THE SOVEREIGN'S POSTERITY

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"What I bear, and clearly perceive to be animated, is innocent of the faults of her who bears it, and has, I beg leave to say, a right to the existence which God has begun to give it." - Bathsheba Spooner[1]

I. INTRODUCTION

"[T]he people are the sovereign of this country."[2] And, although the people delegated many powers to the federal government in the United States Constitution, they retained for themselves the benefits of "Trial by Jury" under Section 2 of Article 3, the Sixth Amendment, and the Seventh Amendment.[3] By these constitutional provisions, not only was the right to a jury trial guaranteed, but also the power to sit on juries and to be the finder-of-fact.[4] These constitutional guarantees are to be understood "with reference to the meaning affixed to them in the [law] as it was in this country and in England at the time of the adoption of" the Constitution.[5]

At the time of the adoption of the Constitution, the people retained the power to determine when life began in the womb by means of matron juries.[6] Pursuant to a writ *de ventre inspiciendo*, a jury of matrons was impaneled in response to a plea of pregnancy made by a condemned woman "to ascertain whether a woman convicted of a capital crime was quick with child . . . in order to guard against the taking of the life of an unborn child for the crime

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* Gregory J. Roden holds a J.D. from South Texas College of Law. I wish to thank my family for their support and understanding of my time and effort devoted to this Article, and I would like to express my gratitude to God for the many blessings received while working on this article, "Thanks be unto Thee, from whom all comes, whenever it goes well with me." T. Kempis, Of the Imitation of Christ, 3rd bk., ch. 40 (Whitaker House 1981). Where appropriate, I have retained the original spelling when quoting from historical documents to preserve the style of the time-period for the reader's appreciation.

[1] Commonwealth v. Bathsheba Spooner, 2 AMERICAN CRIMINAL TRIALS 1, 49 (1778) (Peleg Chandler ed. 1844).

[2] Chisholm v. Georgia, 2 U.S. 419, 479 (1793).

[3] U.S. CONST. art. III, § 2; U.S. CONST. amend. VI; U.S. CONST. amend. VII.

[4] *See* U.S. CONST. art. III, § 2; U.S. CONST. amend. VI; U.S. CONST. amend. VII.

[5] West v. Gammon, 98 F. 426, 428 (6th Cir. 1899).

[6] *See* James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 171–72 (1983).

of the mother."[7] Thereby, as a matter of legal history, the sovereign people retained the right to be the finder-of-fact if any controversy arose over the existence of life in the womb under their jury powers.[8] As a consequence of this proceeding, the existence of a living child *en ventre sa mere* was established, and the equal protection of the law was brought to bear "to all intents and purposes for the child's benefit."[9]

Although modern statutes have replaced the finders-of-fact in such situations with physicians, that replacement had already occurred under the common law of one state just two years after the enactment of the Sixth and Seventh Amendments.[10] The fact that the change from juries of matrons to examinations by physicians began under the common law—contemporaneously with the enactment of the Sixth and Seventh Amendments—illustrates that the "substance of the common-law right of trial by jury" was preserved and enhanced in the form of physicians applying the advances of medical science to the task of their examinations.[11]

II. THE POWER OF THE SOVEREIGN PEOPLE TO ADJUDICATE RIGHTS AS JURIES

A. The People as Sovereigns

Chief Justice John Jay once said:
"[T]he people are the sovereign of this country."[12]

"Sovereignty is the right to govern."[13] One of the first questions that arose under our Constitution asked who was the ultimate sovereign: the

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[7] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 253 (1891).

[8] *See id. See also supra* note 6 (discussing the writ *de ventre inspiciendo*).

[9] 7 THE AMERICAN AND ENGLISH ANNOTATED CASES: CONTAINING THE IMPORTANT SELECTED FROM THE CURRENT AMERICAN, CANADIAN, AND ENGLISH REPORTS 133 (William M. McKinney et al. eds., 1907).

[10] Gregory J. Roden, *The Sovereign's Remedy*, HUMAN LIFE REV. (Jan. 6, 2015), http://www.humanlifereview.com/sovereigns-remedy/.

[11] Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935). *See also* Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 ISSUES L. & MED. 185, 235, 238–39 (2010), http://www.grtl.org/docs/ILM_Spring%2010.pdf.

[12] Chisholm v. Georgia, 2 U.S. 419, 479 (1793).

[13] *Id*. at 472.

> [A] nation or State-sovereign is the person or persons in whom that resides. In *Europe* the sovereignty is generally ascribed to the *Prince*; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the

states, whose representatives attended the Constitutional Convention, or the people?[14]

In the 1793 case *Chisholm v. State of Georgia*, a private citizen from South Carolina brought a suit against the state of Georgia.[15] The state posited that jurisdiction could not be exercised over it because it was immune from the suits of private parties as a sovereign state: "It is said, that *Georgia* refuses to appear and answer to the Plaintiff in this action, because she is a *sovereign* State, and therefore not *liable* to such actions."[16] Chief Justice John Jay, examining the circumstances surrounding the founding of our Constitution, observed that it was the people who were the ultimate sovereign and established the state and national governments:

> It is remarkable that in establishing [the Constitution], the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, "We the people of the United States, do ordain and establish this Constitution." Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform. Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves as to general objects, in a certain manner. By this great compact however, many prerogatives were transferred to the national Government, such as those of making war and peace, contracting alliances, coining money, etc. etc.[17]

> agents of the people, and at most stand in the same relation to their sovereign, in which regents in *Europe* stand to their sovereigns.

Id.

[14] *See id.*

[15] *Id.* at 430–32.

[16] *Id*. at 469.

[17] *Id*. at 470–71.

Noting a key principle in the Constitution of "establish[ing] justice,"[18] Chief Justice Jay found said principle was guaranteed in the Constitution's provisions granting judicial power: "They are specified in the [second] section of the [third] article, where it is ordained, that the judicial power of the *United States* shall extend to ten descriptions of cases."[19] The state argued that this provision was a one-way street: "It is contended, that this ought to be construed to reach none of these controversies, excepting those in which a State may be *Plaintiff*."[20] Chief Justice Jay rendered such an interpretation "inconceivable" and even "repugnant to" the text.[21] Instead, he felt the plain meaning of the term "controversies" expressed otherwise.[22] So too, Chief Justice Jay found that the state of Georgia's argument was against the very principles of justice embodied in the Constitution and the sovereignty of the people:

> The exception contended for, would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to ensure justice to all: To the few against the many, as well as to the many against the few. It would be strange, indeed, that the joint and equal sovereigns of this country, should, in the very Constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality, as to give to the collective citizens of one State, a right of suing individual citizens of another State, and yet deny to those [individual] citizens a right of suing them . . . Words are to be understood in their ordinary and common acceptation . . . .[23]

The *Chisholm* ruling—"that a State is suable by citizens of another State,"[24]—prompted the passage of the Eleventh Amendment, giving states the immunity they argued for in *Chisholm*.[25] Nevertheless, that did not change the status of the people as the sovereign because *Chisholm*'s "great

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[18] *Id.* at 465.

[19] *Id*. at 475.

[20] *Id*. at 476.

[21] *Id*.

[22] *Id.* at 476–77.

[23] *Id*. at 477.

[24] *Id*. at 479.

[25] Mark Strasser, *Chisholm, the Eleventh Amendment, and Sovereign Immunity: On Alden's Return to Confederation Principles*, 28 FLA. ST. U.L. REV. 605, 606–07 (2001).

and glorious principle, that the people are the sovereign of this country," remained the same.[26] Forty-three years after *Chisholm*, the U.S. Supreme Court, in *Mayor, Aldermen, and Inhabitants of New Orleans v. United States*, declared "[a]ll powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people."[27]

More recently, in *Seminole Tribe of Fla.* v. *Florida*, Justice David Souter observes that "ultimate sovereignty rests in the people themselves."[28] He notes that Alexander Hamilton, in The Federalist No. 22, was "acknowledging the People as 'that pure original fountain of all legitimate

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[26] *Chisholm*, 2 U.S. 419 at 479 (emphasis added).

> For my own part, I am convinced that the sense in which I understand and have explained the words "controversies between States and citizens of another State," is the true sense . . . It is useful, because it is honest, because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighbouring State; . . . because it recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national Government, which places all our citizens on an equal footing, and enables each and every of them to obtain justice without any danger of being overborne by the weight and number of their opponents; and, because it brings into action, and enforces this great and glorious principle, that *the people are the sovereign of this country*, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own Courts to have their controversies determined.

Id.

[27] 35 U.S. 662, 737 (1836) (McLean, J.).

> The state of Louisiana was admitted into the union, on the same footing as the original states. Her rights of sovereignty are the same, and by consequence no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States. It belongs to the local authority to enforce the trust, and prevent what they shall deem a violation of it by the city authorities.

Id.

[28] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 151 (1996) (Souter, J., dissenting).

authority.'"[29] Justice Souter also quotes James Madison, from The Federalist No. 49, that "[t]he people are the only legitimate fountain of power."[30] In *Seminole Tribe*, Justice Souter disagreed with the majority over the scope of the Eleventh Amendment.[31] The case involved the proper ordering of sovereignty between the states and the federal government, given the delegation of powers to the federal government.[32]

The people did not delegate their right to sit on juries and their powers to be the finder-of-facts to the federal or state government.[33] The people explicitly retained those rights and powers under the Sixth Amendment's provisions for criminal trials: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[34] Likewise, the people's jury rights were retained in the Seventh Amendment's provision for civil trials: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."[35]

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[29] *Id*. at n.45 (quoting THE FEDERALIST NO. 22, at 146 (Alexander Hamilton)).

[30] *Id*. (quoting THE FEDERALIST NO. 49, at 339 (James Madison)).

[31] *Id.* at 100.

[32] *Id.* at 47.

[33] *See e.g.*, U.S. CONST. amend. VI.

[34] *Id.*

[35] U.S. CONST. amend. VII. *See also* H.R. Doc. 398, at 47–52 (1927) ("An Ordinance for the government of the territory of the United States northwest of the river Ohio.").

> Sec. 4 . . . There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.
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> Sec. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit[.]
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> . . . .

Hence, according to the principle that "the people are the sovereign of this country,"[36] and the notion that "[a]ll powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people,"[37] the sovereign power to be the finder-of-facts in legal controversies has never been relinquished by the people under our Constitution.[38] This role of the sovereign people takes on a heightened importance when the life of a "fellow creature" is being weighed in the judicial balance by the state.[39]

This principal is exemplified by *Hopt v. People*.[40] The Supreme Court framed the issue before it: "The validity of the judgment is questioned upon the ground that a part of the proceedings in the trial court were conducted in the absence of the defendant."[41] The basis for this argument was that, under Utah's Criminal Code of Procedure, "if the indictment is for a felony the defendant must be personally present at the trial."[42] The defendant had challenged the selection of six jurors on the ground of "actual bias"[43]; "that is, 'for the existence of a state of mind which leads to a just inference in reference to the case that he will not act with entire impartiality.'"[44] The

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> ARTICLE II The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great [sic] All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land.

Id.

[36] Chisholm v. Georgia, 2 U.S. 419, 479 (1793).

[37] Mayor, Aldermen and Inhabitants of New Orleans v. United States, 35 U.S. 662, 737 (1836) (McLean, J.).

[38] *See e.g.*, U.S. CONST. amend. VI.

[39] Hopt v. People, 110 U.S. 574, 579 (1884) (Harlan, J.).

[40] *Id.* at 547. This was the second time that defendant Hopt was heard before the Supreme Court. In the first case, the Supreme Court "reversed, and the case was remanded, with instructions to order a new trial." In both the first and the second trials, the defendant was found guilty and "sentenced to suffer death." *Id*. at 575.

[41] *Id*. at 575–76.

[42] *Id*. at 576.

[43] *Id*.

[44] *Id.* (quoting UTAH CRIM. CODE OF PROC., §§ 239, 241).

procedural code provided that, in such situations, the court must appoint "three impartial triers, not on the jury panel,"[45] to examine the challenged juror "as a witness to prove or disprove the challenge."[46]

This part of the jury selection process was carried out in a room separate from the courtroom, providing grist for the appeal.[47] That irregularity was countered with the argument that the right of the accused to be present . . . was waived by his failure to object to their retirement from the court-room."[48] The court forcefully repudiated this argument, holding that a defendant's failure to be personally present at every stage of the trial was a deprivation of life or liberty without due process:

> We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, "cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow

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[45] *Id*. (quoting § 246).

[46] *Id*. (quoting § 249).

[47] *Id.* at 577.

[48] *Id*. at 578. It was also argued by the government "that the trial of the indictment began after and not before the jury was sworn; consequently, that the defendant's personal presence was not required at an earlier stage of the proceedings." *Id*. This argument was dismissed by Justice Harlan in short order:

> The prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors. The necessities of the defence may not be met by the presence of his counsel only. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of empanelling the jury begins.

Id.

> creatures, merely upon their own authority." The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods.[49]

The court so held that an accused could not waive his right to a jury trial by impartial jurors, and, hence, should be personally present "from the time when the work of impaneling the jury begins,"[50] effectively holding the right to a jury trial an unalienable right.[51] Equally important, the people's sovereign role as the finder-of-fact, delegated to a jury of peers, must be preserved from even the appearance of impartiality.[52] This and other rights were, of course, preserved in the Constitution for successive generations, which the Founders make clear in the Preamble when they memorialized that the purpose of this grand document was to "secure the Blessings of Liberty to ourselves and our *Posterity*":

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[53]

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[49] *Id*. at 579 *quoted in* Thompson v. Utah, 170 U.S. 343, 354 (1898) (Harlan, J.) (citations omitted).

[50] *Id*. at 578.

[51] *See id.*

[52] *Id*. at 579.

[53] U.S. CONST. pmbl (emphasis added). *See also* Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) ("The notion that the Constitution of the United States, designed, among other things, 'to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity,' prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.").

B. The Power of the People as Juries

In our legal tradition, facts in a court of law are determined by juries, not by the judiciary.[54] This was a "jealously guarded,"[55] ancient right of the people that was explicitly claimed in the Magna Carta: "No freemen shall be taken or [and] imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, decided upon except by the lawful judgment of his peers or [and] by the law of the land."[56] Indeed, the violation of the right to jury trials was one of the "injuries and usurpations" elicited in the Declaration of Independence to justify the Revolutionary War:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness . . . . The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.
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[54] *See* Jacob v. New York City, 315 U.S. 752, 752–53 (1942) (Murphy, J.) ("The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."); Parsons v. Bedford, 28 U.S. 433, 446 (1830) (Story, J.) ("The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.").

[55] *Jacob*, 315 U.S at 753.

[56] MAGNA CARTA c.39 (1215).

> For depriving us in many cases, of the benefits of Trial by Jury.[57]

The right of trial by jury, accordingly, became a key component in the subsequent debates of our state and federal constitutions.[58] With regard to the formative years immediately following the Declaration of Independence, Justice Hugo Black provided a concise legal history of this crucial right in his dissent in *Galloway v. United States*:

> [I]n response to widespread demands from the various State Constitutional Conventions, the first Congress adopted the Bill of Rights containing the Sixth and Seventh Amendments, intended to save trial in both criminal and common law cases from legislative or judicial abridgment. The first Congress expected the Seventh Amendment to meet the objections of men like Patrick Henry to the Constitution itself . . . . The first Congress, therefore, provided for trial of common law cases by a jury, even when such trials were in the Supreme Court itself.
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> In 1789, juries occupied the principal place in the administration of justice. They were frequently in both criminal and civil cases the arbiters not only of fact but of law. Less than three years after the ratification of the Seventh Amendment, this Court called a jury in a civil case brought under our original jurisdiction. There was no disagreement as to the facts of the case. Chief Justice Jay, charging the jury for a unanimous Court, three of whose members had sat in the Constitutional Convention, said: "For as, on the one hand, it is presumed, that *juries* are the best judges of *facts*; it is, on the other hand, presumable, that the *court*(*s*) are the best judges of *law*. But still, *both objects are lawfully within your power of decision*." [59]

Hence, the right to a jury trial became enshrined in Article 3, Section 2 of the Constitution, along with the Sixth and Seventh Amendments.[60]

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[57] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[58] *See* Galloway v. United States, 319 U.S. 372, 397–98 (1943) (Black, J., dissenting).

[59] *Id.* at 398–99 (Black, J., dissenting) (emphasis added) (footnotes omitted) (citations omitted).

[60] *See* Duncan v. Louisiana, 391 U.S. 145, 152–53 (1968) (White, J.).

Additionally, the roles that juries played in the administration of justice was more expansive at the time of the enactment of our Constitution than today, as evidenced by this startling phrase from Justice Black's dissent in *Galloway*: "In 1789, juries occupied the principal place in the administration of justice. They were frequently in both criminal and civil cases the arbiters not only of fact but of law."[61] Justice Black also added that, long ago, when the Supreme Court held a trial under its original jurisdiction, it empanelled a jury in deference to their role played in the administration of justice.[62] It would likely shock judges and lawyers of our day to learn that, at the

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> Jury trial came to America with English colonists, and received strong support from them. Royal interference with the jury trial was deeply resented. Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765—resolutions deemed by their authors to state "the most essential rights and liberties of the colonists"—was the declaration:
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> > 'That trial by jury is the inherent and invaluable right of every British subject in these colonies.'
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> The First Continental Congress, in the resolve of October 14, 1774, objected to trials before judges dependent upon the Crown alone for their salaries and to trials in England for alleged crimes committed in the colonies; the Congress therefore declared:
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> > "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."
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> The Declaration of Independence stated solemn objections to the King's making "Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries," to his "depriving us in many cases, of the benefits of Trial by Jury," and to his "transporting us beyond Seas to be tried for pretended offenses."
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> The constitutions adopted by the original States guaranteed jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.

Id. (footnotes omitted) (citations omitted).

[61] *Galloway,* 319 U.S. at 399 (Black, J., dissenting) (footnote omitted).

[62] *Id.*

founding of our republic, juries were endowed with the power to decide not only matters of fact, but also issues of law.

Further, the proposition that juries decided issues of "pure law" was an issue of some debate during the 19th Century (the timeframe that Justice Blackmun relied heavily upon to find the alleged right to abortion[63]), and was not formally set to rest until the Sixth Amendment case, *Sparf & Hansen v. United States* was decided in 1895.[64] From footnote 5 of Justice Black's dissent in *Galloway*, we learn:

> The early practice under which juries were empowered to determine issues of law in criminal cases was not formally rejected by this Court until 1894 in *Sparf and Hansen v. United States*, 156 U.S. 51, 715, 15 S.Ct. 273, when the subject was exhaustively discussed. *See also* Howe, *Juries as Judges of Criminal Law*, 52 HARV.L.REV. 582. This jury privilege was once considered of high value; in fact, a principal count in the impeachment proceedings against Justice Chase in 1805 was that he had denied to a jury the right to determine both the law and the fact in a criminal case—a charge which Justice Chase denied. *Report of Trial of Hon. Samuel Chase* (1805), appendix p. 17. This privilege is still at least nominally retained for the jury in some states.[65]

Justice Black cited Justice Chase's impeachment to highlight the importance of the historical right of juries to decide mixed issues of fact and law.[66] Although the Supreme Court held in the *Sparf and Hansen* case that

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[63] Roe v. Wade, 410 U.S. 113, 140–41 (1973).

> It is thus apparent that at common law, 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. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century.

Id.

[64] Sparf v. United States, 156 U.S. 51, 65–66 (1895) (Harlan, J.).

[65] *Galloway*, 319 U.S, at 399 n.5 (Black, J., dissenting).

[66] *See id.*

juries did not hold the power to decide issues of "pure law," Justice John Marshall Harlan's opinion maintained the proposition that juries retained the power to decide mixed questions of law and fact.[67]

More recently, in the 1995 Sixth Amendment case of *United States v. Gaudin*, a unanimous Supreme Court affirmed that juries retained the power to decide mixed questions of law and fact.[68] Justice Antonin Scalia delivered the opinion for the Court, in which he held, "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged."[69] The defendant was charged with "making false statements on [Department of Housing and Urban Development (HUD)] loan documents," which the government "was required to prove . . .that the alleged false statements were material to the activities and decisions of HUD." [70] Yet, the District Court in *Gaudin* insisted that the issue of materiality was a matter of law for it to decide rather than a mixed question of fact and law for the jury's determination.[71]

Justice Scalia rejected first the logic of the government's position, since materiality involves a determination of the significance of the defendant's statements to HUD's decision-making. He noted that "the application-of-legal-standard-to-fact sort of question" was "commonly called a 'mixed question of law and fact,'" and "has typically been resolved by juries."[72] Second, Justice Scalia rejected the government's position as a matter of historical law and practice, finding it had "absolutely no historical support":

> The second difficulty with the Government's position is that it has absolutely no historical support. If it were true, the law books would be full of cases, regarding materiality and innumerable other "mixed-law-and-fact" issues, in which the criminal jury was required to come forth with "findings of fact" pertaining to each of the essential elements, leaving it to the judge to apply the law to those facts and render the ultimate verdict of "guilty" or "not guilty." We know of no such case. Juries at the time of the framing could not be forced to produce mere "factual

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[67] *Sparf*, 156 U.S. at 87.

[68] United States v. Gaudin, 515 U.S. 506, 512 (1995) (Scalia, J., for a unanimous Court).

[69] *Id*. at 511.

[70] *Id*. at 508.

[71] *Id*.

[72] *Id*. at 512 (citing JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 194, 249–50 (1898)).

> findings," but were entitled to deliver a general verdict pronouncing the defendant's guilt or innocence.[73] Justice Chase's defense to one of the charges in his 1805 impeachment trial was that "he well knows that it is the right of juries in criminal cases, to give a general verdict of acquittal, which cannot be set aside on account of its being contrary to law, and that hence results the power of juries, to decide on the law as well as on the facts, in all criminal cases. This power he holds to be a sacred part of our legal privileges . . . ." [74]

Justice Scalia differentiated the case before him with *Sparf and Hansen*. The latter was concerned with whether juries decided "pure questions of law in a criminal case," not whether juries could decide "only historical facts" or "only mixed questions of fact and law."[75] Noting that, although Justice Chase thought juries had the right to decide pure questions of law, Justice Scalia reiterated that, in *Sparf & Hansen*, the Court held juries did not.[76] Still, that left the power in the hands of the jury to decide mixed questions of fact and law in criminal cases; Justice Scalia explained:

> In criminal cases, as in civil, we held, the judge must be permitted to instruct the jury on the law and to insist that the jury follow his instructions. But our decision in no way undermined the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts. To the contrary, Justice Harlan, writing for the Court, explained the many judicial assertions of the jury's right to determine both law and fact as expressions of "the principle, that when the question is compounded of law and fact, a general verdict, ex

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[73] *Id*. at 512–13 (citing Edmund M. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L. J. 575, 591 (1922)). *See also* George Clementson, *A Manual Relating to Special Verdicts and Special Findings by Juries*, 15 YALE L.J. 312, 312 (1905); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 912–13 (1994)).

[74] *Gaudin*, 515 U.S. at 513.

[75] *Id*.

[76] *Id.* at 513–14.

> necessitate, disposes of the case in hand, both as to law and fact."[77]

Next, Justice Scalia took up and refuted the Government's argument that "even if the jury is generally entitled to pass on all elements of a crime, there is a historical exception for materiality determinations in perjury prosecutions."[78] Looking for historical evidence of this alleged ancillary exception, Justice Scalia first noted, "In England, no pre-Revolution cases appear to have addressed the question, and the judges reached differing results when the issue finally arose in the mid-19th century."[79] He then declared, "Much more importantly, there was also no clear practice of having the judge determine the materiality question in this country at or near the time the Bill of Rights was adopted."[80] Reviewing American legal history, Justice Scalia observed, "State and federal cases appear not to have addressed the question until the latter part of the 19th century, at which time they do not display anything like the 'virtual unanimity' claimed by the Government."[81] And, "May's 1881 treatise reported that '[w]hether materiality is a question of law for the court or of fact for a jury, is a point upon which the authorities are about equally divided.'"[82] Consequently, as there was no "consistent historical tradition" on point, Justice Scalia deferred to the clear, straightforward, and "unambiguous" constitutional protections provided by the Fifth and Sixth Amendments:

> In sum, we find nothing like a consistent historical tradition supporting the proposition that the element of materiality in perjury prosecutions is to be decided by the judge. Since that proposition is contrary to the uniform general understanding (and we think the only understanding consistent with principle) that the Fifth and Sixth Amendments require conviction by a jury of *all* elements of the crime, we must reject those cases that have embraced it. Though uniform postratification practice can shed light upon the meaning of an ambiguous constitutional provision,

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[77] *Id.*

[78] *Id*. at 515.

[79] *Id*. at 515–16.

[80] *Id*. at 516.

[81] *Id*. at 517.

[82] *Id*. at 518 (citations omitted).

> the practice here is not uniform, and the core meaning of the constitutional guarantees is unambiguous.[83]

As with Justice Black's dissent in *Galloway*, *Sparf* played a prominent role in Justice Scalia's opinion in *Gaudin*. Justice John Marshall Harlan's majority opinion in *Sparf* held that although juries do not decide issues of "pure law," they most certainly hold the power to decide issues "compounded of fact and law."[84] In turn, Justice Harlan quoted Chief Justice Marshall on this key point: "The court may give general instructions on this as on every other question brought before them, but *the jury must decide upon it as compounded of fact and law*."[85]

Moreover, when Justice Harlan held "when the question is compounded of law and fact a general verdict, ex necessitate, disposes of the case in hand, both as to law and fact," he derived that conclusion largely from English law at the time the U.S. gained its independence.[86] Accordingly, there was a

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[83] *Id*. at 518–19. Justice Scalia then held:

> The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial judge's refusal to allow the jury to pass on the "materiality" of Gaudin's false statements infringed that right. The judgment of the Court of Appeals is affirmed.

Id. at 522–23.

[84] *Id.* at 66–67.

[85] *Id*. at 66 (emphasis added) ("Certain observations of Chief Justice Marshall in the course of the trial of Burr have sometimes been referred to in support of the contention that the jury in a criminal case are under no legal obligation to accept the law as laid down by the court. But nothing said by him at that trial was inconsistent with the views expressed by eminent jurists in cases to be presently cited. In the course of an opinion relating merely to the order of evidence, the chief justice said: 'Levying of war is a fact which must be decided by the jury.' This language is supposed to justify the contention that the jury in a criminal case are entitled, of right, to determine questions of pure law adversely to the direction of the court. But that no such thought was in the mind of the chief justice is manifest from his written charge to the jury at a subsequent stage of the trial–the accuracy of the report of which has never been disputed–in which he discussed, in the light of the authorities, the question as to what constituted treason.").

[86] *Id*. at 90 ("Notwithstanding the declarations of eminent jurists and of numerous courts, as disclosed in the authorities cited, it is sometimes confidently asserted that they all erred when adjudging that the rule at common law was that the jury in criminal cases could not properly disregard the law as given by the court. We are of opinion that the law in England at the date of our separation from that country was as declared in the authorities we have cited. The contrary view rests, as we think, in large part upon expressions of certain judges

"clear practice" of juries deciding mixed questions of law and fact in criminal trials "at or near the time the Bill of Rights was adopted,"[87] and so that proposition is uncontroversial.

As to the general jury protections of the Seventh Amendment and ancillary questions thereto, there are even more compelling reasons for a court to consider our legal history contemporaneous with the enactment of the Bill of Rights. If there are any distinctions to be drawn in allocating the responsibility to decide a question between court or jury, depending upon the nature of the question as one of "pure law" or of "compounded of fact and law," the analysis necessarily begins with the practice as of 1791, the year the Seventh Amendment was enacted.[88] Justice Souter, writing for a unanimous court in *Markman v. Westview Instruments*, gave this history:

> The Seventh Amendment provides that '[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .' Since Justice Story's day . . . we have understood that '[t]he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted.' In keeping with our long-standing adherence to this 'historical test,' we ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the Founding or is at least analogous to one that was. If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to

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and writers enforcing the principle, that when the question is *compounded of law and fact*, a general verdict, *ex necessitate*, disposes of the case in hand, both as to law and fact. That is what Lord Somers meant when he said in his essay on 'The Security of Englishmen's Lives, or the Trust, Power, and Duty of the Grand Juries of England,' that jurors only 'are the judges from whose sentence the indicted are to expect life or death,' and that, 'by finding guilty or not guilty, they do complicatedly resolve both law and fact.' In the speeches of many statesmen and in the utterances of many jurists will be found the general observation that when law and fact are 'blended' their combined consideration is for the jury, and a verdict of guilty or not guilty will determine both for the particular case in hand. But this falls far short of the contention that the jury, in applying the law to the facts, may rightfully refuse to act upon the principles of law announced by the court.").

[87] *Gaudin*, 515 U.S. at 516.

[88] *See* Sparf v. United States, 156 U.S. 51, 66 (1895).

> preserve the substance of the common-law right as it existed in 1791.[89]

In *Markman*, a key issue was petitioner Markman's patent claim that his system for dry-cleaning establishments tracked inventory, whereas respondent Westview Instruments' system made no claim to track inventory.[90] The trial included testimony from an expert witness about the meaning of the disputed patent claims.[91] Justice Souter introduced the central controversy as follows:

> The question here is whether the interpretation of a so-called patent claim, the portion of the patent document that defines the scope of the patentee's rights, is a matter of law reserved entirely for the court, or subject to a Seventh Amendment guarantee that a jury will determine the meaning of any disputed term of art about which expert testimony is offered.[92]

Justice Souter concluded that there was no applicable common law precedent for the issue before him.[93] At trial, the District Court directed a verdict for Westview because its device was unable to track "inventory," as that term was used in Markman's patent claim.[94] This directed verdict

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[89] Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) (Souter, J., for a unanimous Court) (citations omitted) (quoting Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935)).

[90] *Id*. at 372, 375.

[91] *Id.* at 372.

[92] *Id*.

[93] *Id*. at 384 ("Since evidence of common law practice at the time of the Framing does not entail application of the Seventh Amendment's jury guarantee to the construction of the claim document, we must look elsewhere to characterize this determination of meaning in order to allocate it as between court or jury."); *Contra* J. OLDHAM, TRIAL BY JURY 5–16 (NY Univ. Press 2006) ("On the specific question in *Markman*, I have no doubt that the issue of the patent claim construction would have gone to the jury.").

[94] *Id.* at 375. Regarding directed verdicts, where "the evidence is uncontradicted" and the case "raises only a question of law," the Seventh Amendment is not offended by the court with drawing a case from the jury and directing a verdict. Hepner v. United States, 213 U.S. 103, 115 (1909). Although, even post-Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), the Erie doctrine imposes no impediment to the right to jury deliberations in federal courts, even if state law is otherwise controlling (on directed verdicts, or otherwise). Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 534–40 (1958) ("[I]n light of the influence of the Seventh

overturned the jury finding of infringement, based in part on expert testimony discussing the meaning of the patent claim's language.[95] Justice Souter reviewed case law subsequent to the enactment of the Seventh Amendment—defining the scope of the patentee's rights— which is a matter of law reserved entirely for the court.[96] With that, Justice Souter concluded, "Accordingly, we hold that the interpretation of the word 'inventory' in this case is an issue for the judge, not the jury, and affirm the decision of the Court of Appeals for the Federal Circuit."[97]

Still, the starting point in determining rights under the Seventh Amendment necessarily begins with the practice as of 1791, the year the amendment was enacted.[98] Justice Souter cited a 1973 article by Professor Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, supporting that proposition.[99] In that article, Professor Wolfram wrote:

> For at least the past century and a half, judicial and academic writings on the right to jury trial afforded by the seventh amendment have uniformly agreed on one central proposition: in determining whether the seventh amendment requires that a jury be called to decide the case the court must be guided by the practice of English courts in 1791.[100]

Amendment, the function assigned to the jury 'is an essential factor in the process for which the Federal Constitution provides.'") (citations omitted).

[95] *Markman*, 517 U.S. at 372.

[96] *Id.*

[97] *Id*. at 391.

[98] *Id.* at 376.

[99] *Id.*

[100] Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 639–40 (1973). Professor Wolfram provided a detailed examination of this proposition in his article:

> Dimick v. Schiedt, 293 U.S. 474, 476 (1935): **"**In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." *See also* Ross v. Bernhard, 396 U.S. 531, 534 (1970); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); Patton v. United States, 281 U.S. 276, 288 (1930); Thompson v. Utah, 170 U.S. 343, 350 (1898).

It could hardly be any other way; the language of the Seventh Amendment explicitly requiring that, in suits at common law, "the right of trial by jury shall be *preserved*," essentially fixes the existing state of the law at the time of the adoption of the amendment, as the operative verb is "preserved."[101]

III. THE POWER OF THE SOVEREIGN PEOPLE TO ADJUDICATE THE RIGHTS OF CHILDREN EN VENTRE SA MERE AS A JURY OF THEIR PEERS

"The writ de ventre inspiciendo, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother."[102]

A. The Common Law Background

Giving the right of sovereign people to deliberate as juries begs the question: was there a right of trial by jury for the benefit of children *en ventre sa mere* under the English common law when the Sixth and Seventh

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> The Court suggested in Continental Illinois Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry., 294 U.S. 648, 669 (1935), that the appropriate time referent was "when the Constitution was adopted." This presumably could refer either to June 21, 1788, the date on which the ninth state (New Hampshire) ratified the proposed Constitution, or to the first Wednesday in March, 1789, when the Constitution became effective. The seventh amendment was adopted along with the other first ten amendments and became effective almost three years later on December 15, 1791. The statement in Continental *Illinois Nat'l Bank & Trust* Co. might have been a loose reference to the time of adoption of the seventh amendment instead of to the adoption of the main body of the Constitution. In any event, the Court did not suggest that the jury trial practice in 1788 or 1789 differed from that in 1791. In fact, courts have often been imprecise and unhistorical in dating jury trial practices that are held to fix the meaning of the seventh amendment. The accepted formulation of the historical test, however, has specified the year 1791, the year in which the seventh amendment was adopted, as the determinative date.

Id. at 642, n.8

[101] U.S. CONST. amend. VII (emphasis added).

[102] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 253 (1891) (Horace Gray, J.).

Amendments were adopted?[103] Or, "[m]uch more importantly, . . . [a] clear practice of … [such] in this country at or near the time the Bill of Rights was adopted"?[104] Or, perhaps, "whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was"?[105]

A right of children *en ventre sa mere* to a jury's determination—to a "judgment of his peers,"—certainly existed under English common law at the time the Sixth and Seventh Amendments were adopted,[106] and ironically,

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[103] BLACK'S LAW DICTIONARY 479 (5th ed. 1979): "In its mother's womb. A term descriptive of an unborn child. For some purposes the law regards an infant *en ventre* as in being. It may take a legacy; have a guardian; an estate may be limited to its use, etc." (citation omitted). *See also* 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 126 (1st ed.) ("An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It 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."); BARRON'S LAW DICTIONARY 160 (3d. ed. 1991) ("EN VENTRE SA MERE[:] in gestation; in the womb of one's mother"). In the law of property, a person who is *en ventre sa mere* has the same rights as, and is entitled to the same protections as, a person who has been born. POWELL, REAL PROPERTY [Sec.] 796(3)."

[104] United States v. Gaudin, 515 U.S. 506, 516 (1995) (Scalia, J., for a unanimous Court).

[105] Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) (Souter, J.).

[106] *See* Gregory J. Roden, *Roe v. Wade and the Common Law: Denying the Blessings of Liberty to our Posterity*, 35 UWLA L. REV. 212, 240–56 (2003) (on file with author) (illustrating that abortion was as common law crime at the adoption of the Bill of Rights). Indeed, abortion was a common law crime at the time *Roe v. Wade* was decided. State v. Barquet, 262 So.2d 431, 437 (Fla. 1972). In *Barquet*, the Florida Supreme Court struck down for vagueness state statutes which outlawed abortion except when "necessary to preserve the life of such mother," under both the federal Fourteenth Amendment and the Florida Constitution's due process clause. *Id*. at 431. But, by having struck down the statutory law that had replaced the common law crime of abortion, the common law crime of abortion was now again applicable. Consequently, the Florida Supreme Court went on ultimately to hold:

> Our conclusion creates a tremendous problem in that the common law is now brought into play. It was a crime at common law to operate upon a pregnant woman for the purpose of procuring an abortion if she were actually quick with child. "Quick" means "living; alive." Black's Law Dictionary, (4th ed. 1957).
>
> From the filing of this opinion until a statute is enacted by the Legislature, a person may be charged with the common law offense of abortion.

there is no need look further than the first case Justice Blackmun cited in *Roe v. Wade* to supposedly establish the right to "privacy" that encompassed abortion:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back *perhaps* as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.[107]

Justice Blackmun's qualification was most appropriate. First of all, this case from 1891 has nothing to do with substantive due process. The only constitutional lesson to be derived from it was that the trial practice at the time the amendment was adopted is the starting point in Seventh Amendment issues.

Union Pacific R. Co. v. Botsford[108] is in the genus of personal injury actions against railroad companies in federal court under Article III, Section 2 diversity jurisdiction.[109] As a federal case, the Seventh Amendment was applicable to preserve the litigants' common law rights as of 1791.[110] Clara Botsford received a head injury when the berth above her in the sleeping-car she was occupying collapsed upon her.[111] She filed a civil suit in federal court against Union Pacific for negligence, receiving a verdict and judgment against them.[112] Union Pacific, in turn, filed a writ of error complaining that they had a trial motion overruled erroneously.[113] Justice Horace Gray stated the pertinent facts:

> Three days before the trial (as appeared by the defendant's bill of exceptions) 'the defendant moved the court for an order against the plaintiff, requiring her to submit to a surgical examination, in the presence of her own surgeon and attorneys, if she desired their presence; it being proposed by the defendant that such examination should be

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Id. at 437 (citations omitted).

[107] Roe v. Wade, 410 U.S. 113, 152 (1973) (emphasis added).

[108] Union Pac. Ry Co. v. Botsford, 141 U.S. 250 (1891).

[109] *Id.* at 256.

[110] *Id.* at 251.

[111] *Id.* at 250.

[112] *Id.* at 250–51.

[113] *Id.* at 251.

> made in manner not to expose the person of the plaintiff in any indelicate manner, the defendant at the time informing the court that such examination was necessary to enable a correct diagnosis of the case, and that without such examination the defendant would be without any witnesses as to her condition. The court overruled said motion, and refused to make said order, upon the sole ground that this court had no legal right or power to make and enforce such order.'[114]

After this factual introduction, which centered on the defendant's motion for a pre-trial surgical examination of the witness, Justice Gray framed the central legal issue:

> The single question presented by this record is whether, in a civil action for an injury to the person, the court, on application of the defendant, and in advance of the trial, may order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for. We concur with the Circuit Court in holding that it had no legal right or power to make and enforce such an order. No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley: 'The right to one's person may be said to be a right of complete immunity; to be let alone.' For instance, not only wearing apparel, but a watch or a jewel, worn on the person, is, for the time being, privileged from being taken under distress for rent, or attachment on mesne process or execution for debt, or writ of replevin. The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow.[115]

This privacy right deals with being "free from all restraint or interference of others," meaning private persons, as demonstrated by the

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[114] *Id.* at 250–51.

[115] *Id*. at 251–52 (citations omitted).

reference to Judge Thomas McIntyre Cooley's, *The Law of Torts*.[116] The particular passage cited comes under the section titled "Personal Immunity,"[117] which is concerned with the torts of assault and battery:

> Personal Immunity. The right to one's person may be said to be a right of complete immunity: to be let alone. The corresponding duty is, not to inflict an injury, and not, within such proximity as might render it successful, to attempt the infliction of an injury.[118]

Judge Cooley's section on "Personal Immunity" did not touch upon discovery, proof at trial, or any other such procedural issues.[119] Rather, he engaged in a discourse on the substantive reasons for the torts of assault and battery.[120]

Justice Gray then enumerated some instances when the "clear and unquestionable authority of law" does not allow one's "person" to be violated "in the administration of justice between individuals," and drew a general rule to the same effect.[121] More importantly, Justice Gray went on to cite some departures from the general rule,[122] and one interesting exception:

> The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the *crime* of the mother.
>
> The only purpose, we believe, for which the like writ was allowed by the common law, in a matter of *civil right*, was to protect the rightful succession to the property of a deceased person against fraudulent claims of bastards, when a widow was suspected to feign herself with child in order to produce a supposititious heir to the estate, in which

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[116] *See* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS ON THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT, 29 (2d ed. 1888), *available at* https://archive.org/stream/cu31924019311426#page/n451/mode/2up/search/personal+immunity.

[117] *Id.* at 33.

[118] *Id.*

[119] *See id.* at 33–34.

[120] *Id.*

[121] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251–52 (1891).

[122] *Id.* at 252–53.

> case the heir or devisee might have this writ to examine whether she was with child or not, and, if she was, to keep her under proper restraint till delivered. In cases of that class, the writ has been issued in England in quite recent times. But the learning and research of the counsel for the plaintiff in error have failed to produce an instance of its ever having been considered, in any part of the United States, as suited to the habits and condition of the people.[123]

This historical fact—that English common law held that pregnant women had a limited expectation of privacy in criminal and civil actions,[124] —contradicts the central premise of *Roe v. Wade* and its legal principle that a woman enjoyed "a right of personal privacy, or a guarantee of certain areas or zones of privacy,"[125] which supposedly included the right to abort her unborn child "at the time of the adoption of our Constitution, and throughout the major portion of the 19th century."[126] In truth, by means of the *writ de ventre inspiciendo*, it was the child *en ventre sa mere* who enjoyed the right "to be let alone"[127] as a right of "personal security,"[128] which includes

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[123] *Id.* at 253 (emphasis added) (citations omitted).

[124] *See id.*

[125] *Roe* v. Wade, 410 U.S. 113, 152 (1972).

[126] *Id*. at 140–41 ("It is thus apparent that at common law, 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. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century."). *Contra* Roden, *supra* note 106, at 220 (illustrating that abortion was a common law crime at the adoption of the Bill of Rights).

[127] COOLEY, *supra* note 116, at 33.

[128] O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 803 n.11 (1980) (Blackmun, J., concurring) (citations omitted) ("Blackstone, whose vision of liberty unquestionably informed the Framers of the Bill of Rights, . . . wrote that '[t]he right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.'"); Washington v. Glucksberg, 521 U.S. 702, 714 (1997) (citing Martin v. Commonwealth, 184 Va. 1009, 1018–19 (1946) ("The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable."); Ingraham v. Wright, 430 U.S. 651, 672–75 (1977) (Powell, J.) (citations omitted) ("The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation

enjoying "a right of personal privacy, or a guarantee of certain areas or zones of privacy."[129]

This twisted application of English common law in *Roe v. Wade* occurred when Justice Blackmun incorporated a legal speculation of NARAL's, Cyril Means, Jr. into his opinion.[130] Means alleged that Lord Coke "may have intentionally misstated the law."[131] It was a novel theory that Means concocted, which he even admitted that "[n]o modern American scholar has shown any awareness of it."[132] Means alleged that, per his interpretation of two English common law cases from the 1300s, the common law did not hold abortion to be a felony.[133] Furthermore, despite subsequent English common law—in existence at the time of the promulgation of our Constitution—cases holding abortion to be a felony[134] and the American case law adopting this subsequent common law,[135] Means argued that his interpretation of these two Fourteenth Century cases should control American constitutional law, because it was the "true position of abortion at common law prior to the nineteenth century."[136] As the Supreme Court was about to hear arguments on *Roe* and *Doe*, Means proposed "that

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without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."). Under the 39th Article of the Magna Carta, an individual could not be deprived of this right of personal security "except by the legal judgment of his peers or by the law of the land." *Id.* at 673 n.41.

[129] *Roe*, 410 U.S. at 152.

[130] *See id.* at 135 n.26.

[131] *Id.*; *Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?,* 17 N. Y. L. F. 335 (1971) (hereinafter Means II). *See also* Lader 78–79, 43 Geo. 3, c. 58, § 1; Gregory J. Roden, *The Unknown Scholars of Roe v. Wade*, 38 HUMAN LIFE REV. 57, 58 (2012); *The Law of Criminal Abortion*, 43 IND. L. J., 193–94 (1957); LAWRENCE LADER, ABORTION, 185 n.7 (1966); *Roe v. Wade*, OYEZ IIT CHICAGO-KENT COLLEGE OF LAW, http://www.oyez.org/cases/1970-1979/1971/1971_70_18 (last visited April 20, 2015).

[132] Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335, 352 (1971) [hereinafter *The Phoenix*].

[133] *Id.* at 337–39.

[134] *Id.* at 376.

[135] *Id.* (discussing Commonwealth v. Bangs in 1812).

[136] *Id*. at 336.

the Court may find the present conspectus of the Anglo-American legal history of abortion of assistance; for, only if in 1791 elective abortion was a common-law liberty, can it be a ninth-amendment right today."[137]

Any particular English common law rule that empowers the Supreme Court to conform the sovereign states' substantive law to that antiquated rule contradicts fundamental principles of federalism.[138] Still, this is what

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[137] *Id*. at 336. Thereby, Means argued that his revised history of the common law was in effect at the time the Constitution was adopted and so was to be forced on the states by operation of the Ninth Amendment. *Id.* Never mind that the Bill of Rights was not enforceable against state law until the enactment of the Fourteenth Amendment. Rogers v. Tennessee, 532 U.S. 451, 477–48 (2001) (Scalia, J., dissenting). Never mind that even after the enactment of the Fourteenth Amendment, no Supreme Court majority ever held the Ninth Amendment as incorporated into the Fourteenth Amendment protections. *Id.* Never mind that the Constitution's ex post facto clause does not prohibit the states from altering their common law by judicial decision, as that is the very nature of the common law. *Id.* at 451–53. And, never mind that the common law "proceeded upon principle, and not merely upon precedent," and so "every act of a public evil example, and against good morals, is an offence indictable by the common law." Respublica v. Teischer, 1 U.S. 335, 337 (1788). In the through–the–looking–glass–world of abortion jurisprudence, logic and legal history will not avail you.

[138] For example, the court in Wheaton v. Peters, 33 U.S. 591, 658–59 (1834) stated:

> It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.
>
> . . . .
>
> It is insisted, that our ancestors, when they migrated to this country, brought with them the English common law, as a part of their heritage.
>
> That this was the case, to a limited extent, is admitted. *No one will contend, that the common law, as it existed in England, has ever been in force in all its provisions, in any state in this union*.

See also Lucas v. South Carolina Costal Council, 505 U.S. 1003, 1027 (1992) (discussing "'takings" jurisprudence', which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property") (footnote omitted); Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal

happened in *Roe v. Wade*. Under this same theory of "straight jacket"[139] application of English common law to U.S. constitutional law, the pregnant woman still had no expectation of privacy under civil matters.[140] The English common law allowed her to be kept "under proper restraint till delivered."[141] Obviously, the English version of the writ *de ventre inspiciendo*, found in Justice Blackmun's primary case citation on privacy, does not support a substantive due process right to privacy.[142]

In reality, the English common law itself "was freely alterable by statute," so it wasn't "fundamental, nor did it trump statutory law."[143] Although Justice Gray noted in *Botsford* that the civil use of the writ *de ventre inspiciendo*[144] was not "suited to the habits and condition of the

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general common law.") Edward Hines Yellow Pine Trs. v. Martin, 268 U.S. 458, 462–63 (1925) ("Both the meaning of statutes of a state and the rules of the unwritten law of a state affecting property within the state are peculiarly questions of local law to be ascertained and established by the state courts.").

[139] Twining v. New Jersey, 211 U.S. 78, 101 (1908) (Moody, J.) ("It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a *straight jacket*, only to be unloosed by constitutional amendment. That, said Mr. Justice Matthews, in the same case [*Hurtado v. California*, 110 U.S. 516 (1884)], p. 529, "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.") (emphasis added).

[140] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 253 (1891).

[141] *Id.*

[142] Additionally, the civil form of the writ did not contain the quickening requirement of the criminal form. Thomas R. Forbes, *A Jury of Matrons*, 32 MED. HIST. 23, 23–24 (1988). Indeed, in the 13th century the term for the writ was "*per legales feminas diligenter faceret inquisicionem si esset pregnans nec ne*." *Id.* at 24. Instructing the sheriff "that with the help of legally qualified matrons he diligently investigate whether she was pregnant or not," as Professor Forbes translated the phrase into the vernacular. *Id.* Hence, the inquiry was into mere pregnancy rather than quickening; in other words, an inquiry as to whether a child had been merely conceived, rather than quickened. *Id.*

[143] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 163 n.56 (1996) (Souter, J., dissenting, with whom Ginsburg, J., and Breyer, J., joined) ("The traditional conception of the common law as it developed in England had always been that it was freely alterable by statute . . . I demonstrate *infra*, the idea that legislation may be struck down based on principles of common law or natural justice not located within the constitutional text has been squarely rejected in this country.") (citations omitted).

[144] 1 ALEXANDER M. BURRILL, A LAW DICTIONARY AND GLOSSARY 446 (2nd ed. 1867) *available at* http://www.mindserpent.com/American_History/reference/1867_Burrill/1867_

people," he made no such limitation on the criminal use of the writ when he wrote, "The writ de ventre inspiciendo, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother."[145]

B. Juries of Matrons as Finders of Fact

William Blackstone attested to the Eighteenth Century practice of English courts to allow a special jury of matrons to make a finding of fact as to whether there was a living child in the womb possessing the right to life.[146] During this period in history, when juries were normally comprised solely of men, special juries of women were used.[147] As Professor James Oldham explains in his book *Trial by Jury*, "In theory at least, the women chosen to serve on the jury were to be matrons, who were regarded as experts on the subject of pregnancy and childbirth."[148] Blackstone provided this elaboration on the writ, also known as the plea of pregnancy, and on the special jury of twelve matrons, who serve as the finders of fact:

> REPRIEVES may also be *ex necessitate legis:* as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, *in favorem prolis*…. [T]he laws of *ancient* Rome; which direct, with the same humanity as our own, "*quod praegnantis mulieris damnatae poena differatur, quoad pariat*:"[149] which doctrine has also prevailed in England, as early as the first memorials of our law will reach. In case this plea be made in stay of execution, the judge must direct a jury of twelve

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burrill_a_law_dictionary_and_glossary_vol_01.pdf (last visited Apr. 30, 2015) ("DE VENTRE INSPICIENDO, . . . Writ of (or for) inspecting the belly").

[145] *Botsford*, 141 U.S. at 253.

[146] *See* 4 W. BLACKSTONE, COMMENTARIES 387–88 (1st ed. The University of Chicago Press facsimile 1979).

[147] *Id.*

[148] J. OLDHAM, *supra* note 93, at 80.

[149] P. SREENEVASROW, LEGAL MAXIMS 479 (2d ed. 1897), *available at* http://www.forgottenbooks.com/download_pdf/Legal_Maxims_1000000749.pdf (last visited April 20, 2015) ("The punishment of a condemned woman when pregnant must be deferred until she be delivered.").

> matrons or discreet women to enquire 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 staid generally till the next session; and so from session to session, till either she is delivered, or proves by the course of nature not to have been with child at all.[150]

It was for a jury of twelve matrons to determine whether the child in the womb was "alive," in the limited medical understanding of the time.[151] For a number of reasons, Bathsheba's case is of some notoriety. The defendant, Bathsheba Spooner, was a person of some historical significance, because her father, Timothy Ruggles, was the president of the very first continental congress, the Stamp Act Congress.[152] He was a loyalist and "refused his concurrence in the proceedings" of that congress.[153] As a consequence, he was censured by the Massachusetts House of Representatives and "was compelled to leave the country, and all his large estates were confiscated."[154]

Ruggles reportedly had a volatile relationship with his wife, and Bathsheba apparently took after her mother to an extreme extent.[155] Bathsheba took some vagabonds under her roof, and the trouble with her husband began in earnest.[156] She plotted her husband's murder with them,

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[150] 4 W. BLACKSTONE, COMMENTARIES 387–88 (1st ed. The University of Chicago Press facsimile 1979 (footnotes omitted). Blackstone continues, "But if she once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a farther respite for that cause. For she may now be executed before the child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice." *Id.* at 388. This latter qualification to the rule has never been known to have been followed in the American Colonies or the United States. *See* discussion *infra* Part III.C. Indeed, in the case of *Angela Barnett's Plea of Pregnancy* she received a reprieve after admitting she and a fellow prisoner named Jacob Valentine engaged in "repeated acts of coition" while she was in prison under sentence of death. S. MCRAE, CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS FROM AUGUST 11, 1792, TO DECEMBER 31, 1793, PRESERVED IN THE CAPITOL AT RICHMOND, 363–64 (Richmond: A. R. Micou, Superintendent of Public Printing, 1886) [hereinafter CALENDAR OF STATE PAPERS].

[151] *See, e.g.*, *See* Commonwealth v. Bathsheba Spooner, 2 AMERICAN STATE TRIALS 175, 178 (1778) (John Lawson ed., .1914).

[152] *See* 2 AMERICAN CRIMINAL TRIALS *supra* note 1, at 5–6.

[153] *Id.* at 6–7.

[154] *Id*. at 7.

[155] *See id*. at 9 n.1.

[156] *See id.* at 9–11.

and they carried out her ill-conceived plan.[157] They were caught in short order, and the four of them were tried and sentenced to be hanged.[158] A local minister, Reverend Thaddeus Maccarty, took to the care of the souls of Bathsheba and her co-conspirators and made an impression upon them.[159] The good Reverend found out that Bathsheba was pregnant and made out a plea to the Massachusetts Governor's Council to stay the execution until she could deliver her child.[160] A jury of twelve matrons and two male midwives was appointed to examine her, and they returned a verdict that Bathsheba was "not quick with child."[161] Bathsheba, insisting that she was pregnant, took it upon herself to write a letter to the Massachusetts Governor's Council:

> May it please your honors:
>
> [W]ith unfeigned gratitude I acknowledge the favor you lately granted me, of a reprieve. I must beg leave, once more, humbly to lie at your feet, and to represent to you, that though the jury of matrons, that were appointed to examine into my case, have not brought in in my favor, yet that I am absolutely certain of being in a pregnant state, and above four months advanced in it; and the infant I bear was lawfully begotten. I am earnestly desirous of being spared till I shall be delivered of it. I must humbly desire your honors, notwithstanding my great unworthiness, to take my deplorable case into your compassionate consideration. What I bear, and clearly perceive to be animated, is innocent of the faults of her who bears it, and has, I beg leave to say, a right to the existence which God has begun to give it. Your honors' humane *christian* principles, I am very certain, must lead you to desire to preserve life, even in this its miniature state, rather than to destroy it. Suffer me, therefore, with all earnestness, to beseech your honors to grant me such a further length of time, at least, as that there may be the fairest and fullest opportunity to have the matter

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[157] *See id.* at 11.
[158] *See id.*
[159] *See id.* at 47.
[160] *See id*. at 48–49.
[161] *Id*. at 49.

> fully ascertained—and as in duty bound, shall, during my short continuance, pray.
>
> Bathshua Spooner
>
> Worcester Goal
>
> June 16, 1778[162]

Again she was examined, this time by a jury of two matrons and four midwives.[163] The jury was split in its opinion, with the matrons maintaining she was not quick with child and the midwives finding she was.[164] The Governor's Council "refused all further delay" and had the sentences carried out.[165] After the execution, a scandal occurred when the matrons were proved deadly wrong; per a witness to the post-mortem examination, "She was opened the evening after the execution, and a perfect male foetus of the growth of five months or near it, in the judgment of the operators, was taken from her."[166] A popular law dictionary in the early Twentieth Century,

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[162] DEBORAH. NAVAS, MURDERED BY HIS WIFE 88 (1999). Deborah Navas also provides a reproduction of Bathsheba Spooner's handwritten petition with the citation, "*Courtesy Massachusetts State Archives, Boston, Executive Records*, Revolutionary Council Papers, 1777–1778." *Id.* at 94. *See also* 2 AMERICAN CRIMINAL TRIALS, *supra* note 1, at 49–50; J. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 225 (Carolina Academic Press 2006).

[163] *See* 2 AMERICAN STATE TRIALS, *supra* note 152, at 198.

[164] *See id.*

[165] *See id.* at 196.

[166] NAVAS, *supra* note 162, at 92. *See also* 2 AMERICAN CRIMINAL TRIALS, *supra* note 1, at 53 ("On the evening of the same day the body of the wretched woman was examined by surgeons, as she had requested, and a perfect male foetus, of the growth of five months, was taken from her."); *Notes,* 3 HARV. L. REV. 44, 45 (1889); 39 ALB. L. J. 326–27 (1889); JOHN BOUVIER, 2 BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 1786 (Francis Rawle ed., 8th ed. 1914). Peleg Chandler concludes his reporting of the case with this:

> Even now, after the lapse of half a century, no one can read the story of this wretched woman, without a shudder at the fate of that mother, who made an ineffectual prayer for the life of the innocent one whose existence was so intimately and sacredly connected with her own; and who, instead of submitting to her fate with so much calmness and fortitude, might well have exclaimed,—
>
> Murderers!
> They stabb'd Caesar, shed no blood at all,
> Did not offend, nor were not worthy blame,

Bouvier's Law Dictionary, outlined Bathsheba's case in its entry for "jury of women," and concluded:

> It may be safely affirmed that no woman who pleads pregnancy in delay of execution will in any common-law jurisdiction be sentenced to death without examination into the truth of the fact pleaded, and in absence of other statutory provision, it is difficult to see how she could be deprived of this common-law right.[167]

In its elucidation of "jury of women," *Bouvier's Law Dictionary* cites another capital criminal case wherein the writ *de ventre inspiciendo* was issued. In *State v. Arden*, the defendant was convicted of the capital crime of murder.[168] Counsel for the defendant moved in arrest of judgment,[169] claiming that Arden, as merely an accessory to the principal, could not be convicted of a greater crime.[170] The Attorney General countered that the defendant was a principal under the second count of the indictment: "In the second, the prisoner is charged with murdering, the deceased, by stabbing in the throat and breast with a pair of scissors."[171] The court held that the defendant was indicted as a principal, and after finding him guilty, the court addressed sentencing:

> The prisoner was then asked if she had any thing to offer why sentence of death should not be pronounced against her? Upon which she pleaded *pregnancy*. Whereupon she was remanded to [jail]; and the sheriff was directed to summon a jury of matrons, *de ventre inspiciendo*. The court then adjourned from day to day, till the inquisition was found. It was then returned by the sheriff into court, under

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> If this foul deed were by to equal it.
> He was a man; this, in respect, a child;
> And men ne'er spend their fury on a child.

2 AMERICAN CRIMINAL TRIALS, *supra* note 1, at 58.

[167] BOUVIER, *supra* note 166.

[168] State v. Arden, 1 S.C.L. 487 (S.C. 1795).

[169] *Id.* "Arrest of judgment" means "[t]he act of saying a judgment, or refusing to render judgment in an action at law and in criminal cases, after verdict, for some matter intrinsic appearing on the face of the record, which would render the judgment, if given, erroneous or reversible." BLACK'S LAW DICTIONARY, *supra* note 103, at 101.

[170] *Arden*, 1 S.C.L. at 488.

[171] *Id.*

> the hands and seals of twelve matrons, in which they certified they had examined the prisoner, and found that she was not pregnant. The prisoner was then brought up, and received sentence of death, and was afterwards executed pursuant to the sentence.[172]

Commonwealth and *Arden* both straddle the enactment of the Sixth and Seventh Amendments, thus satisfying the historical tests of "the English common law when the Amendment was adopted,"[173] and, "[m]uch more importantly, . . . [the legal] practice . . . in this country at or near the time the Bill of Rights was adopted."[174] Hence, the indisputable legal practice at that time was for an independent finding of fact, be it a jury of matrons or midwives, to ascertain the truth of the pleaded facts "in order to guard against the taking of the life of an unborn child for the crime of the mother"[175] in a state execution. This is of tremendous import to the rights of children *en ventre sa mere* because not only is the *procedure* that existed at the time the Sixth and Seventh Amendments preserved, but so is is the finality of that *finding of fact* from further review by higher courts.[176] Justice Willis Van Devanter made the latter point perfectly clear in *Baltimore & Carolina Line v. Redman*:

> The Seventh Amendment to the Constitution prescribes:
>
> 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.'
>
> The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted. The Amendment not only preserves that right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of reexamination existing under the common law, and to that end declares that "no fact tried by a jury shall be otherwise reexamined in any court of the

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[172] *Id*. at 489–90.

[173] *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) (Souter, J.).

[174] United States v. Gaudin, 515 U.S. 506, 516 (1995) (Scalia, J., for a unanimous Court).

[175] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 253 (1891).

[176] *See, e.g.*, *id.*

> United States than according to the rules of the common law."
>
> *The aim of the amendment*, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly *to retain the common- law distinction between the province of the court and that of the jury, whereby*, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and *issues of fact are to be determined by the jury* under appropriate instructions by the court.[177]

The crux of the common-law right of trial by jury, as the ancient writ *de ventre inspiciendo* pertains to children *en ventre sa mere*, is their entitlement to an inquiry into whether or not they are alive by a finder-of-fact, independent of the court.[178] Furthermore, if said finder-of-fact determines that the child *en ventre sa mere* is indeed alive, no court of the land may set aside that finding.[179] The U.S. Supreme Court made that plain in *Parsons v. Bedford*; after affirming that the term "common law" in the Seventh Amendment means the broader concept of legal rights,[180] the Court stated:

> But the other clause of the amendment is still more important; and we read it as a substantial and independent clause. "No fact tried by a jury shall be otherwise re-

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[177] Baltimore & Carolina Line v. Redman, 295 U.S. 654, 656–57 (1935) (Van Devanter, J.) (emphasis added).

[178] *Id.* at 657.

[179] Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

[180] Parsons v. Bedford, 28 U.S. 433, 446–47 (1830) (Story, J.):

> When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the constitution denominated in the third article "law;" not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit.

> examinable, in any court of the United States, than according to the rules of common law." This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner.[181]

C. The Modern Era of Physicians

The form and methodology of an inquiry by means of a jury of matrons is unsuitable to our modern age, and, indeed, even in Bathsheba Spooner's day.[182] So it was that the Sheriff of Worcester was commanded to have "two *men midwives*[] and twelve discreet and lawful matrons"[183] to "cause [Bathsheba Spooner] . . . diligently to be searched by said matrons, in the presence of the said men midwives, by the Breasts and Belly, and certify the truth whether she be quick with child or not, and if she be quick with child, how long she has so been."[184] Hence, even in Bathsheba's case, recourse was made to those with more medical expertise in the form or midwives,

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[181] *Id*. at 447–48. Justice Story continued:

> The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings. The judiciary act of 1789, ch. 20, sec. 17, has given to all the courts of the United States "power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law." And the appellate jurisdiction has also been amply given by the same act (sec. 22, 24) to this court, to redress errors of law; and for such errors to award a new trial, in suits at law which have been tried by a jury.
>
> Was it the intention of congress, by the general language of the act of 1824, to alter the appellate jurisdiction of this court, and to confer on it the power of granting a new trial by a re-examination of the facts tried by the jury? to enable it, after trial by jury, to do that in respect to the courts of the United States, sitting in Louisiana, which is denied to such courts sitting in all the other states in the union? We think not.

Id. at 448.

[182] "[J]ury of matrons . . . A jury of 'discreet and lawful women' impaneled to try a question of pregnancy, as when a woman sentenced to death pleads, in stay of execution, that she is pregnant." BLACK'S LAW DICTIONARY 987 (10th ed. 2014).

[183] 2 AMERICAN CRIMINAL TRIALS, *supra* note 1 (emphasis added).

[184] *Id*.

which did not escape the notice of commentators like the Harvard Law Review in 1889:

> It was hardly likely that the jury of matrons would be summoned again so long as Mrs. Spooner's case was fresh in mind. Moreover, the progress of the science of medicine has been so great during the past century that every year has seen it less expedient to resort to such clumsy means, when doctors can be had. It is not strange that the "Albany Law Journal" jeers at the Pennsylvania papers for suggesting that such a jury be summoned; "it is antiquated," is the taunt. It is possible, even, by an examination of the later cases, to discover a tendency to put questions of alleged pregnancy to doctors for decision. The writ in Mrs. Spooner's case, for example, added two "men midwives" to the twelve matrons—a departure from common-law practice not entirely happy, however, if we judge by the result. The jury of women in Anne Wycherley's case asked for and got the assistance of a surgeon . . . .In view of all these facts, it seems quite likely that a question of pregnancy arising to-day would be referred for decision directly to doctors.[185]

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[185] BOUVIER, *supra* note 166, at 45. In Professor Jeffrey Rosen's review of Clarke D. Forsythe's book, he complains that Forsythe does not answer the supposition of scholar Reva Siegel of Yale, which is, "[T]he reason a majority of states limited abortion in the late 19th century wasn't simply insights from 'medical science'; it was efforts by the all-male American Medical Association to protect its monopoly on pregnancy-related health care against competition from female midwives. The rule helped enshrine stereotypes that mothers should bear children rather than making autonomous decisions about their lives and careers." Jeffrey Rosen, *How the Court Made the Choice*, WALL ST. J., October 12–13, 2013, at C5–6 (reviewing CLARK D. FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF ROE V. WADE (2013)). This is a problematic argument by which a subjective discernment of alleged motivation and intent of legislators in centuries past can somehow render unconstitutional otherwise good law based on a rational governmental concerns. These types of arguments are a form of presentism, projecting the malleable values of our present culture into historical analysis. *See* BRAD S. GREGORY, THE UNINTENDED REFORMATION 127 (2012) ("In a worldview premised on individual autonomy as the teleological apotheosis of human history, locating the agency of resistance becomes a secular substitute for the salvation of scholars who reconstruct its redemptive exercise by their premodern subjects and thereby, through fashioning a suitable usable past, stand in vicarious solidarity with them."). Typically, these arguments are used to project a right of privacy into our legal history; but, as evidenced by the writ *de ventre inspiciendo*, there was no common law privacy with respect to pregnancy.

Quite likely indeed, as Professor Oldham recounts, "By the late nineteenth century, the obstetrician-gynecologist had come into existence as the recognized expert on the subject of pregnancy. With these developments, the jury of matrons became superfluous."[186] That said, in at least one state, the jury of matrons as an institution was already superseded by the medical profession by the late Eighteenth Century, namely, in the state of Virginia and the 1793 petition of Angela Barnett.[187]

"[D]e ventre inspiciendo [means] [a] writ allowing a presumptive heir to summon a jury of matron to verify the pregnance of a widow suspected of feigning the pregnancy to produce a supposed heir." BLACK'S LAW DICTIONARY, *supra* note 182, at 546. Additionally, the common law provided no expectation of privacy with regards to pregnancies out of wedlock: "[I]f any woman be delivered of a child, which if born alive should by law be a bastard; and endeavors privately to conceal it's death, by burying the child or the like; the mother so offending shall suffer death as in the case of murder, unless she can prove by one witness at least that the child was actually born dead." 4 W. BLACKSTONE, COMMENTARIES 198 (1st ed.). Moreover, the modern concept of privacy was not conceived until 1890 in an article co-authored by Louis Brandeis, and, at that, the authors argued that invasion of privacy was not a constitutional issue but of one of torts. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 211 (1890) ("and the law of tort must be resorted to").

Be that as it may, this 1889 "Note" from the *Harvard Law Review*, arguably independent of American Medical Association, pokes three holes in Siegel's argument, the first is that two midwives were utilized in Mrs. Spooner's case and the result was "not entirely happy." *See Notes*, *supra* note 166. Hence the opinion of the *Harvard Law Review* that "a question of pregnancy . . . be referred for decision directly to doctors." *Id.* The second is that in Mrs. Spooner's case two of the midwives were men; so assertions that all midwives were women is, ironically, just a stereotype. *Id.* Thirdly, the only exclusive female institution of the times was the jury of matrons (which was the real object of the ire of the *Harvard Law Review*, and rightly so "if we judge by the result"), an institution that, it may be said, "helped enshrine stereotypes that mothers should bear children rather than making autonomous decisions about their lives and careers." *Id. See also* Rosen, *supra* note 185. Additionally, Justice Blackmun's opinion in *Roe v. Wade* itself undercuts Siegel's argument with his review of the American Medical Association's Committee on Criminal Abortion during the mid-19th century: "In 1871 a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, 'We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less.'" Roe v. Wade, 410 U.S. 113, 141–42 (1973) (citations omitted).

[186] J. OLDHAM, *supra* note 93, at 113–14.

[187] *See* James Pylant, *"Pleading the Belly"—Angela Barnett Avoided 18th Century Death Sentence* (2005), http://www.genealogymagazine.com/plbeanbaav18.html [hereinafter PLEADING THE BELLY].

A report of Angela Barnett's case can be found in James Pylant's article *"Pleading the Belly"—Angela Barnett Avoided 18th Century Death Sentence*.[188] Pylant's research into Barnett's case relied heavily on a collection of Virginia state papers,[189] and the case has likely not been recorded in any other case books.[190]

Pylant prefaces his examination of Barnett's case with an introduction to "pleading the belly," and asserts, "An electronic database search of the Old Bailey, London, between 1674 to 1830, reveals two hundred and sixty-eight instances where women sentenced to death claimed pregnancy."[191] Pylant recounts that Angela was a "woman of color" convicted of the murder of a man, Peter Franklin,[192] who had suspected her of harboring fugitive slaves.[193] Franklin and a companion, Jesse Carpenter, entered into her house at night (under no apparent authority of law), whereupon Franklin allegedly whipped Barnett with a "cowskin," threatened to kill her, and approached her once more with a bludgeon.[194] Carpenter, as witness for the prosecution, contradicted this account, suggesting that Barnett's "abusive and violent" disposition provoked the otherwise "calm and persuasive" Franklin to threaten Angela with the cowskin,[195] although never actually striking her.[196] Both sides agreed that, at this juncture, Barnett picked up an instrument and struck her assailant on the side of the head, resulting in his death.[197] The jury found Barnett guilty of murder, and she was sentenced to death.[198] Her

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[188] *Id.*

[189] *Id*. at n.6.

[190] This illustrates the problem of drawing too much legal history from a select few cases that occur in *appellate* proceedings, as Cyril Means, Jr. did in his articles that were cited by Justice Blackmun in *Roe*, and became the problematic theoretical premise of the whole of abortion jurisprudence since then. *Roe*, 410 U.S. at 132–33. Likewise, Professor James Oldham argues that Justice Souter fell into the same error in *Markman v. Westview Instruments*, noting, "But a mere fraction of the cases at the trial level went forward to full court proceedings on motions or on reserved questions of law." J. OLDHAM, *supra* note 93 at 14 ("On the specific question in *Markman*, I have no doubt that the issue of the patent claim construction would have gone to the jury.").

[191] PLEADING THE BELLY, *supra* note 187.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] CALENDAR OF STATE PAPERS, *supra* note 150, at 343.

[196] *Id.* (Why "calm & persuasive" Peter Franklin held a cowskin in his hand in the first place is not explained).

[197] *Id.*

[198] *Id.* at 338.

story might have ended there if Jacob Valentine had paid his debts on time; as Barnett explained in her plea to the Governor:

> His Excellency Henry Lee, Esquire, Governor, and the Honourable the Executive of Virginia:
>
> The humble petition of Angelia Barnett Sheweth that your unhappy petioner now under sentence of Death, is with child by a certain Jacob Valentine, who was a debtor arrested by the sheriff of Henrico, by virtue of an execution, and committed to the Jail of this city about the first of November last, 1792. That your petitioner about that time was over persuaded, & yielded to the desires of the said Valentine in repeated acts of coition for the term of three weeks, when the said Valentine was discharged by payment of the debt; and again some time in the month of February last, 1793, he was committed to Jail as aforesaid, and from the connections your petitioner have had with him, she is fully confident of now bearing a live child, and therefore humbly & penitentially implores your generous mercy & Pardon, the more especially for the preservation of the Guiltless infant your unhappy petitioner now carries, which she humbly prays may not be murdered by her execution, but at least to grant her a respite until the child is born, and confiding in the mercy of your Excellencies, she continues to pray.[199]

Barnett's petition was granted, and she was examined to see if she was indeed "bearing a live child,"—a "Guiltless infant,"—but she was not examined by a jury of matrons.[200] Instead, she was examined by two doctors, Dr. James Currie and Dr. J. K. Read;[201] they produced a "Certificate as to Angelia Barnett" which read:

> Pursuant to the Commands of his Excellency, the Governor, we, the subscribers, attended at the Goal of the city and examined (per vaginam) Angelia under sentence of Death. We found the uteras in that situation which it generally is, in a gravid State—an enlargement of the Belly—& on an external application of the hand, we

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[199] *Id*. at 363–64.

[200] *Id.* at 364.

[201] PLEADING THE BELLY, *supra* note 187.

> distinctly felt the motion of the Fetus. On these principles, we give it as our opinion that the aforesaid Anglia is in a state of pregnancy.
>
> Given under our hands this 16th May, 1793.[202]

So it is recorded that, as early as 1793, in conducting examinations pursuant to a writ *de ventre inspiciendo*, examinations of the uterus were conducted "per vaginam."[203] Although the doctors did report "external application of the hand" resulting in feeling the motion of the fetus,[204] they were clear that the examination they performed, and on which they based their opinions, was much more thorough than merely feeling the abdomen.[205] Their examination was much more extensive than what would be contemplated by a simple affirmation of "'quickening' –the first recognizable movement of the fetus *in utero*," as Justice Blackmun described the term in *Roe v. Wade*.[206] Indeed, they went on to to defend their bill in regards:

> Doctor Read's compliments to Doct'r McClurgh; will be extremely obliged to him to bring forward his claim ag't the Council. He presumes, if the Executive were fully acquainted with the nature of the Examination, there would be little objection to the payment. He will be much obliged to D. McClurgh, if necessary, to explain the operation, which was per vaginam & fully disagreeable as a common operation in midwifery.[207]

It may well be that Bathsheba's second examination was also "per vaginam [and] fully disagreeable as a common operation in midwifery."[208] As Deborah Navas reported, "This examination was also painful and injurious; according to Maccarty's account, Bathsheba was 'greatly disordered' by it and could not attend the execution sermon a few days later."[209] By all accounts, Bathsheba was still in a very weak physical state

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[202] CALENDAR OF STATE PAPERS, s*upra* note 150, at 372.

[203] *Id.*

[204] *Id.*

[205] *Id.* at 372–73.

[206] Roe v. Wade, 410 U.S. 113, 132 (1973).

[207] CALENDAR OF STATE PAPERS, *supra* note 150, at 372–73.

[208] *Id.* at 373.

[209] NAVAS, *supra* note 162, at 90.

a week later at the execution.[210] Perhaps the terms of art of the common-law writ conveyed an understanding of a more extensive examination in Bathsheba's day than meets the modern eye—"diligently to be searched by said matrons, in the presence of the said men midwives, by the Breasts and Belly, and certify the truth whether she be quick with child or not, and if she be quick with child, how long she has so been."[211]

Also, Dr. Currie and Dr. Read made clear that the command of the Governor, with regards to Barnett, was to "ascertain her pregnancy,"[212] not whether she was "quick with child."[213] As a result of their report, Barnett's execution was postponed until she could deliver her child.[214] Barnett's case is one of the earliest accounts of doctors being utilized exclusively for the function previously performed by juries of matrons—a far greater "deviation from the common-law procedure"[215] than Bathsheba's case.

Even in England, there were similar changes in the offing.[216] Professor Thomas R. Forbes reported that, during this time period, "medical men were being called on more frequently to deliver babies as the competence of the accoucheur relative to that of the midwife was increasingly recognized" in England.[217] Hence, "medical men" were frequently employed along with juries of matrons pursuant to a writ *de ventre inspiciendo*.[218] Professor Forbes provides the example of Ann Hurle, who, after having been previously convicted of forgery, was examined by a jury for a capital

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[210] *Id*. at 98 ("She was 'exceedingly unwell,' according to the *Massachusetts Spy* account of the hanging."); 2 AMERICAN CRIMINAL TRIALS*, supra* note 1; 2 AMERICAN STATE TRIALS *supra* note 151("Mrs. Spooner was carried in a chaise, being then, as she had been for several days, exceedingly feeble.").

[211] 2 AMERICAN CRIMINAL TRIALS *supra* note 1.

[212] CALENDAR OF STATE PAPERS, *supra* note 150, at 373.

[213] NAVAS, *supra* note 162, at 90.

[214] This postponement also allowed some of the good and upstanding citizens of her county to make a number of requests to the governor to pardon her, which he granted. *See* PLEADING THE BELLY, *supra* note 187.

[215] *The Sovereign's Remedy*, *supra* note 10.

[216] *See* Forbes, *supra* note 142, at 23 ("[The civil and criminal laws of England required that a litigant or a prisoner convicted of a capital offence should be examined to determine whether she was pregnant.").

[217] *Id.* at 28.

[218] *Id.*

offense.[219] When the jury struggled to make up its mind, the sheriff summoned a physician who found that Hurle was not pregnant.[220]

Likewise, in the case of Mary Wright, who was sentenced to death for fatally poisoning her husband, a jury of twelve married, female matrons gave a verdict that she was "*not quick with child*."[221] Fortunately for Wright's child *en ventre sa mere*, three physicians, of whom it was said their eyes were "not closed to the absurd nature of this transaction,"[222] volunteered their services to examine Wright the following morning.[223] In a sworn statement to the court, they asserted Wright was "pregnant with a quick child,"[224] resulting in a reprieve being allowed. The three "surgeon-accoucheurs" had estimated she was in her fifth month, and in due time she delivered a healthy daughter.[225]

In addition to other such cases cited by Dr. Forbes, there is the case of "the notorious Christiana Edmunds," whom a jury found guilty of intentionally murdering a four-year-old boy by feeding him a chocolate cream containing strychnine.[226] Upon receiving a death sentence, Edmunds made a plea of pregnancy.[227] A jury of matrons was empanelled and met to consider their verdict, but requested the assistance of an "accoucheur" just thirty minutes after starting.[228] Professor Forbes let the Medical Times and Gazette tell the story:

> Some further delay occurred. It is rumoured that a policeman was sent for a stethoscope, but brought a telescope instead. At length the jury returned, and the brief verdict "Not" was returned . . . . The period of quickening is selected as that after which the convict may be respited, because it was formerly the opinion of Medical men—and is even now the opinion of the vulgar—that the foetus only receives life when the woman quickens. Quickening is now known to be such an extremely uncertain sign, occurring at

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[219] *Id.* at 29.
[220] *Id.*
[221] *Id*. (quotations omitted).
[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Id.* at 31.
[227] *Id.*
[228] *Id.*

> such varying periods during the pregnant state, that the audible pulsation of the foetal heart is invariably substituted, and this can be ascertained by none other than a Medical examination.[229]

Because the stethoscope had only been invented some fifty years before,[230] perhaps the newness of the instrument contributed to the confusion of the hapless policeman in returning with a telescope.[231] Still, this comic turn of events highlights the underlying evidentiary standard that the employment of physicians ushered in, the "audible pulsation of the foetal heart."[232]

Cases like the ones discussed in this Article illustrate some similarities and distinctions.[233] First of all, both Bathsheba Spooner and Angela Barnett attest to the child they bear as being a living human being with the inalienable right to life and innocent of the crimes charged of the mother.[234] As Bathsheba pleaded, "What I bear, and clearly perceive to be *animated*, is *innocent of the faults* of her who bears it, and has, I beg leave to say, *a right to the existence which God hath begun to give it.*"[235] Similarly, Barnett petitioned, "[S]he is fully confident of now bearing a *live* child, and therefore humbly & penitentially implores your generous mercy & Pardon, the more especially for the preservation of the *Guiltless infant* your unhappy petitioner now carries, which she humbly prays may not be *murdered* by her execution, but at least to grant her a respite until the child is born."[236]

In the *Arden* case, the defendant's plea of pregnancy in court was immediately granted. In *Spooner* and *Barnett*, pregnancy was discovered later, and an appeal was made to the Governor.[237] In the *Barnett* and *Arden* cases, fifteen years and seventeen years after the *Spooner* case, respectively,

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[229] *Id*. (citations omitted) ("The sentence of death on Christiana Edmunds was eventually remitted on the grounds of insanity.")

[230] *See* ENCYCLOPAEDIA BRITANNICA, *Stethoscope, available at* http://www.britannica.com/eb/article-9069644 (last visited April 20, 2015) ("[I]nvented by the French physician R.T.H. Laënnec . . . in 1819").

[231] *See supra* text accompanying note 229.

[232] *See* Forbes, *supra* note 142, at 29.

[233] *See supra* Part III.B–III.C. (discussing *Commonwealth Bathsheba v. Spooner*, *State v. Arden*, and *Angela Barnett's Plea of Pregnancy*).

[234] 2 AMERICAN CRIMINAL TRIALS *supra* note 1; CALENDAR OF STATE PAPERS, *supra* note 150, at 363–64.

[235] 2 AMERICAN CRIMINAL TRIALS *supra* note 1 (emphasis added).

[236] CALENDAR OF STATE PAPERS, *supra* note 150, at 363–64 (emphasis added).

[237] *Id. See also* 2 AMERICAN CRIMINAL TRIALS, *supra* note 1, at 48.

there is no mention of the quickening requirement as there was under English common law, indicating a shift of law from colonial times to the constitutional era.[238] Even Cyril Means, Jr. admitted that Bathsheba's case was the only case in American history where the quickening requirement was applied to a condemned woman.[239] Bathsheba's case (reported to be the first woman executed by American authorities after the Declaration of Independence),[240] preceded the adoption of the Massachusetts Constitution[241] and the United States Constitution.[242] Evidently, the use of the quickening requirement in plea of pregnancy cases is an aspect of the English common law that has proven to be "unsuited to the civil and political conditions"[243] of the United States.

It is undeniable that the inalienable right to life for children *en ventre sa mere* was protected by a jury's deliberations under English common law at the time the Sixth and Seventh Amendments were adopted.[244] Furthermore, only a couple years after the enactment of these amendments, the change from juries of matrons to examinations by physicians began.[245] Still, the

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[238] Philip Rafferty argues that, with regards to criminal prosecutions, "'Fetal Formation', and Not 'Quickening', Was the Common Law Criterion of When a Pregnant Woman Becomes 'Quick with Child' (Pregnant with a Live Child)." PHILIP A. RAFFERTY, *ROE V. WADE*: THE BIRTH OF A CONSTITUTIONAL RIGHT, 136–37 (1992), *available at* http://parafferty.com/Documents/Roe%20v%20Wade%20%20Philip%20Rafferty%201992.pdf.

For criminal prosecutions, fetal formation would indeed be proper forensic evidence of life that was in the womb. *See* State v. Merrill, 450 N.W.2d 318, 324 (Minn. 1990). And, the common law clearly allowed for criminal prosecutions where fetal formation was asserted, yet there was no record that quickening was alleged. *See* RAFFERTY, *supra* note 238, at 136–37, 529–30, 548–49, 551, 568, 571; J. DELLAPENNA, *supra* note 162, at 135–43.

But, post mortem forensic evidence of fetal formation would obviously not do for the purposes of carrying out a writ *de ventre inspiciendo*, which would require a thorough clinical diagnosis. *See* discussion *supra* Part III.C.

[239] *See The Phoenix*, *supra* note 132, at 378.

[240] *See Bathsheba Spooner*, WIKIPEDIA, http://en.wikipedia.org/wiki/Bathsheba_Spooner (last modified Aug. 13, 2014).

[241] 29 ENCYCLOPAEDIA BRITANNICA 280 (15th edition) (ratified in 1780).

[242] *Id*. at 197.

[243] Powell v. Alabama, 287 U.S. 45, 65 (1932). *See also* Twining v. New Jersey, 211 U.S. 78, 100–01 (1908) ("It does not follow, however, that a procedure settled in English law at the time of the emigration . . . is an essential element of due process of law.").

[244] *See* Karen G. Crockett & Miriam Hyman, *Live Birth: A Condition Precedent to Recognition of Rights*, 4 HOFSTRA L. REV.805, 806 (1976).

[245] PLEADING THE BELLY, *supra* note 187.

common-law right to trial by jury was preserved, and enhanced, by the innovation of physicians applying the advances of medical science to the task of their examinations.[246] The physicians appointed to Barnett's case were in direct response to her common law plea of pregnancy.[247] Hence, physicians were acting in the place of juries of matrons as finders-of-fact for the inquiry into whether or not the child *en ventre sa mere* was indeed alive, and no court of law ever set aside such a finding.[248] Lastly, the concept of physicians as fact finders for the point of fetal viability is central to abortion jurisprudence under the *Roe v. Wade* regime,[249] as Justice Blackmun himself asserted in *Colautti v. Franklin*:

> In these three cases [*Roe v.Wade*, *Doe v. Bolton*, and *Planned Parenthood of Central Missouri v. Danforth*], then, this Court has stressed viability, has declared *its determination to be a matter for medical judgment*, and has recognized that differing legal consequences ensue upon the near and far sides of that point in the human gestation period. We reaffirm these principles. Viability is reached when, *in the judgment of the attending physician* on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, *neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability*—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus.[250]

So too, our legal history bears out that the states, with regards to the determination of the existence of a living child *en ventre sa mere*, has "left the point flexible for anticipated advancements in medical skill,"[251] and

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[246] *See* 27 ALB. L. J. 325, 326 (1889).

[247] *See* PLEADING THE BELLY, *supra* note 187.

[248] *See* Colautti v. Franklin, 439 U.S. 379, 388–89 (1979).

[249] *See id*.

[250] *Id*. (emphasis added).

[251] *Id*. at 387 ("We did not undertake in *Roe* to examine the various factors that may enter into the determination of viability. We simply observed that, in the medical and scientific communities, a fetus is considered viable if it is 'potentially able to live outside the mother's womb, albeit with artificial aid.' We added that there must be a potentiality of 'meaningful

"recognized that differing legal consequences ensue upon the near and far sides of that point in the human gestation period."[252]

D. Statutory Legal Rights

It is also of some importance that statutory creation of new causes of action, unknown under the common law, are also incorporated under the constitutional protections for jury trials.[253] In its unanimous decision, the Court held that the Seventh Amendment applied to private civil lawsuits authorized under the Civil Rights Act of 1968.[254] Although the Court had never heard the issue at length, Justice Marshall cited four cases in which the Court applied the Seventh Amendment to statutory causes of action,[255] concluding, "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."[256]

A key issue in the ruling was the notion that the Seventh Amendment protections extend to legal rights, not just suits at common law:

> The Seventh Amendment provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time. Mr. Justice Story established the basic principle in 1830:
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> "The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence . . . .By common law, the Framers of the Amendment meant . . .not merely suits, which the common

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life,' not merely momentary survival. And we noted that viability 'is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.' We thus left the point flexible for anticipated advancements in medical skill.") (citations omitted).

[252] *Id*. at 388.

[253] Curtis v. Loether, 415 U.S. 189, 193–94 (1974) (Marshall, J., for a unanimous Court).

[254] *Id*. at 189–91.

[255] *Id*. at 193–94 ("Although the Court has apparently never discussed the issue at any length, we have often found the Seventh Amendment applicable to causes of action based on statutes.").

[256] *Id*. at 194.

> law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . .In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights."[257]

This inclusion of legal rights is of some consequence because, as discussed, juries of matrons have been replaced by physicians; starting in Virginia under its common law and exhibited through the various codifications of this common law right.[258] In addition to a number of state statutes so protecting the unborn child of a condemned woman,[259] a federal statute enacted in 1994 reads: "A sentence of death shall not be carried out

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[257] *Id*. at 192–93 (citing Parsons v. Bedford, 3 Pet. 433, 446–447 (1830) (alteration in original). In *Parsons*, it was argued that as Louisiana was a civil law state, not a common law, and so the Seventh Amendment did not apply:

> [The Seventh Amendment] was intended to guard the rights of citizens, proceeding according to the common law; and it only provides that the decisions of juries shall not be set aside except according to the common law. How can it apply or operate in a state where there is no common law, where the forms of proceeding under the common law are not known or permitted?

Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 438 (1830).

[258] J. OLDHAM, *supra* note 93 ("By the late nineteenth century, the obstetrician-gynecologist had come into existence as the recognized expert on the subject of pregnancy. With these developments, the jury of matrons became superfluous.").

[259] *See, e.g.*, ALA. CODE § 15-18-86 (LexisNexis 2011); ARIZ. REV. STAT ANN. § 13-4025 (2010); CAL. PENAL CODE §§ 3705, 3706 (West 2011); GA. CODE ANN § 17-10-39 (LexisNexis 2013) (The statute specifies pregnancy as determined by "one or more physicians."); IND. CODE § 35-38-6-10 (West 2012); MASS. GEN. L. CH. 279, § 62 (LexisNexis 2002); NEV. REV. STAT. § 176.465–.475 (LexisNexis 2011); N.Y. CORRECT. § 657 (McKinney 2014) (The statute requires that the superintendent of a correctional facility, when informed that a condemned woman might be pregnant, "shall appoint a qualified physician to examine the convicted person and determine if she is pregnant."); OHIO REV. CODE ANN. § 2949.31 (West 2006); S.D. CODIFIED LAWS §§ 23A-27A-27, 23A-27A-28 (West 2004), UTAH CODE § 77-19-8 (2)(c)(i) (LexisNexis 2012).

upon a woman while she is pregnant."[260] As Justice Gray succinctly stated in *Union Pacific R. Co. v. Botsford*:[261] "The *writ de ventre inspiciendo,* to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother."[262] Hence, "whatever might be the peculiar form" by which the legal right to life for the child *en ventre sa mere* is determined, whether by a jury of matrons or examination by physicians, this finding of fact by a special procedure independent of the court is protected by the Seventh Amendment.[263] Under

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[260] 18 U.S.C. § 3596 (2008).

[261] 141 U.S. 250 (1891).

[262] *Id.* at 253.

[263] Shortly after *Roe* was handed down, Laurence Tribe argued that only "wholly secular" reasons should be advanced for the destruction of "fetal 'life.'" Laurence H. Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 24–28 (1973). He contended that all reasoning seeking to limit abortion prior to viability is inherently based on religious views (and therefore easily dismissed as a violation of the Establishment Clause of the First Amendment) and that the biological fetal development is of no moral significance. *Id*. at 29. Tribe stated, "For just as the state is unable to distinguish postviability 'abortions' from infanticide, so it is unable—within the limits of the secular—to treat previability abortions as though they involved the murder of infants." *Id*. Apparently Professor Tribe totally ignored, or was otherwise unaware of, the historical use of juries of matrons to establish when life begins, as well as evidentiary proceedings presented to juries to determine when a prenatal life had been taken. There can hardly be a more "wholly secular" means for determining when life begins than a jury's deliberation.

Justice Stevens has echoed Professor Tribe's viewpoint that the Establishment Clause disestablishes any viewpoint pertaining to pre-viability abortion that might coincide with religious views (the balance of the First Amendment notwithstanding). Webster v. Reproductive Health Services, 492 U.S. 490, 568–69 (1989) (Stevens, J., concurring in part and dissenting in part); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 914–15 (1992) (Stevens, J., concurring in part and dissenting in part). *Contra* Harris v. McRae, 448 U.S. 297, 319 (1980) (Stewart, J.) ("It is well settled that 'a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive governmental entanglement with religion.' . . . [I]t does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.' . . . That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny . . . . In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.") (citations omitted).

the English common law, it was well-established practice at the time of the adoption of the Seventh Amendment to protect the legal rights of children *en ventre sa mere*.[264] As one English justice declared in 1740, "Nothing is more clear, than that this law considered a child in the mother's womb absolutely born, to all intents and purposes, for the child's benefit."[265]

IV. REMEDIES FOR INJUSTICE

A. Standing

"[S]tanding is built on a single basic idea - the idea of separation of powers." – Justice Sandra Day O'Connor[266]

The sovereign people hold an undiluted power to sit on juries.[267] This is a power for which our ancestors fought the Revolutionary War, and it is a power which had been jealously guarded until the *Roe v. Wade* opinion purloined from the people their historic role in making factual determinations of the existence of life in the womb.[268] Yet, *Gonzales v. Carhart*[269] has reaffirmed that the inquiry of whether or not there is a life in the womb is a factual one.[270] *In Planned Parenthood v. Ashcroft*,[271] one of the cases under review in *Gonzales*, the pro-abortion plaintiffs asserted, "[A]

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[264] *See* Doe v. Clark, [1795] 126 Eng. Rep. 617 (H.L.) 618; Trower v. Butts, [1823] 57 Eng. Rep. 72 (Ch.) 74.

[265] *In re* Holthausen, 26 N.Y.S.2d 140, 143, 145 (Sur. 1941) ("It has been the uniform and unvarying decision of all common law courts in respect of estate matters for at least the past two hundred years that a child *en ventre sa mere* is "born" and "alive" for all purposes for his benefit. In Wallis v. Hodson, 2 Atkyns 115, 118, 26 Eng. Reprint 472, decided on January 22, 1740, Lord Chancellor Hardwicke said "Nothing is more clear, than that this law considered a child in the mother's womb absolutely born, to all intents and purposes, for the child's benefit. Identical conceptions are found in many other English cases and in the early decisions in this State.") (citations omitted).

In his *Roe* opinion, Blackmun disingenuously dismissed the property rights of unborn children as being only contingent in nature and because the "[p]erfection of the interests involved . . . has generally been contingent upon live birth [. . .] the unborn have never been recognized in the law as persons in the whole sense." 410 U.S. 113, 162 (1973). This allegation of Justice Blackmun is refuted by the very articles he claims in support of this falsehood. *See* Roden, *supra* note 11, at 213–24.

[266] Allen v. Wright, 468 U.S. 737, 752 (1984).

[267] *See supra* Part II.

[268] *Roe*, 410 U.S. at 163.

[269] 550 U.S. 124 (2007).

[270] *Id.*

[271] 320 F. Supp. 2d 957 (2004).

previable fetus may nonetheless be 'living' if it has a detectable heartbeat or pulsating umbilical cord."[272] Judge Phyllis Hamilton of the Northern District of California ruled for the plaintiffs, finding that a "previable" fetus may indeed have life and citing trial evidence supporting that finding: "The fetus may still have a detectable heartbeat or pulsating umbilical cord when the uterine evacuation begins in any D & E or induction, and may be considered a 'living fetus.'"[273]

This led the Supreme Court to hold in *Gonzales* that "by common understanding and scientific terminology, a fetus *is a living organism* while within the womb, whether or not it is viable outside the womb. We do not understand this point to be contested by the parties." [274] Thereby, *Gonzales* reaffirmed the common law proposition that a factual determination of when life begins is a matter of law.[275] If there is any contested issue of fact in a case regarding the existence of life in the womb, it is a matter for a jury, or other independent finder-of-fact, to decide.

But, where a federal court clings to the legal fictions that the question of when life begins cannot be resolved in a court of law and that children *en ventre sa mere* merely possess "potential life,"[276] would the sovereign people have standing to challenge it? If a federal court denies the sovereign people their right to decide a factual question, does this create a "case or controversy"[277] giving the people, individually and collectively, "standing to challenge"[278] this denial? As Justice O'Connor stated in *Allen v. Wright*, "standing is built on a single basic idea—the idea of separation of powers."[279] More specifically, the focus of the Supreme Court has typically been the separation of the powers granted the federal government between legislative power, executive power, and the judicial power[280] and whether an exercise of judicial intervention precluding other branches of government from resolving the issue[281] represents an unconstitutional transfer of power

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[272] *Id.* at 977.

[273] *Id.* at 971 (citations omitted).

[274] *Gonzales*, 550 U.S at 147 (emphasis added) (citations omitted).

[275] *See id.*

[276] *Id*. at 150.

[277] *Id*. at 124.

[278] *Id*.

[279] Allen v. Wright, 468 U.S. 737, 752 (1984).

[280] Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992) (Scalia, J.).

[281] *Allen*, 468 U.S. at 752 ("These questions and any others relevant to the standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise power only "in the last resort, and as a necessity," and only when adjudication is "consistent

from one branch of government to the other,[282] or establishes the Supreme Court as administrative manager of the other branches.[283]

In contradistinction to these concerns, the right and power to sit on juries is retained by the people and not given to any branch of the federal government.[284] So, a denial of this jury right and power has, at its core, a fundamental violation of "the idea of separation of powers"[285] The denial of the people (or physicians as their proxies), as independent finders of fact is "an 'injury in fact'–an invasion of a legally-protected interest which is . . . concrete and particularized."[286] The denial of one's lawfully appointed position in our government is a justiciable injury in fact, as evidenced by the seminal case of *Marbury v. Madison*.[287] In that case, William Marbury moved for a mandamus to James Madison commanding him to deliver the

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with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.") (citations omitted).

[282] *Lujan*, 540 U.S. at 576–77 ("The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation of powers significance we have always said, the answer must be obvious: to permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and coequal department," and to become "'virtually continuing monitors of the wisdom and soundness of Executive action.'") (citations omitted).

[283] *Id*. at 577.

[284] *Supra* Part II.B.

[285] *Allen*, 468 U.S. at 752.

[286] *Lujan*, 540 U.S. at 560–61 (footnotes omitted) (citations omitted) ("Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision.").

[287] Marbury v. Madison, 5 U.S. 137 (1803).

commission as justice of the peace in the District of Columbia,[288] the withholding of which was held to be "violative of a vested legal right."[289]

The other two minimum requirements of standing are that there be "a causal connection between the injury and the conduct complained of," and an "injury" that can be "redressed by a favorable decision."[290] The denial by a judge of the people's historic right, with physicians as their proxies, to decide when life begins as independent finders of fact, would be an obvious "causal connection" which could be redressed by mandamus or other means.[291] In Bathsheba's case,[292] the lack of a competent exam by a physician was the "causal connection" to its unfortunate result, and, moreover, it would seem the impetus for the enactment of statutory law substituting exams by physicians for juries of matrons.[293] And, in England, where they retained the form of the jury of matrons longer than in America,[294] a fortunate result was achieved in Mary Wright's case[295] by the intervention and examination of three physicians whose eyes were "not closed to the absurd nature" of the exam by the jury of matrons.[296]

B. Impeachment

"[A]s long as the judges of the United States are obliged to express their opinions publicly, to give their reasons for them when called upon in the usual mode, and to stand responsible for them, not only to public opinion, but to a court of impeachment, I can apprehend very little danger of the laws being wrested to purposes of injustice." – Justice Benjamin Curtis[297]

In light of cases like *Gonzales* and *Planned Parenthood*, along with the judicial recognition that "a previable fetus may nonetheless be 'living' if it

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[288] *Id.* at 137–38.

[289] *See id.* at 162.

[290] *Lujan*, 540 U.S. at 560.

[291] *Id.*

[292] 2 AMERICAN STATE TRIALS *supra* note 151; 2 AMERICAN CRIMINAL TRIALS *supra* note 1.

[293] AMERICAN STATE TRIALS *supra* note 151; 2 AMERICAN CRIMINAL TRIALS *supra* note 1.

[294] Grace Elizabeth Woodall Taylor, *Jury Service for Women*, 12 U. FLA. L. REV. 224, 224–25 (1956).

[295] Forbes, *supra* note 142, at 29.

[296] *Id*.

[297] Sparf & Hansen v. United States, 156 U.S. 51, 107 (1895) (Curtis, J.) (emphasis added) (quoting United States v. Morris, 26 F. Cas. 1323 (C.C.D. Mass. 1851)).

has a detectable heartbeat or pulsating umbilical cord,"[298] it is incumbent on a judge applying federal law to apply this judicial notice; per the Federal Rules of Evidence:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.[299]

Under our Federal Rules of Civil Procedure, the Northern District of California's finding of fact could not have been cast aside unless plainly erroneous."[300] Furthermore, the Supreme Court in *Gonzales* went on to note, "[w]e do not understand this point to be contested by the parties."[301] Accordingly, under Rule 201 of the Federal Rules of Evidence, the Supreme Court has implicitly given this finding of fact judicial notice as it was "generally known," "not subject to reasonable dispute," and "can be accurately and readily determined"; i.e. either the heart is beating or it is not.[302]

Likewise, Justice Cardozo noted in *Ohio Bell Tel. v. Pub. Util. Comm*., "[c]ourts take judicial notice of matters of common knowledge."[303] Moreover, Justice Scalia stated in his *Planned Parenthood* dissent that courts "should rely only upon the facts that are contained in the record or that are properly subject to judicial notice."[304] Ergo, when the Supreme Court declared in *Gonzales* that, "by common understanding and scientific terminology, a fetus is a living organism while within the womb," this "common knowledge"[305] became a fact for courts to rely upon that is "properly subject to judicial notice."[306]

If there is any doubt of the existence of life under this standard, it is incumbent on a judge applying federal law to allow a procedure by a finder of fact independent of the court by which the existence of life in the womb

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[298] Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 977 (2004).

[299] FED. R. EVID. 201(b).

[300] FED. R. CIV. P. 52.

[301] Gonzales v. Carhart, 550 U.S. 124, 147 (2007).

[302] FED. R. EVID. 201(b).

[303] Ohio Bell Tel. v. Pub. Util. Comm., 301 U.S. 292, 301 (1937).

[304] Planned Parenthood v. Casey, 505 U.S. 833, 991 (1992) (Scalia, J., dissenting).

[305] *Ohio Bell Tel.*, 301 U.S. at 301.

[306] *Casey*, 505 U.S. at 991 (Scalia, J., dissenting).

can be determined as a matter of fact.[307] Likewise, it would be incumbent on a judge not to deny a petition by a physician as a proxy for the sovereign people, as an independent finder of fact, the historic right to decide when life begins where that is a matter of controversy.[308] Courts can no longer hide behind Justice Blackmun's "potential life" legal fiction.[309] To do so now, in the wake of *Gonzales*, ought to be make a federal judge liable for impeachment—which would be a proper exercise of the checks and balances that our Founding Fathers embedded in our Constitution.

This susceptibility of impeachment follows from the historical practice of utilizing juries of women, midwives, and physicians to make independent findings of fact as to the existence of a living child in the womb.[310] On at least three occasions, the *Trial of Samuel Chase* has been cited by a Supreme Court justice to prove up the proposition that juries rightfully hold the power to decide questions compounded of fact and law:[311] Justice Harlan in *Sparf & Hansen v. United States*,[312] Justice Black in his dissent in *Galloway v. United States*,[313] and Justice Scalia for an unanimous court in *United States v. Gaudin*.[314] So too, no Supreme Court justice has suggested that this impeachment charge against Justice Chase was illicit; the charge being: "endeavoring to wrest from the jury their indisputable right to hear argument, and determine the question of law, as well as the question of fact, involved in the verdict which they were required to give."[315]

Additionally, in *Sparf & Hansen*, the case explicitly ruling that juries in criminal trials did not have the power to decide on issues of pure law,[316] Justice Harlan cited *United States v. Morris*, a circuit opinion of Justice Benjamin Curtis (who would later write a devastating dissent in *Dred Scott*[317]) in which he came to the same conclusion.[318] Within his opinion, Justice Curtis ponders an argument put forth by the defendant: "A strong

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[307] Roden, *supra* note 11.

[308] *Id.*

[309] *See id.* at 244, adden. 270–73.

[310] *Id*.

[311] *Id.*

[312] Sparf v. United States, 156 U.S. 51, 69–70 (1895) (Harlan, J.).

[313] Galloway v. United States, 319 U.S. 372, 399 n.5 (1943) (Black, J., dissenting).

[314] United States v. Gaudin, 515 U.S. 506, 513 (1995) (Scalia, J.).

[315] CHARLES EVANS, REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE (Butler & George Keatinge eds., 1805).

[316] *Sparf*, 156 U.S. at 69–70.

[317] Dred Scott v. Sandford, 60 U.S. 393, 564 (1857) (Curtis, J., dissenting).

[318] *Sparf*, 156 U.S. at 69–70.

appeal has been made to the court, by one of the defendant's counsel, upon the ground that the exercise of this power by juries [to decide on issues of pure law] is important to the preservation of the rights and liberties of the citizen."[319] As Justice Harlan recounted:

> That view was urged upon Mr. Justice Curtis. After stating that if he conceived the reason assigned to be well founded, he would pause long before denying the existence of the power claimed, he said that a good deal of reflection had convinced him that the argument was the other way. He wisely observed that: "[A]s long as the judges of the United States are obliged to express their opinions publicly, to give their reasons for them when called upon in the usual mode, and to stand responsible for them, not only to public opinion, *but to a court of impeachment*, I can apprehend very little danger of the laws being wrested to purposes of injustice."[320]

The historic legal practice of jury of matron proceedings, or other proceedings by independent finders of fact, to ascertain the existence of life in the womb has been trampled upon to the detriment of the obvious rights of children *en ventre sa mere* and also to the power of the sovereign people to make such a finding of fact.[321] As Justice Harlan stated in *Sparf & Hansen*, "[U]p to the period of our separation from England, the fundamental definition of trials by jury depended on the universal maxim, without an exception, 'Ad quaestionem facti respondent juratores, ad quaestionem juris respondent judices.'"[322] That is to say, "Just as judges do not answer questions of fact, so jurors do not answer questions of law."[323] And, after our separation from England, juries retained the right to decide questions comprised of law and fact.[324] As such, by our historical standards,

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[319] United States. v. Morris, 26 F. Cas. 1323 (C.C.D. Mass. 1851).

[320] *Sparf*, 156 U.S. 106–07 (citing *Morris*, 26 F. Cas.) (emphasis added)).

[321] *Id*.

[322] *Id.* at 82.

[323] JAMES A. BALLENTINE, BALLENTINE'S LAW DICTIONARY, 408–09 (1916).

[324] *Sparf*, 156 U.S. 90 ("The contrary view rests, as we think, in large part upon expressions of certain judges and writers enforcing the principle, that when the question is *compounded of law and fact,* a general verdict, *ex necessitate*, disposes of the case in hand, both as to law and fact. That is what Lord Somers meant when he said in his essay on 'The Security of Englishmen's Lives, or the Trust, Power, and Duty of the Grand Juries of England,' that jurors only 'are the judges from whose sentence the indicted are to expect life

impeachment proceedings are warranted to bring the full weight of our system of checks and balances upon this egregious injustice.[325]

V. CONCLUSION: "THINGS WHICH EQUAL THE SAME THING ALSO EQUAL ONE ANOTHER."[326]

"[T]he people are the sovereign of this country."[327] And, although the people delegated many powers to the federal government in the U.S. Constitution, they retained for themselves "the benefits of Trial by Jury"[328] under Section 2 of Article 3, the Sixth Amendment,[329] and the Seventh Amendment.[330] By these constitutional provisions, not only was the right to

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or death,' and that, 'by finding guilty or not guilty, they do complicately resolve both law and fact.' In the speeches of many statesmen and in the utterances of many jurists will be found the general observation that when law and fact are 'blended' their combined consideration is for the jury, and a verdict of guilty or not guilty will determine both for the particular case in hand.") (citations omitted).

[325] *Id.*

[326] EUCLID'S ELEMENTS 2 (Thomas L. Heathtrans., Dana Densmore ed., 2010).

[327] Chisholm v. Georgia, 2 U.S. 419, 479 (1793) (Jay, C.J.).

[328] THE DECLARATION OF INDEPENDENCE (U.S. 1776).

[329] *See* United States v. Gaudin, 515 U.S. 506, 519 (1995) (Scalia, J., for a unanimous Court) ("Though uniform postratification practice can shed light upon the meaning of an ambiguous constitutional provision, the practice here is not uniform, and the core meaning of the constitutional guarantees [of the Fifth and Sixth Amendments] is unambiguous."); Duncan v. Louisiana, 391 U.S. 145, 153 (1968) (White, J.) ("Objections to the Constitution because of the absence of a bill of rights were met by the immediate submission and adoption of the Bill of Rights. Included was the Sixth Amendment . . . ."); Galloway v. United States, 319 U.S. 372, 398 (1943) (Black, J., dissenting) ("[I]n response to widespread demands from the various State Constitutional Conventions, the first Congress adopted the Bill of Rights containing the Sixth and Seventh Amendments, intended to save trial in both criminal and common law cases from legislative or judicial abridgment."); Thompson v. Utah, 170 U.S. 343, 350 (1898) ("It must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument.").

[330] Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) (Souter, J., for a unanimous Court) ("Since Justice Story's day, *United States v. Wonson*, (CC Mass. 1812), we have understood that 'the right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted.' . . . If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve [under the Seventh Amendment] the substance of the common-law right as it existed in 1791.") (alteration in original); Curtis v. Loether, 415 U.S. 189, 193 (1974) (Marshall, J., for a unanimous Court) ("Although the thrust of the [Seventh]

a trial—a "judgment of his peers,"[331]—guaranteed to a defendant or litigant, but the power to sit on juries and to be the finder of fact was reserved to the people as an unperturbed power.[332] These constitutional guarantees are to be understood "with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of" the Constitution.[333]

At the time of the adoption of the Constitution, the people retained the power to determine when life began in the womb by means of juries of matrons.[334] A jury of matrons was impaneled pursuant to a writ *de ventre inspiciendo* in response to a plea of pregnancy made by a condemned woman or a plea made on her behalf "to ascertain whether a woman convicted of a capital crime was quick with child . . . in order to guard against the taking of the life of an unborn child for the crime of the mother."[335] Thereby, as a matter of legal history, the sovereign people retained under their jury powers the right to be the finder-of-fact if any controversy arose over the existence of life in the womb.[336] And, if as a consequence of this proceeding, the existence of a living child *en ventre sa mere* was established, the equal

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Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time."); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) (Van Devanter, J.) ("The right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted. The [Seventh] amendment not only preserves that right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of reexamination existing under the common law, and to that end declares that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.'"); Dimick v. Schiedt, 293 U.S. 474, 476 (1935) (Sutherland, J.) ("In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.").

[331] MAGNA CARTA c.39 (1215); NORTHWEST ORDINANCE, art. 2 (July 13, 1787).

[332] *See* MAGNA CARTA c.39 (1215).

[333] Thompson v. Utah, 170 U.S. 343, 350 (1898) ("It must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument.").

[334] *See* Union Pac Ry. Co. v. Botsford, 141 U.S. 250, 253 (1891) (Gray, J.).

[335] *Id.*

[336] *Id.*

protection[337] of the law was brought to bear "to all intents and purposes, for the child's benefit."[338]

Although modern statutes have replaced the form of the finders of fact in such situations with physicians,[339] that change had already taken place under the common law of at least one state two years after the enactment of the Sixth and Seventh Amendments.[340] The fact that the change from juries of matrons to examinations by physicians began under the common law—contemporaneous with the enactment of the Sixth and Seventh Amendments—illustrates that the "substance of the common-law right of trial by jury" was preserved and enhanced in the form of physicians applying the advances of medical science to the task of their examinations.[341] In our system of government, with the people as the `sovereign, the equal protection owed to children *en ventre sa mere* cannot be denied without undermining the cornerstone of our society—the unalienable right to life that sovereign people owe to one another.[342] Indeed, the very phrase "children *en ventre sa mere*," a middle-French relic of the common law from the time of the Norman Conquest, is pregnant with intimations of equal protection that have existed for centuries.[343]

It is becoming increasingly obvious to anyone who makes a thoughtful examination of *Roe v. Wade* that its arguments are unworkable. One writer

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[337] As pointed out by legal scholar Philip A. Rafferty, Justice Blackmun did not engage in any meaningful analysis of unborn children's status under the Equal Protection Clause in *Roe*. *See* RAFFERTY, *supra* note 238, at 229–30 ("It is, therefore, somewhat strange that the Court in *Roe* did not see fit to address the issue of whether the fetus qualifies as an equal protection clause person."). Justice Blackmon only mentions the Equal Protection Clause once, in a general description of the Fourteenth Amendment, and nowhere else. *See* Roe v. Wade, 410 U.S. 113, 157 (1973) ("The Constitution does not define 'person' in so many words. . . . The word also appears both in the Due Process Clause and in the Equal Protection Clause."). Whereas, in *Weber v. Aetna Casualty & Surety Co*., the Supreme Court held that there was an equal protection duty owed to an *unborn* illegitimate child. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 169 n.7 (1972) ("We think a posthumously born illegitimate child should be treated the same as a posthumously born legitimate child."). *See also* Roden, *supra* note 11, at 250–55.

[338] *In re* Holthausen, 26 N.Y.S.2d 140, 143, 145 (Sur. 1941).

[339] *See* state statutes cited *supra* note 337.

[340] *See id.*

[341] *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996); Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935).

[342] J. OLDHAM, *supra* note 93.

[343] *See* BARRON'S LAW DICTIONARY, *supra* note 103. *See also* text accompanying note 265.

in an American Bar journal, taking notice of the Unborn Victims of Violence Act ("[T]he term 'unborn child' means a child in utero, and the term 'child in utero' or 'child, who is in utero' means a member of the species homo sapiens, at any stage of development, who is carried in the womb")[344], *McArthur v. Scott* ("the Rule Against Perpetuities gives rights to children not yet conceived")[345], and *Weber v. Aetna Casualty & Surety* ("We think a posthumously born illegitimate child should be treated the same as a posthumously born legitimate child . . . .")[346], observed:

> Both historic and modern courts have recognized the unborn as persons. For instance, consider the property Rule Against Perpetuities, which treats even an unconceived child like a human being, capable of inheriting property. Furthermore, the Supreme Court itself has applied Due Process and Equal Protection rights to the unborn.[347]

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[344] Hoffman, *You Say Adoption, I Say Objection: Why the Word War Over Embryo Disposition Is More Than Just Semantics*, 46 FAM. L. Q., No. 3, 397, 415 n.104 (Fall 2012) (citing Unborn Victims of Violence Act, 18 U.S.C. § 1841(d) (2004)), *available at* http://www.americanbar.org/content/dam/aba/publications/family_law_quarterly/vol46/3fall12_hoffman.authcheckdam.pdf (last visited April 20, 2015).

[345] *Id*. at n.106 (citing McArthur v. Scott, 113 U.S. 340, 384 (1884)).

[346] *Id*. at n.106 (citing Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 169 n.7 (1972)).

[347] *Id*. *See also* Astrue v. Capato, 132 S. Ct. 2021, 2032 (2012) ("[U]nder federal law, a child conceived shortly before her father's death may be eligible for benefits even though she never actually received her father's support."); 5 U.S.C. § 8101(9) (2012) ("posthumous children" of deceased federal employees are entitled to survivor benefits); Sox v. United States, 187 F. Supp. 465, 465 (E.D.S.C. 1960) (an "[a]ction against [the] United States under [the] Federal Torts Claims Act for prenatal injuries allegedly sustained when [an] automobile in which plaintiff's mother was a passenger was struck by [a] Unites States Army automobile driven by a military policeman."). While in the sixth month of gestation, the plaintiff in *Sox* "was severely and permanently injured and deprived of her ability to see, talk, and think for herself, use her limbs, or control the use of her muscles, as a result of the collision," for which the court awarded her $260,000. *Id*. at 465–66. Also in 1960, a federal court in a diversity action ruled an unborn child was a "person" under a state's wrongful death state on the basis that this was the majority rule of the states. Wendt v. Lillo, 182 F. Supp. 56, 61 (N.D. Iowa 1960) (citing Preston v. Aetna Life Ins. Co., 174 F.2d 10, 16 (7th Cir. 1949)) ("It has been held that where state law is in doubt a federal court is justified in assuming that the supreme court of the state will follow the majority rule."). So too, at the time *Roe v. Wade* was decided, children *en ventre sa mere* were held to be separate legal entities from their mothers, "as much a person in the street as the mother," in forty-nine states; as a result of "the most

But the most egregious error in *Roe v. Wade* is that the first case cited by Justice Blackmun to establish the alleged right to "privacy," *Union Pacific R. Co. v. Botsford*,[348] affirms the equal protection of the law afforded children *en ventre sa mere* under the common law, undermining the entirety of *Roe v. Wade:* "The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother."[349] As the daughter of the President of the Stamp Act Congress, Bathsheba Spooner, beseeched in her plea of pregnancy:

> What I bear, and clearly perceive to be animated, is innocent of the faults of her who bears it, and has, I beg leave to say, a right to the existence which God has begun to give it. Your honors' humane *christian* principles, I am very certain, must lead you to desire to preserve life, even in this its miniature state, rather than destroy it. [350]

And, perhaps that is the crux of the problem; there exists too few justices in power informed by "humane *[C]hristian* principles" who "desire to preserve life… rather than destroy it."[351] There is a term for this unlawful destruction of human life, and Angela Barnett put a name to it when she made her plea of pregnancy:

> "[S]he is fully confident of now bearing a *live* child, and therefore humbly & penitentially implores your generous mercy & Pardon, the more especially for the preservation

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spectacular abrupt reversal of a well-settled rule in the whole history of the law of torts." Stetson v. Easterling, 161 S.E.2d 531, 533 (N.C. 1968) (quoting WILLIAM L.W. PROSSER, HANDBOOK OF THE LAW OF TORTS 355–56 (3d ed. 1964)). The only remaining state was Alabama, which had not denied recovery in a modern decision either. *Id*. *See also* Gregory J. Roden, *Prenatal Tort Law and the Personhood of the Unborn Child: A Separate Legal Existence*, 16 ST. THOMAS L. REV. 207, 268–69 (2003).

[348] 141 U.S. 250 (1891); Roe v. Wade, 410 U.S. 113, 152 (1973). So too, Clarke Forsythe noted, sadly, "The scope of the abortion right that the Justices created in *Roe* and *Doe* isolates the United States as one of only four nations out of 195 in the world that allows abortion for any reason after fetal viability. Those four are China, North Korea, Canada, and the United States." Clark Forsythe, *The Medical Assumption at the Foundation of Roe v. Wade & Its Implications for Women's Health*, 71 WASH. & LEE L. REV. 827, 849 (2014).

[349] Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 253 (1891).

[350] 2 AMERICAN CRIMINAL TRIALS *supra* note 1, at 49–50.

[351] NAVAS, *supra* note 162.

> of the *Guiltless infant* your unhappy petitioner now carries, which she humbly prays may not be *murdered* by her execution, but at least to grant her a respite until the child is born."[352]

The Supreme Court affirmed in *Gonzales v. Carhart* that human life equals a living organism with a pulsating human heart.[353] Thereby, the Supreme Court obliterated the foundation of the *Roe v. Wade* opinion that "the difficult question of when life begins"[354] could not be resolved in a court of law and that children *en ventre sa mere* possessed only "*potential* life."[355] Moreover, the Supreme Court declared in *Gonzales* that, "by common understanding and scientific terminology, a fetus is a living organism while within the womb,"[356] this "common knowledge"[357] became a fact that is "properly subject to judicial notice" that courts "should rely . . . upon."[358] If there is a question of fact, against this objective standard of whether the child *en ventre sa mere* possesses a pulsating heart, then the court should appoint physicians to do an independent investigation in their roles as fact finders on behalf of the people, as has been done since *Angela Barnett's Plea of Pregnancy* in 1793. By juries of matrons or physicians, as independent finders of fact, it was the sovereign people that historically determined when

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[352] CALENDAR OF STATE PAPERS, *supra* note 150, at 363–64 (emphasis added). Abortion was held to be homicide by the ancient common law: "Bracton took the position that abortion by blow or poison was homicide 'if the foetus be already formed and animated, and particularly if it be animated.'" Roe v. Wade, 410 U.S. 113, 134 n.23 (1973) (quoting HENRICI BRACTON, 2 DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 279 (Travers Twiss ed. 1879). A later translation phrases Bracton's position as, "if the foetus is already formed or quickened, especially if it is quickened.'" *Id.* But for *Roe*, it is within the power of the states to so criminalize abortions; the California Penal Code proscribes, "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought," and carves out an exception for abortion. CAL. PENAL CODE § 187(a) (West Supp. 2015). Likewise, the Minnesota Supreme Court affirmed a conviction for the murder of a 28-day-old embryo. State v. Merrill, 450 N.W.2d 318, 322 (Minn. 1990). The court rejected the defendant's argument that the statute violated *Roe v. Wade* by finding he was not similarly situated to the woman and her abortionist, and thereby the defendant not allowed such an extension of equal protection. *Id*. at 321–22.

[353] Gonzales v. Carhart, 550 U.S. 124, 156–57 (2007).

[354] *Roe*, 410 U.S. at 159.

[355] *Id*. at 150.

[356] *Gonzales*, 550 U.S. at 147 (Kennedy, J.).

[357] Ohio Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 301 (1937).

[358] Planned Parenthood v. Casey, 505 U.S. 833, 991 (1992) (Scalia, J., dissenting).

such life began, and with that determination came the equal protection of the law—the state action of the execution was stayed until the woman could deliver her child.[359] To deny such an exercise of historical equal protection is to put an axe to the roots of the Liberty Tree.[360] That is because, in a nation where the people are the sovereign either equal protection applies to all or the republic degenerates into factional[361] tyranny.

From the three cases previously examined, which were contemporaneous to the enactment of the Sixth and Seventh Amendments, *Commonwealth v. Bathsheba Spooner*, *State v. Arden*, and *Angela Barnett's Plea of Pregnancy*, it is a matter of our legal history that jury protections were extended to children *en ventre sa mere* and, hence, were encapsulated in these amendments.[362] As was recounted in Justice Black's dissent in *Galloway v. United States*, Justice Chase was charged in his impeachment trial for an alleged failure to allow "a jury the right to determine both the law and the fact in a criminal case[363]—a charge that he vigorously denied as a matter of fact, tacitly conceding the legality of the charge.[364] Consequently, the sovereign people have every right to seek the vindication of their right as finders of fact to answer the not so "difficult question" of when life begins, including the impeachment of judges who deny said right.[365]

Euclid postulated, "Things which are equal to the same thing are also equal to one another."[366] Life inside the womb and outside the womb both possess the same thing, a beating heart.[367] As one state supreme court

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[359] *See supra* Part III.

[360] *See* Hopt v. Utah, 110 U.S. 574, 579 (1883) (Harlan, J.) ("The public has an interest in . . . life and liberty.").

[361] THE FEDERALIST NO. 10, at 43 (James Madison) ("By a faction I understand a number of citizens, whether accounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.")

[362] *See* U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI; U.S. CONST. amend. VII.

[363] Galloway v. United States, 319 U.S. 372, 399 n.5 (1943) (Black, J., dissenting).

[364] Whereas, Justice Chase defended a judge's right to render opinions on issues of law, which was properly within the scope of his duties, and was not an impeachable offense should that opinion later deemed to be incorrect. CHARLES EVANS, REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE app. 14 (Butler & George Keatinge eds., 1805).

[365] Roe v. Wade, 410 U.S. 113, 159 (1973).

[366] EUCLID'S ELEMENTS *supra* note 326.

[367] Peter M. Doubilet, M.D., et al., *Diagnostic Criteria for Nonviable Pregnancy Early in the First Trimester*, 369 NEW ENG. J. MED. 1443, 1445 (2013).

posited: "To have life, as that term is commonly understood, means to have the property of all living things to grow, to become."[368] Accordingly, children *en ventre sa mere*, having vital signs of life equal to persons born, are equal to them before the law; they are *in utero* Americans.[369] In the U.S., with the people as the sovereign, the equal protection of *in utero* Americans cannot be denied without undermining the cornerstone of that society—the unalienable right to life for all.[370] As Justice Marshall Harlan succinctly stated:

> The natural life, says Blackstone, "cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures merely upon their own authority." The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law.[371]

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[368] State v. Merrill, 450 N.W.2d 318, 324 (Minn. 1990).

[369] *Id.* *See also* U.S. CONST. amend. V; U.S. CONST. amend. XIV.

[370] *See* Chisholm v. Georgia, 2 U.S. 419, 479 (1793) (Jay, C.J.) ("[T]he people are the sovereign of this country."). *See also* Hopt v. Utah, 110 U.S. 574, 579 (1884) (Harlan, J.) ("The public has an interest in . . . life and liberty. Neither can be lawfully taken except in the mode prescribed by law.").

[371] *Hopt*, 110 U.S. at 579 (Harlan, J.) (citation omitted).