Justice Antonin Scalia and AUL's Senior Counsel,

Clarke Forsythe Light up the Northern Skies in the Dead of Winter

What have Justice Scalia and Clarke Forsythe related on the question of constitutional fetal personhood when they were not sitting on the electrified legal chair of cross-examination, i.e., when they were responding to fetal-person questions put to them by persons who lack both a working knowledge of the constitutional interpretive process and the concept that constitutional interpretation has its own integrity?

The Gospel Coalition put to Forsythe this question: "*Roe* declared that an unborn child is not a person protected under the Fourteenth Amendment. Some pro-life advocates would like to see the Court revisit this holding. Why, in your view, is that improbable?" Here's Forsythe's answer (not one dot of which even qualifies as legal argument):

> It is not simply improbable but almost certainly impossible in our lifetime. That's because every single justice since *Roe* has rejected the proposition that the unborn child is a person within the meaning of the Fourteenth Amendment, including the most anti-*Roe* justices, Justice Scalia and Justice Thomas. And Scalia and Thomas have rejected it for at least these reasons. Firstly, the words "abortion" and "unborn child" are not in the Constitution. They weren't specifically considered by the framers of the 14th Amendment. Secondly, Justices Scalia and Thomas believe that the abortion issue was and is an issue for only the states to decide. Thirdly, and this one is perhaps the most powerful and the one most often ignored by pro-lifers: Scalia and Thomas want the Court out of the "abortion-umpiring business," which they think has undermined the integrity of the Court as a constitutional and political institution. The declaration that the unborn child is a "person" within the meaning of the 14th Amendment would only thrust the Court more deeply into the "abortion-umpiring business." So, for constitutional and institutional reasons, Scalia has implicitly rejected 14th Amendment fetal-personhood. And it's almost certain that any justice nominated by even a pro-life president and confirmed by the Senate in the next 20 years will be heavily influenced by the reasoning of Scalia.

Let's hope not. The text of the Constitution is silent on the right of an "individual" to possess a firearm; but that didn't stop Justice Antonin Scalia in Heller's Case (2008) from ruling that the Constitution (via the 2nd Amendment) recognizes just such a right. And so, evidently, Justice Scalia would not be in favor of extracting the Court from the gun rights umpiring-business. Scalia claims not to know what that human thing growing in its mother's womb really is. He claims that the right to life guaranteed by the 5th (14th) Amendments due process clauses is limited to "walking-around persons", and that "there is nothing in the constitutional text or in the legislative history of those two amendments that gives any indication that their framers intended the post-embryonic fetus (let alone the pre-post-

embryonic fetus) to be included within the meaning of the word person in those two due process clauses." True enough. But the same can be said of the newborn babe feeding at her mother's breasts. And no reasonable person would claim that the newborn babe does not qualify so. I assure the reader if Scalia were to employ his Heller historical-legal approach to constitutional interpretation to the question of whether the child in the womb of his mother qualifies as a due process clause person, then he would hold so fifteen times over.

In *Smith v. Alabama* (1888) 124 U.S. 465, 478, the Court reiterated that "the interpretation of the Constitution … is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in light of its history. Unlike myself, neither Forsythe nor Justice Scalia have even an inkling of a "working knowledge" of the prosecution of procured abortion and unborn child-killing at the English common law. So, they are in no position to affirm or deny the statement in *Roe v. Wade* that *Roe* is in line with the English common law on the same. (*See Roe v. Wade*, 410 U.S. at 165.) The exact opposite is the truth. What *Roe* held to be a "fundamental right" (access to induced or procured abortion) because it was recognized as such at the English common law (and therefore is established as one of the most sacred of all constitutionally guaranteed rights), was "murder" at the English common law. And an English trial court judge ruled so in *Queen v. West* (1848), 1848 Cox's C.C. 500, 503; 2 Car & K 785, 175 English Rpt. 329), in the course of instructing the jury on the common law crime of the murder of a non-viable human fetus or human being.

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

Blackstone, in no uncertain terms has, from his grave, deemed our Constitution (which includes the Court's holdings in *Roe v. Wade* and in *Casey v. Planned Parenthood*) as tyrannical to the highest degree. His four-volume *Commentaries* (1765) on the English common law, continues to serve as "primary legal authority" on the common law, just as it did so for 18th century American lawyers, magistrates, and judges. (*Washington v. Glucksberg* (1997), 521 U.S. 702, 710). In the course of discussing the common law-recognized fundamental or inalienable rights of persons (in this instance, *the right to life* – "a right inherent by nature in

every individual" - and confirmed implicitly as such in the Declaration of Independence), Blackstone observed (*1 Commentaries* 125-26):

> This natural life [i.e., the rationally ensouled life of a new human being, which "begins in contemplation of law as soon as an infant is able to stir" or is organized or formed into a recognizable human shape and, at which such stage, it receives its human or rational soul, and the pregnant woman is then said to be "quick with child", and so said Samuel Johnson in his *A Dictionary of the English Language* (1775) at Vol. 2, sub. tit.: "quick"] being, as was before observed, the immediate donation of the great creator, cannot legally be disposed of or destroyed by any individual [particularly by its very own mother or a physican]….merely upon their own authority…. Whenever the Constitution of a state [or country, such as the United States] vests in any man, or body of men, a power of destroying at pleasure … the lives or members of the subject, such constitution is in the highest degree tyrannical.

Here comes the grand hypothetical question. Current federal death penalty law provides, in pertinent part, that a "sentence of death shall not be carried out upon a woman while she is pregnant." (18 USC § 3596 b). Now, suppose that this federal statute is amended to delete this subsection (b) provision on the grounds that since, and according to *Roe v. Wade*, the Constitution gives no consideration or protection period to the unborn child in the womb of his mother, then it stands to reason that neither should federal policy-making. Now, suppose further that a federally condemned woman was impregnated by one of her prison guards eight (8) weeks to the day before her scheduled date of execution, and that the dirty deed was uncovered through a DNA analysis of semen contained in a used prophylactic found in her bedding on the eve of her scheduled date of execution. Suppose further that the condemned woman does not request a stay of execution until the birth of her child, but that an obstetric ultrasound or dating scan confirms the existence in her womb of a live, walnut-size, formed fetus. Finally, suppose that the "sole" (I repeat: "sole") issue before the Court is whether a federal statute (say, 18 USC § 3596, as amended by the deletion of subsection b) which bars, without exception (other than the exception of the person's inability to appreciate that his or her death is imminent (id., supra, at subsection c)), all reprieves, violates the Fifth Amendment's due process clause (enacted in 1791), in that the condemned woman's live fetus qualifies as a Fifth Amendment, due process clause person. Who would argue to "uphold" the statute barring the granting of the fetus's petition for a stay of his mother's execution? Would the ACLU argue so? Would pro-choice Catholic Politicians argue so? Would Justices Scalia or Ginsburg or Clarke Forsythe, or radical feminists and other pro-choice organizations or PETA, argue so? Would law professors Erwin Chemerinsky or Laurence Tribe (who is so fond of arguing that mammalian fish should qualify as constitutional persons) or Alan Dershowitz or Jack Balkin, argue so? I think not as to all of them.

I put this hypothetical to Clarke Forsythe in an email. He initially refused to make any attempt to answer it, saying that the "Court would undoubtedly decide the issue on alternative constitutional grounds." I responded: "Clarke, the hypothetical presupposes that no such alternative grounds are in play or are even in existence. He still refused to answer it. Had he refused so while sitting on the electrified legal chair of cross-examination, then he would have lit up the entire northern skies in the dead of winter.

Here's a side bar that should be in the forefront of all such bars: The foregoing hypothetical issue could only become a real issue before the Supreme Court if, at the trial court level, the unborn child of the condemned woman was appointed - by the trial court - a "guardian ad litem" who would bring or initiate the court action to stay the pregnant woman's execution on behalf of the unborn child, and would retain or would have appointed sagacious counsel to argue on behalf of the helpless unborn child. And this brings home the most egregious injustice ever committed by any court in the entire legal history of Western Civilization: The failure of the *Roe* Justices, in its deciding of *Roe v. Wade*, to appoint Jane Roe's defenseless and helpless unborn child a guardian ad litem and a sagacious counsel to defend him or her against the contention that he or she does not qualify as a due process clause person. Even the slave, Dred Scott was at least provided with an opportunity to argue in favor of his freedom before the Supreme Court. In *Roe*, Jane Roe's fetus was not even a party to the action, and was not given "legal standing". Also, no party to a Supreme Court case can raise a legal issue simply by raising and then arguing it in his brief to the Supreme Court, as did the State of Texas on the question of fetal personhood in its *Roe* brief. So, the *Roe* Court, in effect, and on its own illegal motion, simply raised the issue of 14th Amendment due process clause recognized fetal personhood (and, in doing so, conceded necessarily that a state's failure to take concerted "affirmative action" to prevent procured abortion would constitute due process clause "state action"- which is all that that clause can protect against), and then proceeded to rule, here, against Jane Roe's fetus without first providing him or her with an opportunity to be heard on this most vital issue. This means, in effect, that going into to this issue of constitutionally recognized fetal personhood, the *Roe* Court had "already decided in advance" that Jane Roe's fetus was "not" a constitutional person; for otherwise the *Roe* Court would have had to appoint him or her a guardian ad litem and sagacious counsel, since all 14th Amendment due process clause persons have a constitutional right to be heard and to defend against a state's attempt to take away or to fail to secure or safeguard his or her life. This stands on its head "the principle of the impartiality of the adjudicator," which lies at the base of all of our judicial and quasi-judicial legal institutions. (See Gray v Mississippi (1987), 461 U. S. 648, 668). (Additionally, in holding initially that procured abortion constitutionally qualified as a pregnant woman's "fundamental right," the *Roe* Court had, thereby, already held implicitly that Jane Roe's fetus does not qualify as a due

process clause person. See www.parafferty.com, and click on the link that reads: University Faculty for Life, and then scroll to page 6.) So, shame on all nine of the *Roe* justices, and also every one of the post-*Roe* justices, as well as the entire constitutional legal community for not taking immediate committed and concerted action to rectify this most egregious of all judicial injustices. And more shame on Clarke Forsythe for telling the pro-life community to lay down and meekly accept this most egregious of all judicially-created injustices.

In Massachusetts, in 1778, the governing body that presided over Mrs. Spooner's capital execution was looked upon as a child-murderer by its own citizenry after an autopsy on Spooner, who had pleaded her belly – claiming to be "quick with child", but was found not to be so) revealed that Mrs. Spooner was then pregnant with a "perfectly formed child". (*See* Peleg Chandler, *American Criminal Trials* (1844), 49-50, 53, & 379-83.)

Justice Stevens observed that Supreme Court justices, in interpreting the text of the Constitution, "must, of course, try to read … [the] words [employed there] in the context of the beliefs that were widely held in the late 18th century. (Justice Paul Stevens, *Addresses: Construing the Constitution*, 18 U.C. Davis L.R.1, 20 (1985).) Charles Leslie, in his *Treatise of the Word Person* (1710), at p.14, observed that a fetus or man becomes "a *Person* by the Union of his Soul and [formed] Body … This, is the acceptance of a person among men, in all common sense, and as generally understood. Similarly, Walter Charleton, a fellow of the Royal College of Physicians, in his *Enquiries into Human Nature* (1699) at p.378, observed "That the life of man doth both originally spring, and perpetually depend from the intimate conjunction and union of his reasonable soul with his body, is one of those few assertions in which all Divines [theologians] and natural philosophers [scientists] unanimously agree. This union was then understood to occur at "fetal formation" (and not at "quickening" – the pregnant woman's initial perception of the movement of her fetus). This understanding was not based on any religious belief, be it Catholic, Protestant, theistic, or otherwise, rather on the opinion or teaching of Aristotle as set forth in his *Historia Animalium* at Lib. 7, c.3, 4:583. That most celebrated, American physician Benjamin Rush (1745-1813), a founding father and signer of the Declaration of Independence, in his *Medical Inquiries* (1789) at p.42, observed: "No sooner is the female ovum thus set in motion, and the fetus formed, then its capacity of life is supported."

Additionally, at the English common law procured abortion was criminally prosecuted not only after the pregnant woman became "quick with child," but also "before "she became "quick". In Derby, England, in August of 1732, in *Rex v. Beare*, Beare was convicted of (1) the common law misdemeanor offense of destroying, through procured abortion, the "foetus in the womb or Grace Belford (aka Beare)" (it was not alleged, and no evidence was presented that Belford was then "quick with child", i.e., was pregnant with a formed fetus or live child), and (2) the misdemeanor offense of encouraging a husband to administer a poison to his wife. Beare

received separate sentences of two days on the pillory and three years imprisonment. The "populace … gave her no quarter, but threw such quantities of eggs, turnips, etc., that it was thought she would hardly have escaped with her life." The *Beare* trial judge commented to the *Beare* jury relative to the abortion indictment that "he never met with a case so barbarous and unnatural." (Beare's Case is reproduced in www.parafferty.com at the link: *Roe v. Wade: Unraveling the Fabric of America* (hereinafter: Rafferty), at pp. 78-82.) Another case (and there are many more related cases) is *R. v. Jane Wynspere* (Nottingham, England, 1503):

> On inquisition taken at Basford … before [coroner] Richard Parker … upon the view of the body of Jane Wynspere … by The oath of … [names of fourteen jurors omitted], who say Upon their oath that … Jane Wynspere … single woman, Being pregnant ... drank … various … poisons in order to kill and destroy the Child in her body; from which she said Jane then and there died. And thus the same Jane … feloniously, as a "felo de se," killed … herself.

Wynspere is in 74 KB 9/434/12. *And see Russell's Case* (1832), *Rafferty*, *supra,* at pp.159-163.

Since the 5th Amendment's due process clause was "unqualifiedly" incorporated into the 14th Amendment's due process clause, then the latter must be said to contain all of the contents of the former. As observed by Justice Frankfurter in his concurring opinion in *Malinski v. N.Y.* (1945), 324 U.S. 401, 415: "to suppose that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." *See also Rafferty*, *supra*, at p.196 (endnote 1).

It is no doubt true that it does not follow from the fact that the fetus or child in the womb of his or her mother qualifies as a due process clause person for purposes of constitutionally mandating the prohibition of implementing the death penalty on a pregnant woman that, therefore, the fetus or unborn child qualifies so in all cases to his or her benefit. (But *see, e.g., Hall v. Hancock* (1834), 32 Mass. 255, 257-58: at the English common law, the child in the womb of his or her mother, from the very moment of his or her conception, is "generally considered to be in being [or born alive] … in all cases where it will be for the benefit of such child to be so considered".) The fact remains, that the reasons and legal authority which dictate that the fetus or unborn child qualifies as an (innocent) due process clause person for death penalty purposes dictate that it qualify equally so for all such purpose for his or her benefit. This means that 5th and 14th Amendment due process require the federal government and the states to take all reasonable action to protect unborn children from procured abortion. As observed by the Court in *Palmore v. Sidoti* (1984), 466 U.S. 429, 433: by virtue of the *parens patria* doctrine, "the State has a duty of the highest order to protect … children."