

2014

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Recommended Citation

Ostler, Duane L., "A Conversation About Abortion Between Justice Blackmun and the Founding Fathers" (2014). *Constitutional Commentary*. 281.

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A CONVERSATION ABOUT ABORTION BETWEEN JUSTICE BLACKMUN AND THE FOUNDING FATHERS

*Duane L. Ostler**

It is dark at Independence Hall in Philadelphia. The historic scene where the U.S. Constitution was hammered out in the hot summer of 1787 is completely still; the chairs empty, the hall silent. The only movement in the stuffy hall is that of a cockroach scavenging for nonexistent food along the periphery of the hall, whose presence would no doubt cause the janitor to be fired for not using enough insect spray.

But hark! A sudden ghostly shadow has appeared at the President's chair! Its misty shape has an uncanny resemblance to none other than George Washington, minus his ivory teeth (since ghosts don't eat). Appearing not far to his left is James Madison, proficient note taker in the 1787 Constitutional Convention, who once more spreads out his notes, ready for action. The ghosts of other luminaries also make their entrance into the hall. There is Benjamin Franklin, his pockets full of kite string in case of a lightning storm; Thomas Jefferson, lugging the newest student enrollment list of the University of Virginia; John Adams, with a sheet of paper and pen, ready to write a quick note to Abigail about tonight's ghostly proceedings; Alexander Hamilton, carrying a wad of new ten dollar bills which he fondles deliciously. Other founders file silently into the hall, taking seats without pulling them out from the tables they face, so that their insubstantive frames are partly buried in the tables in front of them.

Last of all, another ghost arrives. However, his ghostly personage is not clad in the knee breeches and wigs worn by the other ghosts in the hall. He arrives wearing a tie and a long black

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robe. He wears glasses and has the appearance of being a kindly old grandfather. He is Justice Harry Blackmun.

“Gentlemen,” begins President Washington, looking dispassionately on the assemblage. “We are here today to discuss abortion in America. This is not a court and we will not pass judgment. It is a discussion only.” Turning toward Blackmun, he nods his head slightly. “We will commence by allowing Mr. Justice Blackmun to present his support for the *Roe v. Wade* decision he penned, which continues to be the primary abortion case in America.¹ You may proceed, sir.”

Blackmun’s ghost clears his nonexistent throat. “Distinguished founders,” he says in his mild voice, “I thank you for this opportunity to present *Roe v. Wade* to you. As I stated in my opinion, my hope and my purpose in that case ‘[was] to resolve the issue of abortion by constitutional measurement, free of emotion and predilection.’”²

“Excuse me sir,” interposes Mr. Madison from his chair. “I have been reading your subsequent decision in the 1989 case of *Webster v. Reproductive Health Services* in which your opinion in *Roe* was somewhat modified in ways you did not approve.³ You asserted that in doing so the majority had been deceptive,⁴ had engaged in a tortured effort to defend its position,⁵ that their reasoning was unadulterated nonsense,⁶ and that they were cowardly.⁷ Are you asserting that such statements uttered when you were no longer safely on the side of the majority were free of emotion or predilection?”

“Yes, well . . .” mumbled Blackmun incoherently. “Let me continue and I’m sure the import of my opinion will become clear. What was at issue in *Roe* was a Texas law which stated that if anyone administered a drug or other means to a woman to procure an abortion, he or she could be imprisoned.”⁸

“I am impressed with this new State of Texas,” said Alexander Hamilton, rising to his feet. A crisp, new ten dollar bill was pinned to his outer cloak. “This law sounds almost the same as the 1716 law of my home City of New York, which

1. *Roe v. Wade*, 410 U.S. 113 (1973).

2. *Id.* at 116.

3. *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

4. *Id.* at 538.

5. *Id.* at 544.

6. *Id.* at 556 n.11.

7. *Id.* at 559.

8. *Roe*, 410 U.S. at 117 n.1.

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made it illegal for a midwife or anyone attending a pregnant woman to ‘administer any herb medicine or potion or any other thing to any woman being with child whereby she should destroy or miscarry.’”⁹

Blackmun’s eyes bulged at the revelation of this law that predated his *Roe* opinion by 257 years. “Are you quite sure of that law?” he said testily. “After all, I asserted in my opinion that ‘the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws . . . are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.’”¹⁰ I further stated that America’s first anti-abortion law was passed in Connecticut in 1821.¹¹ Because of this I concluded that ‘at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.’”¹²

Several of the founding ghosts had jumped to their feet. “If I may correct the misguided gentleman,” said Benjamin Franklin, “I indicated as early as 1728 through a fictional character I created that abortion was intolerable in American society. When Samuel Keimer had the audacity to publish a short article about abortion in his newspaper, I responded with an opposition by my fictional character ‘Celia Shortface’ who expressed outrage against Keimer that ‘thou would have printed such things . . . as would make all the modest and virtuous women in Pennsylvania ashamed!’”¹³

“And I wish to assure you sir, that the 1716 law I referred to is genuine,” said Mr. Hamilton. “Indeed, this law was similar to others enacted in England as early as 1512.”¹⁴ Blackmun’s eyes bulged some more.

“And I also rise to assure you sir,” interposed Mr. Madison, “that you are greatly mistaken if you believe abortion was not

9. 3 MINUTES OF THE COMMON COUNCIL OF THE CITY OF NEW YORK, 1675–1776, at 122 (1905) (a law for regulating midwives within the City of New York, July 27, 1716).

10. *Roe*, 410 U.S. at 129.

11. *Id.* at 138.

12. *Id.* at 140.

13. A BENJAMIN FRANKLIN READER 46 (Walter Isaacson ed., 2003).

14. Dennis J. Horan & Thomas J. Marzen, *Abortion and Midwifery: A Footnote in Legal History*, in NEW PERSPECTIVES ON HUMAN ABORTION, 199 (Thomas W. Hilgers et al. eds., 1981).

viewed with disfavor at the time of the adoption of our Constitution. I have been perusing your opinion in *Roe*, and note that the claimant was a single, unmarried woman who was great with child.¹⁵ This precise situation was covered in our day by what were known as the concealment statutes in many of the colonies, intended to protect the mysterious deaths of bastard children found dead, regardless of whether their death was induced prior to or after their birth. In other words, these laws covered both abortion and infanticide. Indeed, these laws were patterned after a 1623 Act of Parliament entitled ‘An Act to Prevent the Destroying and Murdering of Bastard Children.’”¹⁶

Blackmun’s eyes were now bulging so much they threatened to pop off his glasses. “Indeed,” exclaimed Alexander Hamilton, “I was against a proposed revision to just such a concealment law in New York in 1787. However, my opposition was not a support of abortion but rather an objection that the law could unfairly penalize women with a legitimate stillbirth, rather than targeting women who intentionally aborted their children. The law provided for a murder charge for ‘women who clandestinely were delivered of children and the same die, or be born dead,’ and required that in order to avoid the charge ‘the mother within one month thereafter, should before a magistrate be obliged to produce one witness at least, to prove that the child was not murdered; and in default of the same, to be deemed guilty of murder.’”¹⁷ This law unfairly reversed the presumption that a person is innocent until proven guilty, and ‘the operation of this law compelled her to publish her shame to the world’ in order to avoid a conviction. In my comments to the New York legislature on this law I ‘expatiated feelingly on the delicate situation it placed an unfortunate woman in, *who might by*

15. *Roe*, 410 U.S. at 120.

16. 21 Jac. I. c. 27. The 1623 act appears to have been directed more toward infanticide since it presumed an unmarried woman found with a dead child was guilty of murder unless she could produce a witness saying the child had been “born dead,” although elsewhere it made reference to whether the child “were born alive *or not*” (emphasis added). As the Hamilton and Jefferson quotes which follow below demonstrate, the American adaptations of the concealment law stated that even where a child was born dead there was a presumption of murder, unless the woman could produce a witness saying the child had not been murdered. For two additional examples of colonial and early state concealment acts other than New York and Virginia, see 1 N.H. Original Act 96 (enacted 1714); Act of 1719, ch. 22, 1719 Del. Laws § 6 at 67.

17. 4 THE PAPERS OF ALEXANDER HAMILTON 39 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

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accident be delivered stillborn.’¹⁸ I was untroubled however at a murder conviction for women whose stillbirth was not accidental.”

“I opposed a revision in 1778 to Virginia’s concealment law for the very same reason,” said Thomas Jefferson, rising to his feet. “I noted in the debates on this revision to the law that ‘so many children die before or soon after birth that to presume all those murdered who are found dead, is a presumption which will lead us oftener wrong than right, and consequently would shed more blood than it would save.’¹⁹ In our day, before the miracles of modern technology known to your world, I acknowledged that such matters are difficult to prove, but that proof was still possible in some cases. I urged that such matters not be settled by a legal presumption of guilt but by referral to a ‘jury who are in a regular course to hear presumptive as well as positive testimony.’²⁰ I noted that such a jury could rely on better evidence than mere action by the accused within a month— ‘circumstantial proof will do; for example, marks of violence, the behavior, countenance, &c., of the prisoner, &c.’²¹ Naturally this would include marks of violence on the bodies of both the mother and child, which may have been inflicted before or after birth.”

“Well said,” noted Madison, beaming over at his old friend. “I note that England clarified and replaced its old concealment law in 1803 with wording that specifically identified abortion as criminal and no longer allowed for a murder conviction based on presumption.”²² Madison then looked over at Blackmun, his face hardening. “I also note, Mr. Blackmun, that you mentioned this 1803 English law in your opinion, but for some reason failed to mention that it was a revision of the anti-abortion concealment laws that had existed since 1623,²³ and indeed you characterized

18. *Id.* (emphasis added).

19. THE JEFFERSONIAN CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON 598 (John P. Foley ed., 1900).

20. *Id.*

21. *Id.*

22. JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 100-07 (2006).

23. The lengthy title of the 1803 Act is as follows:

An act for the further prevention of malicious shooting, and attempting to discharge loaded firearms, stabbing, cutting, wounding, poisoning and the malicious using of means to procure the miscarriage of women; and also the malicious setting fire to buildings; and also for repealing a certain act, made in England in the twenty-first year of the late King James the First, entitled “An act to prevent the destroying and murdering of bastard children” 43 Geo. III c. 58, §3 (1803, emphasis added).

it as ‘England’s first criminal abortion statute.’²⁴ Is this a further example of how your *Roe* opinion was supposedly issued ‘free of emotion and of predilection?’²⁵

Blackmun’s hands were beginning to shake a bit, and he swayed briefly on his feet. With a cracked voice, however, he quickly sought to defend his position. “The Texas law is not like the concealment statutes you have been speaking of, since it ‘fails to distinguish between married and unwed mothers.’”²⁶

“Are you suggesting sir,” said James Mason, rising to his feet, “that an abortion by a married woman was acceptable, even though the concealment laws in all the colonies and early states forbade such an action by an unwed mother? Just what is the basis for such a proposition?”

“The common law, of course,” said Blackmun confidently, sure that he had now found his sure defense. “As I stated in my opinion in *Roe*, ‘It is undisputed that at common law, abortion performed before “quickenings”—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. The absence of a common-law crime for pre-quickenings abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins.”²⁷

“Surely you jest!” cried several voices at once, as nearly half the founders in the hall rose angrily to their feet. The ghost of Mr. Washington on the president’s chair found it necessary to pound his nonexistent gavel to quiet the group. “One at a time, if you please gentlemen. After all, we still have several hours before the dawn when we must return to our graves.”

“Are you suggesting sir,” said James Madison in a biting tone as he stared angrily at Blackmun, “that the common law is justification for your opinion in *Roe*?”

“Yes,” said Blackmun without hesitation. “There was no other law on the subject so naturally I turned to the common law.”

Within the body of the act, the new abortion law is set forth, followed by repeal of the old 1623 concealment law because “doubts have been entertained respecting the true nature and meaning” of the old concealment law, and “the same have been found in sundry cases difficult and inconvenient to be put in practice.” *Id.*

24. *Roe v. Wade*, 410 U.S. 113, 136 (1973).

25. *Id.* at 116.

26. *Id.* at 148.

27. *Id.* at 132-33.

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Washington again had to resort to the gavel to bring order to the assemblage. “I presume,” he then said to Blackmun, “that when you say there was no other law on the subject you are ignoring the concealment and midwife laws that have already been pointed out to you as effective in all the colonies in the 1780s?”

“Well, yes . . .” said Blackmun, swallowing hard. “I’m afraid I was a bit . . . in the dark about those. But that is of no importance. The common law was clearly the basis of my decision.”

Madison was shaking his head sadly. “Was I so quickly forgotten?” he asked in a pained voice. “Did I not clearly say that the common law was full of ‘incongruities, barbarisms and bloody maxims’²⁸ and that it ‘never was nor by any fair construction ever can be deemed a law for the American people?’²⁹ And then sir, using language so clear it could not possibly be mistaken, did I not say that resort by the Supreme Court to the common law ‘would confer on the judicial department a discretion little short of a legislative power,’³⁰ resulting in their deciding ‘what parts of the common law would, and what would not, be properly applicable to the circumstances of the United States. A discretion of this sort has always been lamented as incongruous and dangerous . . . the power of the judges over the law would, in fact, erect them into legislators, and . . . it would be impossible for the citizens to conjecture, either what was or would be law?’³¹ Did I not say these things? Had they no effect on you?”

“With all due respect,” Blackmun said, taking courage on the basis that Madison was short and not at all imposing, “your personal views of the common law are hardly binding on a decision of the Supreme Court today.”

“The audacity!” cried Jefferson, rising to his feet. “Many states of the union specifically adopted the common law as applicable in their jurisdictions.³² The federal government had the

28. 6 THE WRITINGS OF JAMES MADISON 1790–1802: COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE 380 (Gaillard Hunt ed., 1906).

29. *Id.* at 381.

30. *Id.* at 380.

31. *Id.* at 381.

32. Examples of some states that adopted the common law either in their constitution or by statute include DEL. CONST. art. 25 (1776); MASS. CONST. ch. VI, art. VI (1780); N.H. CONST. pt. II (1784); N.Y. CONST. art. 35 (1777); S.C. CONST. art. 7 (1790). In contrast, a number of judges and prominent officials in the 1790s (in addition to Madison as noted in the text) pointed out that the common law was never adopted by the federal government. *See, e.g.,* *United States v. Worrall*, 28 F.Cas. 774, 779 (C.C.D. Pa. 1798) (Justice Chase stating, “[I]n my opinion, the United States, as a Federal government, have

same opportunity, yet refused to do so. Tell me where in the United States Constitution the common law was adapted in like manner? What then was your basis for adopting the common law in this case?”

“Well . . . ,” mumbled Blackmun, trying to think fast to counter an argument he had never heard before, “because as I said before there was no law on the subject. After all, we had to turn somewhere.”

“Have you never heard of natural law, Mr. Blackmun?” demanded Hamilton. “As I said to Samuel Seabury in 1775, you should ‘apply yourself without delay to the study of the law of nature. I would recommend to your perusal Grotius, Pufendorf, Locke, Montesquieu and Burlamaqui.’”³³

“Indeed,” thundered Jefferson, “did I not say as plainly as it could be said in the Declaration of Independence that our very justification for treason and willful rebellion against the crown was the law of nature?³⁴ Such laws are superior even to the Constitution! Without them there would be no United States!”

“Precisely,” said James Wilson in his Scottish brogue. “I wrote a book on the subject of natural law! Did you miss it somehow?”

Having put his foot in his mouth, Blackmun now added a few comments that were sure to result in his shoving it deeper down his throat. “But gentlemen,” he cried, “there is nothing in the Constitution about the laws of nature being superior as you say!”

The outcry in the hall was now so tumultuous, it looked almost as if it would result in nonphysical violence. “Blasphemy!” cried the hot-headed Patrick Henry. “Unbelievable ignorance in one sitting on the highest court!” said John Marshall. Madison then turned to Blackmun and asked simply, “Have you never heard of the Ninth Amendment, Mr. Blackmun? I know you

no common law . . . the United States did not bring it with them from England; the constitution does not create it; and no act of congress has assumed it”); 9 *THE WORKS OF THOMAS JEFFERSON* 76 (Paul Leicester Ford, ed. 1905) (in a letter to Edmund Randolph on Aug. 23, 1799, Thomas Jefferson wrote “[T]he common law did not become, ipso facto, law on the new [federal] association; it could only become so by a positive adoption”); Steward Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231 app. at 1326 (1985) (using a rather confusing double negative in letter to St. George Tucker on Nov. 27, 1800, John Marshall wrote “The opinion which has been controverted is, that the common law of England has not been adopted as the common law of America by the constitution of the United States. I do not believe one man can be found who maintains the affirmative of this proposition . . . I never suspected that an attempt would be made to represent this as a serious opinion entertained by respectable men.”).

33. 1 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 17, at 86.

34. *THE DECLARATION OF INDEPENDENCE* para. 1–2 (U.S. 1776).

have—since you mentioned it several times in your opinion. Indeed, I was amazed that you partly based your ‘finding’ of a so-called right of privacy on the Ninth Amendment.³⁵ However, you very sadly misinterpreted it. Do you honestly believe that we, the framers of the very constitution which you profess to honor, would have inserted a provision like the Ninth Amendment intending to give leave for each succeeding generation to defy the very principles on which the Constitution was based, and thereby undermine the entire structure? Do you think of us as such fools, Mr. Blackmun?” Poor Mr. Madison was shaking, and since he was a ghost it obviously was not because he was cold.

“What my friend means,” said Jefferson, “is that the Ninth Amendment was intended to protect natural law rights. Even scholars in your day who have studied the Ninth Amendment agree that this was our intent.³⁶ These natural law rights are immutable and unchangeable, and cannot be ‘created’ at a whim based on fluctuating values of society.” Seeing Blackmun’s somewhat confused look, he said, “You and I are both lawyers, Mr. Blackmun. And you and I both know what an ‘incorporation by reference clause’ is in a contract. It is a clause inserted into a contract which incorporates other terms not contained in the written instrument. That is precisely what the Ninth Amendment was and is, since the Constitution itself is essentially a compact or contract of the people. And what contract lawyer in his right mind would incorporate terms to be made up at a whim in the future? That would nullify the entire contract and render it void. No, Mr. Blackmun. To incorporate something by reference it must be *currently in existence*. The rights to be incorporated by the natural law as part of the Constitution through the Ninth Amendment were natural law rights as we understood them in our day.”

“I said as much in 1790,” interjected Madison, rising again to his feet, “when I likened the government we created to a building or improvement, and said ‘the *improvements* made by the dead form a debt against the living, who take the benefit of them. This

35. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

36. See, e.g., BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT: A CALL FOR LEGISLATIVE AND JUDICIAL RECOGNITION OF RIGHTS UNDER SOCIAL CONDITIONS OF TODAY* 19 (1955); DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* 8 (2007); Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 2 (2006); Duane L. Ostler, *Rights Under the Ninth Amendment: Not Hard to Identify After All*, 7 FED. CTS. L. REV. 35 (2013).

debt cannot be otherwise discharged than by a proportionate obedience to the will of the Authors of the improvements.”³⁷

“Oh?” said Blackmun vaguely, his head swimming with the astounding impact of all the un contemplated ideas he had heard that night. Then he said stupidly, “But there is nothing in natural law against abortion.”

“I beg to differ,” said Jefferson. “Ask my colleagues in this hall! We have all read and studied the natural law writers referred to by my old enemy, Mr. Hamilton. For example, did you know that one of my favorite natural law writers, John Locke, listed a number of wrong and unacceptable actions such as ‘not to kill another man; not to know more women than one; not to procure abortion; not to expose . . . children; not to take from another what is his?’”³⁸ Not only that, but Locke stated clearly that ‘the body of an embryo, dying in the womb, may be very little, not the thousandth part of an ordinary man. *For since from the first conception and beginning of formation, it has life.*’³⁹

“Aye, but that’s not all,” added James Wilson with a twinkle in his eye. “The great natural law writer Pufendorf said ‘Obligation has also been enjoined upon parents by the law of nature that . . . they not destroy by abortion the offspring conceived within their flesh.’⁴⁰ And on another occasion he clearly showed abortion is wrong from the moment of conception when he noted that ‘now by him who is not yet a part of the world we understand one who has not yet been conceived, not one who is still in the womb.’”⁴¹

“And don’t forget the words of Montesquieu,” added Jefferson, “when he stated that ‘there is among savages another custom . . . it is the cruel practice of abortion.’⁴² I rather like this reference, since I myself referred to abortion in describing the uncivilized practices of the American savages, and how they stopped such barbarity upon becoming civilized.”⁴³

“Really?” Blackmun blurted without thinking. “*You* wrote against abortion?”

37. 5 THE WRITINGS OF JAMES MADISON 1787-1790, *supra* note 28, at 439.

38. 1 JOHN LOCKE, THE WORKS OF JOHN LOCKE IN NINE VOLUMES 48 (12th ed. 1824).

39. *Id.* at 353 (emphasis added).

40. 2 SAMUEL PUFENDORF, THE ELEMENTS OF UNIVERSAL JURISPRUDENCE 283 (William A. Oldfather trans., Clarendon Press 1931) (1660).

41. 2 SAMUEL PUFENDORF, EIGHT BOOKS ON NATURAL RIGHTS 657 (Charles H. Oldfather & William A. Oldfather trans., 1934) (1688).

42. CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE PERSIAN LETTERS 218 (Herat ed. 1901) (1721).

43. 3 THE WRITINGS OF THOMAS JEFFERSON 153 (Paul Leicester Ford ed., 1892-99).

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“And so did I,” said John Adams, rising to his feet. “I spoke against it when praising the virtues of the Greek reformer Lycurgus, who refused to let his sister-in-law have an abortion after his brother died, even though it cost him the throne.”⁴⁴

Blackmun suddenly shook his head as if to clear it from a fog. Then he looked them all in the eye and said firmly, “Well, the common law still said abortion is not criminal prior to quickening, and is not equivalent with murder even after quickening, since apparently that is when the people of your generation thought life began.”

There were several exclamations of anger through the hall. “Have you not been listening, man?” cried Benjamin Rush, rising to his feet. “Locke and Pufendorf both said life is to be protected from conception! That’s the law of nature! And furthermore, I was one of the few founders trained as a doctor—and I clearly stated that life’s ‘first motion is produced by the stimulus of the male seed upon the female ovum . . . [n]o sooner is the female ovum thus set in motion and the foetus formed, than its capacity of life is supported.’”⁴⁵

“And what of my opinion printed in the New York Journal in 1788 as part of the debate over ratifying the Constitution,” said Hugh Hughes, one of the sons of liberty. “I clearly stated that ‘the term “person” may include every human creature, whether born or unborn.’⁴⁶ This contradicts your claim that the word person does not include the unborn.”⁴⁷

“And as for the common law,” said James Wilson, “I clearly stated that ‘*in the contemplation of law*, life begins when the infant is first able to stir in the womb,’ and from that point is to be protected.⁴⁸ That stirring is the point of ‘quickening’ which you mention in your *Roe* opinion. But don’t you see the qualification in my statement? ‘In the contemplation of law’ clearly shows that philosophical ideas about when life begins have nothing to do with the common law abortion rule! Rather, that rule is all about

44. 4 THE WORKS OF JOHN ADAMS 549 (Charles Francis Adams ed., 1851).

45. 2 BENJAMIN RUSH, MEDICAL INQUIRIES AND OBSERVATIONS 406 (2d ed. 1805).

46. 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES 664 (Wis. Hist. Soc’y Press 2004).

47. *Roe v. Wade*, 410 U.S. 113, 158 (1973) (“All this, together with our observation . . . that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”).

48. 2 THE COLLECTED WORKS OF JAMES WILSON 1068 (Kermit L. Hall & Mark David Hall eds., 2007) (emphasis added).

evidence! In our day, we couldn't *prove* a child was alive and protectable until its mother could feel it!⁴⁹ After all, a murder charge is very serious! Are you going to send a man to the gallows without sufficient evidence?"

"I heartily agree," said Alexander Hamilton, fingering the ten dollar bill on his cloak. "The common law in New York was summarized by James Parker in 1764, who cited Lord Hale for the proposition that in an abortion case in our day 'it cannot be *legally known* whether the child were killed or not.'⁵⁰ That's why an indictment against a person for killing an unborn child was refused in the 1348 *Abortionist's Case* in England, because in the words of the opinion 'it is difficult to know whether he killed the child or not.'⁵¹ Clearly, the rule was solely one of evidence."

"And if that's not enough for you," continued James Wilson, "consider another common law principal espoused by Blackstone—the same Blackstone that you cited in support of your decision.⁵² When he gave the common law rule for executing a woman who was found guilty of a capital offense and who claimed to be pregnant, he said '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*

49. See PELEG W. CHANDLER, 2 AMERICAN CRIMINAL TRAILS 3-58 (1841-1844; reprinted 1970). One of the best examples of this is the case of Bethesda Spooner, who was convicted of conspiracy to murder her husband in 1778 and sentenced to death. She claimed she was pregnant and thus her execution should be delayed. Under the common law as expressed by Blackstone, in such a case "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." 2 WILLIAM BLACKSTONE, COMMENTARIES, at *395. Hence, the same "quick with child" standard applied, but the italicized portion emphasized that if the jury somehow had a way to verify the child was "alive in the womb" while the mother was "barely with child" before quickening, the child's life was to be protected. Because such a thing could not be conclusively shown in that day, however, the jury was to determine whether she was "quick with child," or in other words the child could be felt. In Spooner's case, a jury of discreet matrons was called and her execution was stayed while they performed their examination and gave their report. They said she was not pregnant. However, Spooner continued to insist she was and asked for another examination, which was given. This time three of the midwives said she was pregnant. However, other matrons disagreed and the state Executive Council ordered the execution to proceed. Upon Spooner's death she was examined and a five month old "perfect male fetus" was found inside her, and "it was thus discovered, but too late, that a great and humane principle, to be found in the laws of all civilized nations, had been violated."

50. JAMES PARKER, CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE 216-17 (1764) (emphasis added).

51. ANTHONY FITZHERBERT, LA GRAUNDE ABRIDGEMENT f. 268, pl. 263 (1st ed. 1516). See also, JOHN M. RIDDLE, EVE'S HERBS: A HISTORY OF CONTRACEPTION AND ABORTION IN THE WEST 96 (1997) (discussing and quoting the *Abortionist's Case*).

52. *Roe*, 410 U.S. at 135.

it be alive in the womb, is not sufficient), execution shall be stayed generally till the next session.⁵³ His reference to ‘barely with child’ was clearly a reference to the time prior to quickening—and his statement ‘unless it be alive in the womb’ clearly shows that if it was possible to show the child alive in that prior stage, it would be protected. It wasn’t possible to prove that in our day—but it is in yours! You yourself mentioned how ‘modern medical techniques’ have changed.⁵⁴ With modern technology, a fetal heartbeat can be detected at approximately the 25th day after conception,⁵⁵ which is about the time most women even realize they’re expecting! Even your modern first trimester abortion procedures are almost never performed prior to this time!

“Which means,” said Alexander Hamilton firmly, “that the common law rule is an evidentiary rule, requiring protection of the unborn from the earliest time that movement can be detected. And today, that is from the 25th day after conception!” He looked at Blackmun sharply. “You know as well as I do that you acknowledged in your *Roe* opinion yet another common law rule, that for inheritance purposes, a child has his property protected from the moment of conception.⁵⁶ In the words of an illustrious judge from my state of New York in 1913, under such a rule ‘one must respect the rights of ownership and . . . disregard the safety of the owner. In such argument there is not true sense of proportion in the protection of rights. The greater is denied.’”⁵⁷

There was silence in the great hall for a moment. Resounding silence. Deathly silence, since none but the dead were present. All eyes were turned on Mr. Blackmun. He merely returned their gaze, but said nothing. Then slowly, without another word, he turned and retreated toward the back part of the hall. As he walked through the wall he disappeared.

George Washington pounded his gavel on the podium, waking up some of the less active founders present who had dozed off during the proceedings. “Thank you all for your attendance and comments,” he said. “The pity of course is that neither Mr. Blackmun nor we are in a position to alter the current state of things in America today. Much as we love this nation for which

53. 2 WILLIAM BLACKSTONE, COMMENTARIES *395 (emphasis added).

54. *Roe*, 410 U.S. at 149.

55. Natan Haratz-Rubinstein & Ilan E. Timor-Tritsch, *The Role of Ultrasound in Oocyte Donation Programs*, in PRINCIPLES OF OOCYTE AND EMBRYO DONATION 121, 144 (Mark V. Sauer ed., 1998).

56. *Roe*, 410 U.S. at 162.

57. *Nugent v. Brooklyn Heights R.R. Co.*, 154 A.D. 667, 672 (N.Y. App. Div. 1913).

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we sacrificed so much, it is left to other hands and minds and hearts to resolve this issue.”

There were general nods of agreement. Slowly President Washington rose from his chair and strode from the hall, disappearing into the blackness of the night. After collecting his notes and papers, James Madison followed. The others dispersed slowly, some talking in groups, others merely looking around to see how the hall had changed since they had last visited it. One by one they all went out into the night and were scattered to the wind.

Last to leave was Benjamin Franklin. And as he passed from the hall and noticed developing storm clouds in the eastern sky, he happily clutched the kite string in his pocket and smiled in anticipation.