions) in Shaw's judgment should all have been phrased differently

> [1] We are also of opinion, 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. ...

On Bernstein's fictionalist view, Shaw should have said "a child, if born alive, will be treated as if it had been in being from conception..."

. [2]..the Court are of opinion, that a child *en ventre sa mere* is to be considered a child living, so as to take a beneficial interest in a bequest, where the description is "children living."

Shaw should, on Bernstein's view, have said "a child born alive is to be considered as if it had been living when the testator died while it was *en ventre sa mere*."

> [3] A child *en ventre sa mere* is **taken to be a person in being**, **for many purposes**. He may take by descent; by devise.... or under the statute of distributions,... and generally for all purposes where it is for his benefit.

Shaw should on this view have said "a child born alive is for many purposes taken, by fiction, to have been in being while *en ventre sa mere*."

between Bernstein's imagined common law discourse and the real discourse of the common law is illustrated in n. 110 below. The real common law goes with the grain of reality. **Its fictions, where they are adopted, run in the direction of enhancing protection of the unborn *in utero*** (by treating them for many purposes *as if* they were born) while simplifying the disposition of the affairs and interests of the born by treating those unborn who emerge from the womb *dead* (and thus incapable of being benefited) *as if* they had never existed.

Bernstein points to a couple of decisions in which judges, *obiter*, speak of the unborn as if they were only fictitiously existent, or fictitiously persons. Thus the Chancellor of the Chancery Court of New York in *Marsellis v Thalheimer* (1830) said:

> [T]he existence of the infant as a real person before birth is a fiction of law, for the purpose of providing for and protecting the child, in the hope and expectation that it will be born alive and be capable of enjoying those rights which are thus preserved for it in anticipation.[111]

Though the case is not reported to have been cited to the court in *Hall v Hancock*, Shaw's piling up of statements of principle looks as if it was aimed against this talk of fiction, and was concerned to emphasise that **the existence of the infant as a real person from conception to**

> Lord *Hardwicke* says, in *Wallis v. Hodson,* the principal reason I go upon is, that [4] **a child *en ventre sa mere* is a person *in rerum naturâ,*** 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 the father's lifetime.

The correct common-law way of speaking would, on Bernstein's view, have been "a child *en ventre sa mere* is NOT a person *in rerum natura*, but if born alive is treated as if he had been, and is NOT a person for any purposes at all, unless he is born alive."

> And *Buller* J., in delivering his opinion, in *Thellusson v. Woodford,* 4 Ves. 324, after citing various cases, says, the effect is, that [5] **there is no difference between a child actually born and a child *en ventre sa mere*.**

Buller and Shaw should have said "there is all the difference in the world between a child actually born and a child *en ventre sa mere* unless the child is actually born, in which event it will by fiction of law be treated, for some purposes (but not others), as having had some existence before birth."

> ...it was stated [in *Doe v. Clarke,* 2 H. Bl. 399] as [6] **a fixed principle**, that wherever such consideration would be for his benefit, **a child *en ventre sa mere* shall be considered as absolutely born.**

No, Hardwicke and Shaw should have said that "the fixed principle is that a child *en ventre sa mere* is not a person and has no being or existence unless born alive, in which case it will then be treated as if it had been born at the time of its conception, if so treating it will be for the benefit of the born child."

These inversions are, each and all, absurdly unnecessary, and out of line with the common law's willingness to acknowledge human beings in their reality and be ready to adjust the degree, forms and limits of the protection it affords the life and property interests of the unborn, for the sake not least of avoiding needless complexity and uncertainty in complex family and other property interrelationships.

[111] 2 N.Y. (Paige) Ch. 35, 40.

birth is acknowledged by the law, with two qualifications: (1) the protection afforded to its interests in life and property is afforded for its benefit only, and cannot be deployed in the property interests of others unless and until the child is born; (2) these protections terminate if it is born dead (or otherwise dies before birth), and for the future the law's rules apply to those concerned (who might have benefited had it been born alive) **as if the child had never lived**.

The dicta about fiction in *Marsellis* were entirely unnecessary to the decision,[112] which itself and in its essential reasoning and treatment authority is fully in line with the cases deployed four years later in *Hall v Hancock*. All that needed to be said was said elsewhere in the judgment, and in all the authorities including *Hall v Hancock*: that the law's acknowledgement of the reality and existence of the unborn human being/person is, pending birth, *for the benefit of that infant only*. It is not for the benefit of others, and so does not count for purposes of defining those others' property/succession entitlements.

Similarly with Bernstein's other succession authorities, first *Gillespie v Nabors* (1877, Ala.), which states:

> From the citations above,[113] it results that although an unborn child is treated as having an existence for certain purposes beneficial to it, yet, this existence is conditional and imperfect, and confers no rights of property, until it is born alive. When that event happens, to preserve successions, and to prevent forfeitures, it becomes, by relation and legal fiction, a separate,

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[112] The ruling in *Marsellis* is that a still-born child does not count as having been born alive for the purposes of the rule that *if a child is born of a marriage* the surviving spouse has a life estate ("in curtesy") in property in respect of which the deceased spouse was seised of an inheritable estate (whether or not the child had predeceased the deceased spouse). That was a conventional and proper application of doctrine, even though the doctrine of estates in curtesy would not have been subverted had the ruling gone the other way; the ruling in the case is the neater solution, avoiding difficult potential problems of defining whether and when, for the purposes of the curtesy rule, a child miscarried or born dead had indeed been present and living in the womb as a fruit of the marriage.

[113] The first of these is the above-discussed passage in *Marsellis,* with the sentences following that: "The rule has been derived from the civil law; … although by the civil law of successions, a posthumous child was entitled to the same rights as those born in the life-time of the decedent, it was only on the condition that they were born alive, and under such circumstances that the law presumed they would survive. … Children in the mother's womb are considered, in whatever relates to themselves, as if already born; but children born dead, or in such an early stage of pregnancy as to be incapable of living, although they be not actually dead at the time of birth, are considered as if they had never been born or conceived." Notice that the latter fiction is deployed only *after* the death of the unborn, when all need for protecting *that child's* interests (benefit) has ceased.

> individual person having personal and property rights, dating back to the time of conception, when such backward step is necessary to protect a descent or devise. If, however, the fœtus is never born alive, then it is treated as if it never had an existence.[114]

This is an outlier, not a convincing or representative analysis or explanation. The claim that the *existence* of the unborn is "conditional and imperfect" and that on birth the "unborn child"/"foetus" "becomes, by relation and legal fiction, a separate, individual person" is *one way* of expressing the conditionality of, and limitations upon, the law's acknowledgement and protection of the unborn person's rights and interests. But it is not the only way, the best way, or the way adopted by the weightier line of authority and exposition, exemplified by *Hall v Hancock* and the cases it relied upon.

Bernstein's remaining relevant authority is Justice Field's dictum for the Supreme Court in *Knotts v Stearns* (1875):

> The posthumous child did not possess, until born, any estate in the real property of which his father died seized which could affect the power of the court to convey the property into a personal fund, if the interest of the children then in being, or the enjoyment of the dower right of the widow, required such conversion.[115]

But Bernstein does not mention what the Court's opinion also says, later on the same page, a statement (quoted below) that supports the directly contrary premise (for reaching the same conclusion), and cancels every possible implication that the Court has set its face against acknowledging either the existence of the unborn child, or that child's capacity while unborn to possess an estate or interest in land (even if that possession or interest could not be counterposed to the power of conversion):

> But there is another answer to the objection. Assuming that the child, before its birth, whilst still *en ventre sa mère*, possessed such a contingent interest in the property as required his representation in the suit for its sale, he was thus represented, according to the law which obtains in Virginia, by the children in being at the time who were then entitled to the possession of the estate. Parties in being possessing an estate of inheritance are there regarded as so far representing all persons, who, being afterwards born, may have interests in the same, that a decree binding them will also bind the after-born parties.[116]

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[114] *Gillespie v. Nabors*, 59 Ala. 441, 444-445 (1877).

[115] *Knotts v. Stearns*, 91 U.S. 638, 640, 23 L. Ed. 252 (1875)

[116] *Id.*

In short, the Court here showed itself to be quite free of the dogmatic fictions of fetal non-existence that Bernstein asserts as "the common-law."

In sum: rather than awaiting birth and then *backdating* to conception the personhood and existence of the child born alive, the common law ascribes to the unborn child – from its actual conception and all the way along its gestation *in utero* – the status and legal protections that it will possess once a born child.

It does so (a) to the full extent that that status and those protections are for *its* benefit, and (b) subject to a condition subsequent: that if it is never born alive, that status will – for many purposes *but not all* – be treated as if it had never been in place. Not all, because electively aborting the unborn child, at least once it had attained the definite individuality connoted by "quick" in sense (2), remained a serious offence, just below *capital* felony, even when the child is never born alive; and in cases where the aborted child, *even though not "quick,"* died after birth or where the mother died from the elective abortion (however skilfully and carefully performed), the inchoate felony status of the abortive acts *when done* entailed that the abortion provider was guilty of murder

b. *Common-law criminal law*

Bernstein's extended treatment of the common-law criminal law is less adequate than his treatment of succession (where he commendably acknowledges that some of the decisions of the great Lord Chancellors can be read as opposed to his fictions). He misunderstands the classic treatises by under-estimating their subtlety; he truncates and consequently distorts their key formulations, and he misreads *Sims*. We have already, in n. 34 *supra*, addressed the central, strategic claim Bernstein makes in this discussion; what follows is supplementation.

(i) Not unreasonably, Bernstein focusses on Coke's treatment of homicide and abortion. Bernstein quotes the passage from 3 *Inst.* 50 that we quoted above in n. 38 – but omits Coke's claim that what has just been said agrees with the Bracton sentence (which Coke then quotes in full) – and comments:

> [1] The important point from that passage is ... that abortion **could not count as murder** precisely because the law did not regard the unborn **as persons yet in existence** [citation to a 1674 Chancery case citing this page of Coke] unlike all other natural persons (those listed [by Coke] above).
>
> The evidence of this is as follows. [2] First, Coke addresses each element of murder in turn, including the element that the entity

> killed **be a person in existence**. [3] Second, both the list of natural persons within that concept's extension and his statement of the Born Alive Rule are included under his exposition of **this element**. Third, the discussion about abortion and the Born Alive Rule follows immediately after his list of examples of **natural persons in existence**. [4] Fourth, the obvious reason to include feticide here is to distinguish fetuses from the other natural persons listed and to clarify that **feticide**, unlike killing more generally, **could not** count as murder at common law, because it could not satisfy this element. [5] Putting all this together, Coke **affirms that abortion** is wrong and for that reason is criminalized, but it **could be no murder** — and this is the crucial point — **because** "in law" the fetus **is not** "accounted a reasonable creature, in **[existence], [until]** it is born alive."

Each of the sentences we have enumerated miscarries.

[1] Nothing in Coke's passage says abortion *cannot* or *could not* be murder, and indeed the whole or a large part of the point of the passage is to affirm that abortion (or what Bernstein also calls feticide) *is* murder when the aborted child's death follows, however closely, its live birth. The reason why Bernstein has things so back-to-front emerges in point [5].

[2] Again Bernstein uses "a person in existence," and he will continue to do so. But the element in his definition of murder that Coke is expounding in this passage is neither "person" nor "in existence," but rather "reasonable creature" and "*in rerum naturae*." "Reasonable creature" is close in its reference (denotation) to "(human) person," but like Blackstone a century and a half later it keeps in view both (a) all life's dependence on a Creator and (b) the distinction between human nature and the nature of other animals. Both "person" and "rational animal/reasonable creature" smoothly include the unborn human child, but the latter perhaps a shade more obviously. As for "in existence," if it were a fully safe translation of *in rerum natura* it would surely have been used by Coke, Hale, Blackstone and all; but it is not, so they didn't. Literally "in-the nature-of things," it is obviously used here in an idiomatic sense, as a term of art, signifying being in a condition to participate in the *ordinary world*, in the palpable social world as a distinct individual of known sex, appearance, ability to communicate even if inarticulately, and so forth. By substituting "person in existence" for Coke's actual terms, Bernstein makes it seem as if Coke and the common law use "person" as a building block in the law's definitions or trains of reasoning. Instead, "person" functions in Coke's discourse (when it is used at all) in much the same untheorized way as "child" (as in "child in the womb")

[3] and [4] use the same problematic verbal substitutions as [1] and [2]; and [4] makes the same entirely mistaken claim as [1] – that abortions cannot be murder.

[5] Here the verbal substitutions are within the framework of a syntactic inversion which helps obscure Coke's point from Bernstein. Coke is telling us that abortifacient blows or ingestions *are* murder whenever they result in the child's death after being born alive, and he gives us the reason why this is conceptually possible: "**for** in law it is accounted a reasonable creature *in rerum natura*" – that is, it falls within *that* element in his definition of murder – "when it is born alive." For of course, *every* child *is* a reasonable creature *in rerum natura* when the child is born alive, but the law *counts* the child who is murdered by abortion – the child who was born briefly alive despite the abortion – as *having been* a reasonable creature when the lethal deed was done to it while it was still in the womb.

The problem that confronts Coke, and all his readers who are following the legal argument he develops across his entire exposition of the law of murder, is that *actus reus* and *mens rea* must coincide (he articulates the related classic axiom *actus non facit reum nisi mens sit rea* only four pages later). *When* the death occurs is not a problem, provided it is within a year and a day of the lethal act done with "malice aforethought;" and *when the death occurs* we can say that the murder victim *was murdered* at the time when that act – the murder! – was done, perhaps many months before the victim's death. And this holds good also in the special case of the unborn child murdered by abortion, whose death occurred after his or her live birth but who must have satisfied – and in contemplation of law did satisfy – the relevant element of the definition of murder *at the time of the lethal act – the murder* – a time when that child was in the womb. And that relevant element is, in Bernstein's phrasing: being an existing person; and in Coke's: being a reasonable creature *in rerum natura* – in the ordinary world.

So Coke owes his readers an explanation of why murder by abortion is subject to a limiting condition subsequent – that the child be born alive – since that state of affairs does not relate, whether chronologically nor causally, to either the lethal abortifacient act or the death. He was well placed to provide the explanation that Hale provides, at precisely this point in *his* exposition of why abortion though a dreadful and lethal crime is not murder:

> The second consideration, that is common both to murder and manslaughter, is, who shall be said a person, the killing of whom shall be said murder or manslaughter. If a woman be quick or great with child, if she take, or another give any potion to make an abortion, or if a man strike her, whereby the child within her is

> kil[led], it is not murder or manslaughter by the law of England, because it is not yet *in rerum natura*, tho' it be a great crime...**nor can it legally be known, whether it were kil[led] or not** [citation to Yearbook of Edward III]. So it is, if after that child were born alive, and baptized, and after die of the stroke given to the mother, this is not homicide [citation to an earlier Yearbook].[117]

That last sentence makes Hale an outlier whose opinion his successors Hawkins and Blackstone (see 4 *Commentaries* 198), and everyone subsequently, decline to follow. Hale, if not blindly following the two highly questionable[118] Yearbook authorities he cites, is following the logic of his general explanation of why abortion is not homicide: **not** that the unborn child is not a person, or not a reasonable creature, or is non-existent, but that he or she is not yet *in rerum natura*, and that "it cannot legally be known, whether it were kil[led] or not." And that was the explanation that Coke himself, so it seems, elicited (as prosecuting or intervening Attorney-General) from Popham C.J. and Fenner J. in King's Bench in *Sims* – the evidential considerations[119] quoted above at n. 104. It is perhaps surprising that Coke neglects to give the explanation here, in its appropriate place, 3 *Inst.* 50. Perhaps he harbored (but did not act upon) the doubt that Hale did act upon (but perhaps in the wrong direction): the evidential argument seems to "prove too much," for if causality can be proved in the case of the victim of abortion born alive, why not in the victim of abortion born dead?

Bernstein mishandles this passage of Hale in more ways than one. Immediately after point [5] in his passage about Coke, above, he goes on:

> Sir Matthew Hale was as explicit and clear on this point.[fn omitted] [1] Here is how he describes the essential element in the law of homicide that the victim be an entity the law considers as a person: “The second consideration, that is common both to murder and manslaughter, is, *who shall be said a person*, the killing of whom shall be said murder or manslaughter.” [cit.] [2] Immediately after Hale describes this essential element of homicide, he says that abortion “is not murder nor manslaughter by the law of England, *because* [the fetus] is not yet *in rerum natura*.” [cit.] [3] According to Hale, then, the unborn fetus is not

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[117] M. HALE, 1 HISTORY OF THE PLEAS OF THE CROWN 433 (1743 ed.)

[118] See DELLAPENNA, MYTHS OF ABORTION HISTORY, 143-150, 189, giving full translations of the court documents underlying (and changing the sense of) the brief YB reports.

[119] Similarly framed evidential concerns, similarly crystallized into a rule of law, underlie the year-and-a-day rule for murder: "for if he die after that time, it cannot be discerned, as the law presumes, whether he died of the stroke or poison, etc., or if a natura death; and in case of life the rule of law ought to be certain." 1 *Inst.* 53.

> an entity "who shall be said a person" in the law against homicide.[fn omitted] [4] It follows that the criminal law counted a natural person (in the ordinary sense) as in existence only if it is born alive, and the lesser offense of which one might be guilty for killing a fetus involved an offense against an entity lacking the legal personality that inhered in other natural persons.[fn omitted]

Again, the propositions we have enumerated all miscarry.

[1]. Here Bernstein takes Hale to be working with a theorem or premise of the form "Only persons can be murdered," as if he were setting up the syllogism that continues: "But fetuses are not persons. Therefore fetuses cannot be murdered." But once Hale's now obsolete system of punctuation is allowed for, we can see that his thought is not that the unborn are *not persons* (as Bernstein wrongly truncates his thought in paraphrase) but that they are *not persons the killing of whom is murder*[120]– a thought for which Hale gives two reasons, neither of them in any way suggesting that the unborn are not persons or are non-existent persons: (a) they are human beings not yet *in rerum natura* and (b) human beings the cause of whose death is hidden in the profound darkness of the womb (Was this dead child alive when the blow or potion went to work?).

[2]. Bernstein helps his misinterpretation on its way by inserting "the fetus" where Hale had an "it" that looked back to the beginning of the very same sentence: "the child within her." It is harder to deny that human beings are persons with (as Blackstone will say) a right to life if you are calling them children, sometimes located here, sometimes there, rather than using the term "fetus" (shared with sub-rational animals; depersonalised). Hale's English does not include "fetus" in any of its spellings.

[3]. Again Bernstein mistakenly assumes that Hale or his readers are in search of the class each of whose members is an "entity 'who shall be said a person'." Hale's concern is with the class of *persons whose killing is criminal homicide at common law,* and identifies the class: those persons who are in *rerum natura*: persons born alive. Persons not yet born are protected by other rules of criminal law, one

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[120] Bernstein not rarely abbreviates sentences with the result that their meaning is substantially or even radically changed (as here). Another incidental example occurs when he quotes the second of Blackstone's paragraphs on *129 quoted and discussed above at n. 13 – the one beginning "An infant . . . in the mother's womb, is supposed in law to be born for many purposes...", and says: "Professor Finnis says of this passage that it establishes that 'the law treats [unborn children], even at [conception], as equal to a born child.'[cit.] This is mistaken." But what Finnis in fact says at the place cited is quite different: "For some purposes (guardianship, for example) the law treats such an individual, even at that beginning stage, as equal to a born child."

or more rule(s) punishing their killing as such, one or more punishing their killing or attempted killing whenever it results in their mother's death, and so on.

[4]. Though Bernstein does not formally deny this, Hale neither says nor implies that the unborn lack legal personality. He is concerned to delineate murder or homicide, and does not use "person" as his categorising tool. **The term is used not as a term of art deployed in legal rules, but as a scarcely theorised way denoting human beings including infants or children both before and after birth, a legally significant line but not one bearing upon personhood as he conceives it.**

Much more could be said about Bernstein's efforts to construct a common-law doctrinal denial of fetal personhood. But there is little need, since they err in the same sorts of ways as are on display in the two passages we have discussed. We note only, in parting, that he entirely misses the evidential concerns at the core of *Sims* (*supra* n. 104) (and of Hale's passage quoted at n. 117 *supra*).

In sum

The upshot is that common-law rules rarely use "person," and dictionaries of the common law that Bernstein cites to define other terms include no definition of person(s). The term is used in high-level analytical syntheses such as Hale's or Blackstone's *Analysis of the Law* (*supra* n. 105). Though it is there extended to corporations conceptualized as artificial persons, its use in relation to natural persons is all but identical to common-language use. In these uses, which display law's most general purpose or rationale, to serve the wellbeing of natural persons (human beings in all their similarities and dissimilarities), the term "person" is used by the great scholarly and judicial exponents of the common law (and makers or ratifiers of constitutions in its mould) in a manner that approximates closely to the common-sense and common-speech use that other parts of Bernstein's article successfully affirm and show *includes unborn human children*.

3. Amicus Briefs of the United States and Associations of Historians

The *amicus curiae* Brief of the United States makes a number of submissions that contradict or cut across the positions proposed in the present Brief. In reviewing and rebutting those submissions, we will also respond shortly to relevant assertions in the Historians' Brief in this case.

A. The United States at 23-26 makes a number of inter-related arguments showing how far that Brief is from confronting the

possibility that *Roe* could and should be overruled on the ground, accepted by *Roe* itself as (if sound) "collaps[ing]" its entire holding and rationale: that is, on the ground that the object and victim of an elective abortion is entitled, precisely as a person within the meaning of the Due Process and Equal Protection clauses of the 14th Amendment, to constitutional protection against such a procedure.

For on the basis of that ground, the "absolute" or natural rights to life, limbs, and bodily integrity (and consequent rights of self-determination) that are urged by the United States at 23-23 (mainly on the sound basis of Blackstone's representative recital of them) cease to be decisive or even weighty in favor of *Roe* and its antecedent and progeny, and yield instead a position essentially like that of Texas in *Roe*: elective abortions violate the corresponding absolute and constitutional rights of the child who is their object and victim, while non-elective terminations of pregnancy vindicate the absolute and constitutional rights of the pregnant woman even when they unavoidably cause the child's death.

Similarly, the position advanced by the United States at 24 that *Roe* and *Casey* simply cannot be *grievously* wrong stands and falls with its hidden premise: that *Roe* succeeded in rebutting Texas's assertion of the 14th Amendment rights the unborn child. In accepting, unequivocally, that if that assertion was sound, the case for the rule established in *Roe* collapses, the Court in *Roe* was accepting, inevitably and rightly, that if it was going wrong in rejecting Texas's assertion, it was going *grievously* wrong and licensing a substantial and ongoing violation of the absolute and constitutional right always acknowledged *first*, to life.

Nor does the position change when the United States denial of *grievous* error is given its full formulation: a woman's liberty "to have some freedom to terminate her pregnancy....is so closely related to bodily integrity, familial autonomy, and women's equal citizenship" that "*Roe*'s and *Casey*'s core holding that the Constitution protects some freedom to terminate a pregnancy cannot be *grievously* incorrect." For, rhetoric and emphases aside, those interests in bodily integrity, familial autonomy and equal citizenship were amply present to the mind of the *Roe* Court when it acknowledged that if the unborn are Fourteenth Amendment persons its position collapses. And as soon as the destruction of *another person's* bodily integrity is acknowledged as implicated in a woman's decision to terminate her pregnancy, the ambiguity in the phrase twice used by the United States, "some freedom to terminate," becomes vividly evident and clarification becomes an inescapable responsibility. The phrase "elective abortion" is a compressed summary of the needed disambiguation: The pregnant woman unquestionably has an "absolute" (natural) and constitutional

freedom – closely connected with bodily integrity – akin to the legitimate freedom of self-defense in situations where exercise of that liberty-right does not become illegitimate even when foreseeably lethal. So she would indeed retain, unimpaired but measured (like ordinary self-defense) by inter-personal fairness, a real "freedom to terminate" if *Roe* and *Casey* were overturned on account of the legitimate constitutional right of her child. But just as Equal Protection prevents her interest in familial autonomy and/or equal citizenship being the constitutionally legitimate basis of a right to infanticide, so too, analogously, Equal Protection prevents those interests being the constitutionally legitimate basis or measure of a right to *elective* abortion.

It scarcely needs saying that in the perspective developed in our Brief, the phrase "state interests" (deployed in a customary way by the United States on 24-25), though of course retaining the relevance it has to the state's upholding of other individuals' rights to life, ceases to be an adequate articulation of the interests and the "absolute" and *Federal-constitutional* rights of the person whose life is at stake in her mother's choice of elective abortion.

Similarly the argument advanced by the United States at 25-26, that overruling *Roe* would threaten the Court's decisions in *Griswold, Loving, Lawrence,* and *Obergefell*, has no force if the ground for overruling *Roe* is recognition of the neglected countervailing rights of constitutional persons erroneously denied that status. For no such denial of personal status or countervailing rights was involved in any of the cases just mentioned.

B. At 26-27 the United States makes a number of historical and legal-historical claims that this Brief shows to be mistaken, and constitutional claims that a more accurate history rebuts.

At 26, going immediately to the critical issue, the United States asserts on the authority of *Roe*, 410 U.S at 134, that at common law "there was agreement" that the fetus in the early stages of pregnancy was to be regarded as "part of the woman." But in its very next sentence, *Roe* bases both the meaning and the truth of its assertion on perhaps the most absurd of the errors in its error-strewn Opinion: it says that "[d]ue to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80-day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point" – and thus quickening, "appearing usually from the 16th to the 18th week of pregnancy" (132), "found its way into the received common law in this country" (134). But, as noted above (at nn.42-43 *supra*), this

asserted clarification of the law by Bracton is fantasy. For Bracton, writing in Latin, said nothing whatsoever about quickening, let alone quickening in the sense naively taken for granted by *Roe*: he spoke only of the unborn infant becoming "formed and *animatum*," where *animatum* means nothing either more or less specific than ensouled, animated in the sense of endowed with *anima*, a human soul. Nor do Bracton, Coke, Hale, Hawkins or Blackstone speak of the pre-"quick" fetus or embryo as "part of the mother," or concede that she is entitled to treat it as simply a part. The very occasional uses of the term "part" (usually as *pars viscerum matris*) are by outlier authorities.

But the United States, in its next sentence on 26, rightly identifies Chief Justice Shaw's judgment in *Parker* (*supra* n. 43) as the appropriate representation of what *Roe* called the "received common law in this country," and summarises it:

> Until the fetus had "advanced to that degree of maturity" that it could be "regarded in law" as having a "separate and independent existence," abortion was not prohibited. *Commonwealth v Parker*, 50 Mass. (9 Met.) 263, 266, 268 (1845).

But at 50 Mass. 268 the court said only that the acts set forth in the indictment, without averment that the woman had been "quick with child," "are not punishable at common law." At 265, having defined the issue before the court, Shaw recalls one of what our Brief has shown were many ways which "abortion" was "prohibited" in the sense of unlawful even when not itself per se indictable/punishable at common law: he reaffirms the rule that if the child dies from abortion after being born alive, the abortifacient acts, however early in the pregnancy they were done, were murder.

And at 50 Mass. 266 itself, Shaw illustrates what "separate and independent existence" means by not merely citing but quoting Bracton saying that abortion is homicide if the unborn infant is formed and *animatum*. The only authority that Shaw finds identifying "quick with child" with "quickened" in the *Roe* sense is *Phillips* (*supra* n.28), interpreting "quick with child" "in the construction of this [English] statute." And Shaw immediately (267) declines to rule on ("decide") the question "what degree of advancement in a state of gestation would justify the application of that description," *scil.* "quick with child," "to a pregnant woman," at common law. Nor did he ever have to, since a few weeks earlier the state's legislature had definitively swept away the whole debate about "quick with child," by making abortion at any stage punishable (variously but with at least one year's imprisonment).[121]

It follows that the next sentence of the United States Brief is mistaken in citing *Parker* at 267 to verify its claim that "at common

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[121] *See supra* n. 43; *Commonwealth v Wood* 11 Gray 86 (1858).

law, the fetus was generally considered to have a legally 'separate existence' [only] after quickening–when the woman could feel its movement in utero."[122] More pointedly: **the only common-law authority advanced by the United States to support *Roe*'s entire "quickening" doctrine is, if anything, an authority against it**.

And even if that were not so, the definitive evolution or rectification of Massachusetts law in the same early months of 1845 is a sign of the constitutional irrelevance of quickness in any but its central sense, the child's being alive. That evolution in Massachusetts, subsequent to New York, Ohio, Maine, Alabama and Iowa (and on one view Illinois), manifested a reform (accomplished completely by the end of 1868 in 27 states and substantially in 28) that is of more immediate constitutional significance than the common law, whose entrapment in unresolved uncertainties concerning ambiguous sources and physiologically exploded concepts obscured its basic and enduring recognition of the unborn child's status as a person with a right to life – the status implicit in Bracton's word *homicidium*, killing of a human being, so carefully and otherwise needlessly *quoted* by Coke, Blackstone and Shaw along with the same Bracton sentence's focus not on maternal perceptions but on the fetus/child's reality as *formatum et animatum*.

In retailing, in its Brief's next sentence on 26, *Roe*'s preposterous claim that it is doubtful whether abortion of a quick child "was ever firmly established at common law" and *Roe*'s associated assertion of the "paucity of common-law prosecutions for post-quickening abortion," the United States overlooks not only the probable relative rarity of abortions until the early 19th century (a rarity established with some clarity in the affirmations made and sources quoted and cited by Joseph Dellapenna's *amicus* Brief at 13-16) but also by *Parker* itself, an appeal from just such a prosecution and conviction and referring to a Massachusetts conviction (similarly overturned on appeal for reasons found obscure by Shaw) in 1810.

Conspicuously, the United States does not repeat *Roe*'s central claim that at common law there was a legal "liberty" or "right" to early abortion; it makes the already-noted assertions, refuted by its chosen authority *Parker*, that such abortion was "legal," and for the rest limits

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[122] At 27 n. 4 the Brief for the United States again cites *Parker* at 267 mistakenly for the proposition that abortion was "often legal at least before a fetus could be considered legally separate from the pregnant woman." What is said at 267 subtracts nothing from what *Parker* said at 235 to remind readers that even when it is not indictable, elective abortion early or late is always "done without lawful purpose" – was never "legal" – and is murder whenever, however skilfully performed, it happens to result in the death of the woman who while pregnant had consented to it.

itself to the vague "women generally could terminate an abortion" (27) or "abortion was generally available" (27n.).

C. Similarly, the Historians' Brief in this case marks a notable retreat from some of the most confidently advanced legal errors in its predecessor *amicus* Briefs – signed by individual historians, unlike the present one (signed by counsel) – made by those predecessors in endorsing *Roe*'s invented common-law "liberty" and "right." As to the historic law relating to abortion, the present Historians' Brief rightly abstains even from the word "free," let alone "liberty" or "right." The most it will venture is the hazy formulations "opportunity to make this choice" (3, quoting *Roe*) and "under the common law, a woman could terminate a pregnancy at her discretion prior to physically feeling the fetus move." (7) (This is the same "could" as the United States ventured while scrupling to add the equivocal and misleading "at her discretion.")

Instead, the Historians offer a new, romanticised version of the common law as focussed upon an alleged "female-centric principle" (5), a "subjective standard decided by the pregnant woman alone," a legal standard "not considered accurately ascertainable by other means" (2). The evidence offered for this last proposition proves on inspection to be no evidence at all: a sentence quoted (6) from Taylor's *Medical Jurisprudence* (1866) with the innuendo that it concerns evidence for ascertaining and determining the fact of quickening for legal purposes turns out on inspection to be in a section of the book entirely concerned with informing clinicians for clinical purposes. The sentence relied upon has nothing whatever to do with law or legal proceedings, actual or potential. The Brief undeniably misuses it.

The footnote on the same page (6) misuses *Russell On Crimes* (1841) almost as severely, quoting a proposition that asserts that "quick with child" means "the woman has felt the child within her" as if it were the author's affirmation of a common-law principle – the Historians come up with no other affirmation comparably clear – when in fact it is no more than a marginal note summarising (as a kind of running index for rapid readers) the content of the adjacent paragraph, which is transcribing the reported trial direction in *Phillips* (*supra* n.28). Simply for brevity (as throughout the volume), the marginal note (in no case offered to make an authorial affirmation) omits the essential qualification made by the trial judge: that his interpretation of "quick with child" is for the purposes of applying the English statute (Lord Ellenborough's Act) of 1803. About the common law neither the judge nor the author/editor of the marginal note said anything.

The Historians' Brief on 9 offers an inept formulation of "the common law principle" said to be "consistently enunciated" by "legal treatises:"

> Like Blackstone, these sources explained that the reason for this principle was the legal belief that a fetus was not considered a cognizable life for purposes of the law until quickening. *See*, e.g, [*Roscoe on Evidence*, 3rd ed 1846 p. 652 [in fact 694]]. ("A child in the womb is considered *pars viscerum matris*...and not possessing an individual existence, and cannot therefore be the subject of murder.")

The proposition in *Roscoe on Evidence*, being about "a child in the womb," manifestly does nothing to verify "until quickening" in the previous sentence. Nor does it manifest a "legal belief," but only a legal fiction. Nor does it say anything about "a cognizable life for purposes of the law." The fiction is merely to account – in the non-explanatory way that fictions do – for the legal rule that abortion, even when a serious criminal offence,[123] is not murder or manslaughter. And this fiction is particularly inept, because it leaves the criminality of abortions, at least when done to a woman "quick with child," entirely unexplained.

Seeking to discredit Wharton, whose treatises on criminal law, like those of Joel Bishop, were of greater weight than those cited with approval by the Brief, the Brief alleges (10) that he "opposed allowing any abortion." But in fact Wharton writes, in his chapter on abortion at common law: "Of course it is a defence that the destruction of the child's life was necessary to save that of the mother."[124]

The later parts of the Brief continue at the same low level of accuracy, coherence, and balance.

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[123] The Historians' Brief, misspelling misprision, erroneously equates it to misdemeanor.

[124] Francis Wharton, 2 *A Treatise of the Criminal Law of the United States* sec. 1230 (7th ed. 1874). The footnote to the sentence quoted cross-refers to sec. 90 *b*, actually 90 *c*, a short sec. on killing "by necessity" as acknowledged by natural law, canon law, and French and German jurists, and promising a fuller discussion in secs. 1013 and 1028. Sec. 1013 is irrelevant, and the reference is evidently to sec. 1019, the first of several sections on "Homicide from necessity in defence of a man's own person or property, or of the persons or property of others." Sec. 1028 discusses self-defence in situations of necessity where both parties are innocent, such as two persons on a plank in the shipwreck. Sec. 1029 discusses "Sacrifice of life in childbed [*scil.* in obstetric emergency], where either the mother or the child must die, because (he writes) 19 out of 20 Caesarean operations to save the child result in the death of the mother. "The dictates of humanity, and, in consequence, those of the law, call for the sacrifice of the child." (cross-citation to secs. 942 and 1230). Sec. 942 is the general treatment of the born-alive rule for murder under the doctrine articulated in *Sims* (*supra* n. 104) and by Coke, 3 *Inst*. 50 (*supra* n. 38).

III. Recognizing Unborn Children as Persons Requires No Irregular Remedies or Unjust Penalties.

Recognizing unborn personhood would be a natural exercise of courts' power to bind parties to a case by applying the law to the facts, disregarding unconstitutional laws, directing lower courts, and enjoining unlawful executive actions.[125] Such a holding would bar lower courts from enjoining prosecutions or vacating convictions of abortionists. Injunctions would lie against officials asked to facilitate elective abortions, as in cases like *Garza v. Hargan*,[126] where guardians *ad litem* could be appointed for the unborn with a view to protecting them against elective abortion, as before *Roe*.[127]

While state homicide laws would need to forbid elective abortion,[128] here too courts would be limited to customary remedies. Most States have laws tailor-made for "feticide"[129]; any carve-outs for elective abortion would be disregarded by courts as invalid.[130] New laws reducing unborn protection would face legal challenge like any statute *today* that decriminalized homicides of some class—say, the cognitively disabled. State regimes invalidated for denying minimal prenatal protection would, absent amendment, revert to the default, general homicide law.

Moreover, equal protection allows States to treat different cases differently, for legitimate ends.[131] States may consider degrees of culpability as mitigating factors, or altogether immunize from prosecution certain participants in wrongful killings. Here such policy choices serve legitimate purposes by fairly balancing the child's

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[125] *See Barr v. Am. Ass'n of Pol. Consultants, Inc,* 140 S. Ct. 2335, 2351 n.8 (2020).

[126] 874 F.3d 735, 736 (D.C. Cir. 2017) (en banc), *cert. granted, judgment vacated sub nom. Azar v. Garza*, 138 S. Ct. 1790 (2018).

[127] *See, e.g.*, JOHN T. NOONAN, THE MORALITY OF ABORTION 245 (1970).

[128] *Cf. People v. Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984) (reinstating rape charges against a husband despite a statutory marital-rape exception after holding that the exception violated equal protection and failed rational basis review).

[129] *See* Bradley, *supra* note 92.

[130] *See* John Finnis, *Born and Unborn*: *Answering Objections to Constitutional Personhood*, FIRST THINGS (Apr. 9, 2021), https://www.firstthings.com/web-exclusives/2021/04/born-and-unborn-answering-objections-to-constitutional-personhood.

[131] *See Vacco v. Quill* 521 U.S. 793, 799 (1997).

humanity and her unique physical dependence and impact on her mother. And the mother's constitutional rights could require States to allow urgent or life-saving medical interventions even when these would unavoidably result in fetal death.[132]

If States failed in their duties in enforcement, a responsibility would fall to Congress, which could follow a personhood holding with proportional legislation under Section 5 of the Amendment to protect the unborn.[133]

CONCLUSION

The Court should reverse the judgment of the Fifth Circuit and hold that Mississippi's law is permissible—and required—because the unborn are "person[s]" guaranteed equal protection and due process by the Fourteenth Amendment.

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NOTE ON CHANGES TO THE FILED BRIEF

In general the text filed is intact, with occasional clarificatory tweaks to syntax. The following is a non-exhaustive indication of other changes.

page in present version

2, 4 relation between 1866 Act and A14 reformulated

3, 21 adjustments to counts of statutss

5 fn supplements on Blackstone

6 fn on fictions

8, 13 fn supplements on *in rerum natura* (also pp. 38-9, 41)

8, 9, extensive supplements on cases

10 fn supplements on Bracton, Blackstone on reprieve for pregnancy

11 fn supplements on popular understanding of quick, animation, embryo, etc.

12 fn on Bernstein on shift to non-person; Hawkins on abortion

13, 14 fn supplements on Blackstone, Bracton, text of 3 *Inst.* 50, logic of born-alive murder

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[132] *See Roe*, 410 U.S. at 127 (Rehnquist, J., dissenting).

[133] *See City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

16 new text and fnn on *Roe* on Bracton, quickening; fn adjustment to date etc. of *Parker*

17 fn supplements on *Cooper*, Murphy, NJ statiute of 1849

20 fn supplement on Blackstone on abortion felony murder

21 text and fn supplements on other aspects and evidences of early abortion's illegality; Aaron Tang on common law, statutes.

28-48 all new text and fnn restating and developing the points made in the filed Brief, in critical engagement with Roscoe Pound's jurisprudence of persons, C'Zar Bernstein on supposed ordinary and common-law meanings of "person," and on the Briefs of the United States and the Historians' Associations.