NO. 70-18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

JANE ROE, et al.,

Appellants

vs.

HENRY WADE,

Appellee

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF AMICUS CURIAE ON BEHALF OF ASSOCIATION OF TEXAS DIOCESAN ATTORNEYS, IN SUPPORT OF APPELLEE

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October 15, 1971

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INTEREST OF AMICUS CURIAE

The Association of Texas Diocesan Attorneys appears as amicus curiae with the written consent of both parties, given in letters which have been filed with the Clerk of this Court. The Association is organized to provide mutual aid and benefit for its members in dealing with all problems of a legal nature relating to bishops, priests, religious, dioceses, parishes, orders, congregations, societies in the Roman Catholic Church, and their work, and all that relates thereto. The Association has been in existence for a number of years and has an active voting membership consisting of licensed Texas lawyers designated by their respective Ordinaries. While subserving the end for which it was organized, the Association is an autonomous one and independent of the above-mentioned Church. One of the legal problems relating to the named offices, divisions, and societies of the Church with which they, and thus the Association, are concerned is the problem of abortion. The position of the Roman Catholic Church on abortion, long since taken, was elaborated for the first time by a general council of this Church, the Second Vatican Council, and promulgated by Pope Paul Paul VI on December 5, 1965. It stated:

> "Life from its conception is to be guarded with the greatest care. Abortion and infanticide are horrible crimes." Second Vatican Council, De ecclesia in mundo huius temporis (Guadium et spes), sec. 51.

The Roman Catholic Church in the United States and the amicus Association seek to encourage and foster the rights guaranteed by the Constitution of the United States and endeavor to vindicate those rights whenever threatened.

Amicus appears here because of its conviction that unborn children have been deprived by the decision of the court below of the protection of a valid state statute prohibiting abortion except in defined circumstances with the effect of denying their federal constitutional right to life and all other federal and state rights consequent upon the enjoyment of this right.

STATEMENT OF THE CASE

Amicus respectfully refers the Court to the statements of the case incorporated in the brief for appellants but asserts that the statement of appellants contained in their last sentence on page 15 of their brief is incorrect insofar as it advances the argument that the issuance of the judgment by the lower court in declining to enforce its declaratory judgment was one "without meaningful effect." Whether or not that judgment was without meaningful effect depends upon the resolution of constitutional issues presented in this case and focused upon in the brief of amicus.

QUESTIONS PRESENTED

1. the unborn child must or may reasonably be viewed by the State of Texas as a person for the purposes of giving effect through statutory and decisional law to the safeguards of the person contained in the Constitution of the United States as expressed in the Fourth Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendment, and the Ninth Amendment?

2. Whether, in the event the unborn child must or may reasonably be viewed by the State of Texas as a person for the purposes of giving effect to the safeguards of the person in the Fourth, Fifth, Fourteenth, and Ninth Amendments, the unborn child has a right to life under these amendments vis-a-vis its single mother or married parents who desire to terminate its life that this State has reasonably protected through Articles 1191-1194 and 1196 of the Texas Penal Code, which prohibit the performance of abortions unless "procured or attempted by medical advice for the purpose of saving the life of the mother"?

3. Whether, in the event the unborn child has a right to life protected by the Fourth, Fifth, Fourteenth, and Ninth Amendments but Articles 1191-1194 and 1196 of the Texas Penal Code, although directed to protection of that

life, are held to be unconstitutional and to be given no further operation, a federal court can constitutionally delegate the power of decision-making with respect to the continued enjoyment by unborn children of their right to life to private persons, viz., single women, married persons, and physicians such as the appellants in this case without making provision for the grounds upon which abortions may constitutionally be secured or performed and for official institutions to administer such standards in accordance with the requirements of procedural due process?

SUMMARY OF ARGUMENT

Although there are numerous issues involved in this case, this brief will address itself only to three, so as to avoid repetition of the arguments presented by appellee and by other briefs of amicus curiae. We believe that the time is ripe for this Court to determine that the unborn child or foetus is a person for the purpose of administering the safeguards of the person contained in the Fifth, Fourteenth, and Ninth Amendments; that the unborn child, however unwanted or considered to be a burden by its parents, has a constitutionally protected right to life; and that the protection of their lives accorded by a state to unborn children through statutory provisions like Articles 1191-1194 and 1196 of the Texas Penal Code is a reasonable protection that a state can constitutionally provide those children. Stating the last proposition differently, the protection of the unborn child or foetus under statutory provisions like Articles 1191-1194 and 1196 of the Texas Penal Code does not unreasonably impair the personal freedom of married couples or of single women, their right to determine the number and spacing of their children, or their rights to marital privacy, personal privacy, or physical privacy so far as these are constitutionally recognized. Neither do these statutory provisions unreasonably impair the constitutional right of physicians to administer health care to women.

Most of the arguments by appellants and amicus curiae in support of appellants proceed almost exclusively

to consider the constitutional rights of married couples and of single women and to analyze the applicable constitutional provisions as well as the judicial gloss upon them without really considering whether, for the purpose of administering the constitutional safeguards of the person, the unborn child or foetus is a person and has the right to life as a matter of federal constitutional right. It is the position of amicus that the unborn child or foetus possesses the status of a person and is entitled to protection of its life as a matter of fundamental federal constitutional right. This court cannot adequately dispose of this case on the merits without a decision upon these and related matters.

Amicus urges this Court to render a decision holding that the three-judge court erred in holding that Articles 1191-1194 and 1196 of the Texas Penal Code are unconstitutional (1) insofar as that decision was reached without recognition that the unborn child or foetus is a person within the meaning of and has a right to life protected by the constitutional safeguards of the person contained in the Constitution of the United States and, most especially, in its Fifth, Fourteenth, and Ninth Amendments; (2) insofar as that court held the right of single women and married persons to choose whether to have children, as protected by the Fourteenth Amendment, was infringed by the above articles; and (3) insofar as the court did not apply in favor of unborn children and the protection of their right to life the same constitutional standard it applied "under the Ninth Amendment" in favor of single women and married persons and their right to choose whether to have children.

ARGUMENT

POINT ONE

THE UNBORN CHILD OR FOETUS IS OR MAY BE REASONABLY TREATED BY THE STATE AS A PERSON WITHIN THE MEANING OF THE CONSTITUTIONAL SAFEGUARDS OF THE PERSON CONTAINED IN THE CONSTITUTION OF THE UNITED STATES, AND ESPECIALLY IN THE FOURTH, FIFTH, NINTH, AND FOURTEENTH AMENDMENTS.

A. The Stance From Which The Court Should Approach This Constitutional Issue

In Application of Yamashita, 327 U.S. 1 (1946) the petitioner, a defeated general of a recent enemy nation had been sentenced to hang by a United States military commission, asked this Court to consider the issue of whether or not, as he contended, he, as a person, had been deprived of his rights to a fair trial in violation of the Due Process Clause of the Fifth Amendment by the action of that commission in admitting in evidence of depositions, affidavits and hearsay and opinion evidence. This Court, in a decision by a divided panel that had been subjected to extensive criticism, refused to pass upon this contention, without even determining whether the petitioner was a "person" entitled to invoke the protection of the clause invoked. In response to the petitioner's contention, the Court simply stated:

> "We have considered, but find it unnecessary to discuss other contentions which we find to be without merit." 327 U.S. at 25.

This case, as it has been handled by the lower court, is very similar to the Yamashita case. It involves a party, here a state officer, who impliedly asserted before the lower tribunal that a certain class of human beings, here unborn children, are "persons" within the meaning of the Due Process Clauses of the Fifth and Fourteenth Amendments; that these persons have a right to life protected by these clauses; that the State has a right to enact an abortion law to protect that constitutional right; and that the abortion law, as enacted, does not violate the Fourth, Fifth, Fourteenth, or Ninth Amendments insofar as single women and married couples also have constitutional rights protected by these provisions. The lower court, as did this Court in the Yamashita case, did not address itself to the central, primordial constitutional issues that had been properly raised by one of the parties in the case, here the appellee. It is the position of amicus that the decisional process utilized by the lower court was a denial of procedural due process of law to appellee and to the

unborn children whose lives were sought to be protected by the statute appellee was attempting to defend as to its constitutionality. Since what the lower court did in this case follows the precedent for that action contained in Yamashita, amicus urges this Court to overrule the latter case at least insofar as it seems to authorize what the lower court did.

Mr. Justice Rutledge, in a dissenting opinion in the Yamashita case, stated the point of view that must surely control consideration of the issues by this Court in this case. Referring to the fact that the decision was "unprecedented in our history," he stated:

> "The novelty is legal as well as historical. We are on strange ground. Precedent is not all-controlling in law. There must be room for growth, since every precedent has an origin. But it is the essence of our tradition for judges, when they stand at the end of the marked way, to go forward with caution keeping sight, so far as they are able, upon the great landmarks left behind and the direction they point ahead. If, as may be hoped, we are now to enter upon a new era of law in the world, it becomes more important than ever before for the nations creating that system to observe their greatest traditions of administering justice, including this one, both in their judging and in their new creation. The proceedings in this case veer so far from some of our time-tested road signs that I cannot take the large strides validating them would demand.
>
> "...I am completely unable to accept or to understand the Court's ruling concerning the applicability of the due process clause of the Fifth Amendment to this case. Not heretofore has it been held that any human being is beyond its universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy

belligerents, it can be pushed back wider for others, perhaps ultimately for all.

"The Court does not declare expressly that petitioner as an enemy belligerent has no constitutional rights, a ruling I could understand but not accept. Neither does it affirm that he has some, if but little, constitutional protection. Nor does the Court defend what was done. I think the effect of what it does is in substance to deny him all such safeguards. And this is the great issue in the cause." 327 U.S. at 43, 79.

In this case this Court once again, as in Yamashita, stands on strange ground and at the end of the marked way. The great issue in this case is whether the unborn child or foetus is a person within the meaning of the constitutional safeguards of the person contained in the Constitution of the United States, and especially in its Fourth, Fifth, Fourteenth, and Ninth Amendments. For, if the unborn child is a person for constitutional purposes, the whole framework of argument and decision must be changed from that adopted, respectively, by the appellants and the lower court. This result would mean that the unborn child, as a person, is entitled, in general, to the protection of its life under the Constitution of the United States and that in assessing the validity of state abortion legislation directed toward the protection of this constitutional right, the right to life of the unborn child must be considered and evaluated by the courts quite as thoroughly and equally as the rights of single women and married couples with respect to marital privacy, personal privacy, physical integrity, personal freedom, and determination of the number and spacing of their children.

In short, amicus urges this Court squarely to face and resolve the issue properly and explicitly raised by the appellee, a state officer charged with the performance of an important function by his state, as to whether the unborn child or foetus is a person within the meaning of the constitutional safeguards of the person contained in the Constitution of the United States, and especially in its

Fourth, Fifth, Ninth and Fourteenth Amendments, and as to whether the unborn child or foetus, as a person, has a constitutional right to life. To do otherwise would be for this Court to deny procedural due process to appellee and to all those whom, in the name of the State of Texas, this appellee represents.

B. The concept of the person utilized in the Constitution of the United States and in its first ten Amendments had a well-defined meaning for those who framed and adopted their provisions that clearly included the unborn child or foetus who was deemed by them to be a subject of rights, including the right to life, and a person to whom its parents as well as political society itself owed important duties of care and support. As a matter of sound constitutional interpretation theory, this Court must recognize and apply this meaning of the concept of the person and implement the purpose underlying the employment of this concept as the foremost principle of this Constitution.

Chief Justice Marshall in Marbury v. Madison, 1 Cranch 137, 179-180, stated "that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature." While his focus in that case was primarily upon a legislative disregard of a Constitutional rule, it was also upon avoiding a like judicial disregard of that rule. It is not without significance for the instant case that the Chief Justice, in selecting a few of many parts of the Constitution to illustrate his basic proposition, referred to one of the explicit safeguards of the person contained in the Constitution, Section 3 of Article III:

> "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Ibid.

It would have been just as inadmissible by the Chief Justice and the other members of the Court in 1803 that this rule

did not speak to and bind the Court insofar as it provided that a "person" was to be protected by the rule as it was inadmissible to them that the type of the protection to be accorded the person as specified in this rule did not speak to and bind the Court. Not just part but the whole of this and other rules of the Constitution must be deemed to be "rules for the government of courts." Thus, each of the rules of the Constitution providing a safeguard either expressly or impliedly for the "person," including the Fifth, Fourteenth, and Ninth Amendments, must be viewed in the same way. For this reason, the inevitable first task for the Court in this case, where a state asserts the right of the unborn child, as a person, to live, as the basis for sustaining its challenged abortion law, is to determine what is the appropriate meaning to be assigned the term "person" expressly or impliedly used by the framers of the Constitution in establishing its fundamental safeguards of the person. The Court must recognize that the Fifth, Fourteenth, and Ninth Amendments also provide a "rule for the government of the legislature" of a state in the sense that the state is entitled and in some instances duty bound to take positive, affirmative action to protect the federal constitutional rights of the persons safeguarded by them. See, e.g., Brewer v. Hoxie School District No. 46, 238 F.2d 91 (8th Cir. 1956).

Chief Justice Marshall in the Marbury case provided the essential principle for approaching the problem of determining the meaning of the term "person" as used in the Constitution. He said:

> "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act,

they are designed to be permanent." 1 Cranch at 176.

Of all the principles the people of the United States established in their Constitution none can be more paramount than those designed by them for safeguarding the civil rights of the individual person. Indeed, so concerned were the people of the United States for providing these safeguards that it is altogether likely that the Constitution, which did not contain such safeguards in the form of a Bill of Rights as did the state constitutions, would not have been adopted by sufficient states unless the Federalists, sensing the impending disaster, had not made a gentlemen's agreement that they would propose and submit in the First Congress in 1789 detailed amendments to establish a comprehensive federal Bill of Rights.[1] Both John Adams and Thomas Jefferson, when they first received news of the Constitution at their London and Paris ministerial posts, respectively, agreed that they were very distressed that it did not contain a bill of rights providing "for the whole catalog of civil rights commonly accepted as fundamental in America" to guarantee freedom of the person.[2] This agreement was, of course, carried out by the next Congress on September 25, 1789.

Moreover, it was the "original right" of the people of the United States to adopt a concept of the person for inclusion in and administration of their Constitution as "in their opinion, shall most conduce to their own happiness," as Marshall stated. It is the meaning and the purpose of the people who framed, debated, and adopted the Constitution and its Bill of Rights to safeguard the person that must be respected by this Court. Even if many of the present generation have come to view the religious motiva-

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[1] See, Robert Allen Rutland, The Birth of the Bill of Rights: 1776-1791. Chapel Hill: The University of North Carolina Press, 1955, 119-218.

[2] Id. at 129.

tion, the philosophy of natural rights, and the views of the person entertained by the framers and adopters of the Constitution as lacking in validity, this Court is not free, because of its dedication and commitment to the rule of law, to disregard the meaning of the concept of person the framers entertained when they inserted it into the constitution safeguards of the person. It was their "original right to establish, for their future government" the principles that "in their opinion" were to be subsequently treated as "fundamental" and as "designed to be permanent." Citizens may today reject, although with perhaps great loss of societal direction, the religious motivations, philosophy of natural rights, and view of the person entertained by the constitutional framers, but they cannot avoid or set aside the objective choice made by those framers of the meaning to be given the normative concept of the person placed by them in the Constitution. If this Court must respect still today the choice of the framers in the First Amendment rule that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...," it must also still respect the rule that "nor shall any person... be deprived of life, liberty, or property, without due process of law." If we must be very vigilant about judicially enforcing the requirement that "no law" respecting an establishment or religion shall be made, we must also be very vigilant about judicially assuring that any person obtains due process of law with respect to deprivations of his life, liberty, or property by action of the state or nation.

Chief Justice Marshall has also provided this Court with the interpretative theory to implement the basic approach he laid down for assigning meaning to provisions of the Constitution. In Gibbons v. Ogden, 9 Wheat. 1, 188-189, while referring to the problem of construction of a clause conferring a power upon Congress, he stated:

> "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlighted patriots who framed our constitution,

and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case."

Precisely the same reasons that commended this rule of constitutional interpretation to the Court for the purpose of assigning meaning to a provision granting power to Congress commends it even more highly as the basis for assigning meaning to provisions designed for the safeguarding of the persons who established the constitution. In Boyd v. United States, 116 U.S. 616, 635, Mr. Justice Bradley in the opinion for the Court stated this principle:

> "...illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis."

Still another principle of constitutional interpretation bears even more closely upon the function of this Court in giving effect to the safeguards of the person which the people of the United States established in the exercise of their "original right." This principle was also articulated by this Court in the Boyd case, supra, and has

reference to the relevance of conceptions of personal freedom entertained by those who framed the provisions of the Constitution and its first ten amendments. In the Boyd case, the question was whether a statute which provided for compulsory production of a man's private papers to be used in evidence against him in a proceeding to forfeit his property, was unconstitutional as authorizing an unreasonable search and seizure within the meaning of the Fourth Amendment. In deciding that the statute was unconstitutional, the Court referred to the contemporary conceptions of personal freedom entertained by American statesmen at the time of the adoption of the Constitution and of the first ten amendments to it. The subject of unreasonable searches and seizures had been thoroughly canvassed in the quarter of a century just preceding their adoption, and especially in the discussion of Lord Camden in the celebrated case of Entick v. Carrington, 19 Howell, St. Tr., 1029. Referring to this discussion, Justice Bradley stated for the Court:

> "As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. ...Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and unreasonable character of such seizures?" 116 U.S. at 627, 630.

Putting these three long established and honored principles of constitutional interpretation to work in this instant case requires this Court to hold that the unborn child was clearly within the meaning of the concept of the

person adopted by the American statesmen who formulated the Constitution and its first ten amendments and that it was their purpose to have its safeguards of the person applied by courts and legislatures to the unborn child or foetus and especially so as to recognize a constitutionally guaranteed right to life.

James Wilson, who helped formulate, voted for, and signed the Declaration of Independence, participated in the Constitutional Convention and signed the proposed Constitution of the United States, and served as an Associate Justice of the Supreme Court of the United States had something to say about the concept of the person.[1] This remarkable Pennsylvania lawyer, member of the Continental Congress, classical scholar, draftsman of the Pennsylvania Constitution, and person chiefly responsible for the adoption of the Constitution of the United States by Pennsylvania was also a professor of law at the College of Philadelphia at the same time he served upon the Supreme Court of the United States. Steeped in the philosophy of natural law and well-acquainted with the basic concepts of those revolutionary times, he was in an especially good position to articulate the meaning of the concept of the person generally shared by his fellow citizens and woven into the sinews of the colonial and state Bills of Rights and finally into the Constitution of the United States. In his law lectures delivered in the winter of 1792, Justice Wilson stated:

> "Persons are divided into two kinds — natural and artificial. Natural persons are formed by the great Author of nature. Artificial persons are the creatures of human sagacity and contrivance; and are formed and intended for the purposes of government and society."[2]

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[1]Charles Page Smith, James Wilson: Founding Father. Chapel Hill: The University of North Carolina Press, 1956. 87-88, 246-61, 305.

[2]The Works of James Wilson, James DeWitt Andrews, Ed., Chicago: Callaghan and Co., 1896. Vol. II, p. 3.

In this statement Wilson was simply reflecting the common view of the Constitutional Fathers that the person was not something subject to man's contrivance, like the artificial person which is the corporation or the state, but above and apart from and prior to any construction or contrivance of man. The person was for the makers of our Constitution a datum, a given, a being created "by the great Author of nature." The status of person was not something to be conferred by the state or even all the people of the state. A person simply is and has his being by virtue of an act of creation by God himself — this was the concept of the person for those who wrote and adopted the Constitution of the United States.

This concept of the person was Christian in its origin and in its development. Its meaning had been elaborated long before the period of American constitution-making even if it had never been woven as securely into the fabric of a legal order as it was to be in 18th Century America. Man was deemed to be a composite of body and soul, the latter having been given to him closely consequent upon the human event of conception in an act of creation by "the only Creator of human souls: God."[1] As Doctor John Witherspoon, the sixth president of Princeton University and signer of the Declaration of Independence, observed and taught his students:

> "Considering man as an individual, we discover the most obvious and remarkable circumstances of his nature, that he is a compound of body and spirit."[2]

And as the great teacher of American statesmen, John Locke, put it in the best Christian tradition:

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[1]Etienne Gilson, The Spirit of Mediaeval Philosophy. London: Sheed & Ward, 1950. 203.

[2]John Witherspoon, Lectures on Moral Philosophy. Princeton: Princeton University Press, 1912. 8.

> "God, I say, having made man and the world, ... directed him by his senses and reason...to the use of those things which were serviceable for his sub sistence, and gave him the means of his 'preservation'...and therefore had a right to make use of those creatures (animals) which by his reason or sense he could discover would be serviceable there unto..."[1]

No man had greater influence upon the minds of the Constitutional Fathers than John Locke. His Second Treatise of Government was characterized by Sir Frederick Pollock as "probably the most important contribution ever made to English constitutional law by an author who was not a lawyer by profession."[2] Beyond this it has been generally recognized that "the principles of the American Revolution were in large part an acknowledged adoption of the ideas i contained."[3] In Locke's discussion of paternal, or as he preferred to call it, "parental" power, he observes that

> "Adam and Eve, and after them all parents were, by the law of Nature, under an obligation to preserve nourish and educate the children they had begotten not as their own workmanship, but the workmanship of their own Maker, the Almighty, to whom they were to be accountable."[4]

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[1]John Locke, Two Treatises of Government. Book I. New York: E.M. Dutton & Co. (Everyman Library) 55.

[2]Sir Frederick Pollock, Essays in the Law. 1922.80

[3]W.F. Carpenter, "Introduction to John Locke, "Two Treatises of Civil Government, vii.

Locke, Two Treatises, p. 143.

> "The power, then, that parents have over their children arises from that duty which is incumbent on them, to take care of their offspring during the imperfect state of childhood. ...that duty which God and Nature has laid on man, as well as other creatures, to preserve their offspring till they can be able to shift for themselves..."[1]

Locke pointed out that although the parental duty after procreation of children to care for them could not be put aside until they could shift for themselves, the name and authority of a father or indeed any parent over a child could be quickly lost:

> "So little power does the bare act of begetting give a man over his issue, if all his care ends there, and this be all the title he hath to the name and authority of a father."[2]

Locke was simply making the point of the great concern of political society for children and its insistence upon their protection from and after the act of procreation. The name and authority of the parent could be lost if that parent disregarded the very precious value borne by the child as a person through the soul created for it by God. Thus, the foster-father who rescued and then took care of a child who had been exposed by its natural father for the purpose of letting it die gains the title and authority of father and the latter loses it.[3]

Again, in order to emphasize the importance of the child, because it is a person created by God at all of its stages of development, Locke states:

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[1]Locke, Two Treatises, pp 144-145.

[2]Id.

[3]Id. at 147.

> "Conjugal society is made by a voluntary compact between man and woman and though it consists chiefly in such a communion and right in one another's bodies as is necessary to its chief end, procreation, yet it draws with it mutual support and assistance, and a communion of interest, too, as necessary not only to unite their care and affection, but also necessary to their common offspring, who have a right to be nourished and maintained by them till they are able to provide for themselves.
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> "For the end of conjunction between male and female being not barely procreation, but the continuation of the species, this conjunction betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones. ...This rule...the infinite wise Maker hath set to the works of His hands..."[1]

Moreover, a person, whether a child or an adult, was deemed superior, in a very basic sense to the state and to its law, even its most fundamental law, the constitution. Not only was the person not a creation of man or of his state, but the person was before and above the state and its constitution. Locke stated the principle that

> "Men being,... by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and be united into a community for their comfortable, safe, and peaceable living..."[2]

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[1] Id. at 155.

[2] Id. at 164.

Each of the principal American constitutions and bills of rights made this conception of the person and of his relation of the person to the state abundantly clear. The American Declaration of Independence states:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable 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, ..."[1] [Emphasis added]

The principal American constitutions and bills of rights also made it clear that while the adult persons were the persons from whom the just powers of government were actually derived by their consent, these adults relative to their children, unborn or born, were performing an act not only for themselves but also for their children, as trustees or guardians for their lives, futures, and happinesses, according to the Lockeian doctrine. Thus, we see that the Virginia Bill of Rights states:

> "1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity: namely, the enjoyment of life and liberty..."[2] [Emphasis added]

And, as especially pointed out by Alexander Hamilton in his Paper No. 84, the preamble of the Constitution of the United States states:

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[1]Donald Barr, July 4, 1776. New York: Crown Publishers, 1958. 138.

[2]Robert Allen Rutland, The Birth of the Bill of Rights: 1776-1791. Chapel Hill: The University of North Carolina Pre-s, 1955. 231.

> "We THE PEOPLE of the United States,...to secure the blessing of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States."[1]

It is not without significance that Hamilton quoted the preamble precisely in the form above set out. He was arguing in this paper that there was no necessity for inclusion of a Bill of Rights in the original Constitution to safeguard the persons constituting the people of the United States against their representatives in government. His argument was that these persons, both individually and collectively, were the source of the authority and power of their representatives and the latter had been granted no authority to abridge the fundamental rights of the person, such as life, liberty, or property. Thus he states:

> "Here, in strictness, the people surrender nothing and as they retain everything, they have no need of particular reservations (of rights)."[2] [parenthesis added]

Thus, by his quotation, Hamilton indicates that he is thinking of the rights not only of adults but also children, both born and unborn, their "posterity." It is these rights, he contends, that are not surrendered to the representatives of the people.

Richard Henry Lee, who was closely associated with Patrick Henry and Thomas Jefferson and introduced the resolution in the second Continental Congress for declaring independence on July 2, that was adopted two days later, worked vigorously for the addition of a Bill of Rights to the proposed Constitution. An orator whose associates compared with Cicero, he perhaps articulated better than

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[1]The Federalist. New York: The Heritage Press, 1945. 575-576.

[2]Id. at 575.

most of the Constitution Fathers the sense of what they were about when he said on October 12, 1787 in a popular pamphlet widely read in the states:

> "...when we are making a constitution, it is to be hoped, for ages and millions yet unborn, why not establish...essential rights, which we have justly understood to be the rights of freemen..."[1]

Dr. John Witherspoon in some of his lectures at Princeton at least as early as 1772:

> "Some nations have given parents the power of life and death over their children, and Hobbs insists that children are the goods and absolute property of their parents, and that they may alienate them and sell them either for a time, or for life. But both these seem ill founded, because they are contrary to the end of this right, viz. instruction and protection. Parental right seems in most cases to be limited by the advantage of the children."[2]

Here Dr. Witherspoon carries through to the constitution-making times, to which he contributed much, the basic doctrine of Locke about the duty of parents and the right of their children vis-a-vis each other.

Thomas Jefferson introduced a bill concerning crimes and punishments in 1779 in the Virginia Legislature. It is interesting that he provided for the penalty of hanging and dissection of the body for the murder of a child by its parent.[3] In view of the usual Founding Father

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[1]Pamphlets on the Constitution of the United States, Paul Leicester Ford, ed. 314.

[2]Dr. John Witherspoon, Lectures on Moral Philosophy. Princeton: Princeton University Press, 1912. 84.

[3]Saul K. Padover, The Complete Jefferson. New York: Duell, Sloan & Pearce, 1943. 92.

view of the child as a being a person from the very moment of its procreation or begetting by its parents, one would assume that this bill was directed against abortion at any stage of the development of the child in the womb. Jefferson also showed that he was quite familiar with the law of England with respect to abortion as far back as the Laws of King Alfred. He noted that this law penalized the killing both of a pregnant woman and of her child and that that law required the payment or weregild not only for the killing of the mother but also for the killing of the child. He also took the position that despite his espousal of a constitutional safequard for religious freedom, the state could not permit churches in their sacred rites "to murder a child."[1]

Life on the colonial frontiers involved raids upon the early settlements by hostile Indians. The unborn child was a special target of these raids. The Rev. Joseph Doddridge reported upon the Indian attacks in Western Virginia in the latter part of the 18th Century. He stated that children were the special victims of Indian vengeance because they could either become warriors or reproduce the species. With respect to the unborn child, he reported upon its treatment by the hostile Indians and showed the special concern of the colonists for such treatment and what their reaction was:

> "The Indian kills indiscriminately. His object is the total extermination of his enemies. It is not enough that the fetus should perish with the murdered mother, it is torn from her pregnant womb, and elevated on a stick or pole, as a trophy of victory and an object of horror to the survivors of the slain."[2]

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[1] Id. at 935, 945.

[2] Daniel J. Boorstin, The Americans: The Colonial Experience. New York: Vintage Books, 1958. 347-348.

The Indian forays and attacks in which these and other atrocities were committed were not isolated instances seldom repeated. As Boorstin reports:

> "The Indian was omnipresent; he struck without warning and was a nightly terror in the remote silence of backwood cabins....Every section of the seacoast colonies suffered massacres. The bloody toll of the Virginia settlements in 1622, and again in 1644, was never forgotten in the colony. ...Such nightmares shaped the military policy of settlers until nearly the end of the 18th century. ...The apprehension of another visit from the Indians, and of being driven back to the detested fort, was painful in the highest degree, and the distressing apprehension was frequently realized. In such colonial warfare all were soldiers because all lived on the battlefield. ...among Colonial Americans...war was the urgent defense of the hearth by everybody against an omnipresent and merciless enemy."[1]

The loss of children in warfare was an especially drastic loss in colonial America. The colonials placed a very high value upon children not only because, according to their religion they were persons, but also because they were badly needed in the emerging nation. As Boorstin reports:

> "Labor and skills were scarce in colonial America; men had to do many things for themselves simply because they could not hire others to do them."

Benjamin Franklin indicated that it was easy for poor families to get their children instructed in a trade:

> "for the Artisans are so desirous of Apprentices,

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[1] Id. at 348-352. [Citing The Rev. Joseph ...idge]

> that many of them will even give Money to the Parent, to have Boys from Ten to Fifteen Years of Age bound Apprentices to them till the Age of Twenty-one; and many poor Parents have, by the means, on their Arrival in the Country, raised Money enough to buy Land sufficient to establish themselves, and to subsist the rest of their Family by Agriculture."[1]

Thus, colonial Americans generally down through the period of the making of the Constitutuion not only revered and respected the unborn child as a person created by God but saw in the unborn an addition to the family who, after birth, could be the way to meet the labor scarcity on the farm and frontier and to enable the family, particularly the poor one, to establish itself firmly in the cities.

The English law concerning abortion discussed by Jefferson as previously noted, had existed since at least the time of King Alfred with both secular and ecclesiastical laws being directed at the problem although by different kinds of sanctions. The Leges Henrici of the time of Henry I reveals that the ecclesiastical laws provided for a lighter penalty if a woman deliberately destroyed her unborn child within the first forty days following conception and a heavier one if she destroyed her unborn child after that period. The common law courts also handled cases of abortion although they exercised a less extensive jurisdiction than that of the ecclesiastical courts. The rule applied by the former was primarily concerned with abortion of a child that was quick or able to stir in the mother's womb. Blackstone in 1765 observed in his Commentaries:

> "1.Life. This right is inherent by nature in every individual, and exists even before the

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[1]Id. at 194.

the child is actually born.

Rights of Unborn Child. The offence of abortion of a quick child is not murder, but homicide or manslaughter. An infant in ventre sa mere is supposed in law to be born for many purposes. It is capable of having a legacy made to it. It may have a guardian assigned to it, and may have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born."[1]

This recognition of the unborn child as a person before the law is highly significant in view of the fact that as Boorstin reports,

> "...by 1775
> "Blackstone's Commentaries had sold nearly as many copies in America as in England...he had provided for the first time the means by which any literate person could grasp the large outlines of his legal tradition. ...was a godsend to the rising American, to the ambitious backwoodsman and the aspiring politician."[2]

In 1803, only a little over a decade after the adoption of the Constitution of the United States and its first amendments, the English Parliament adopted a statute which characterized as felonies abortions performed either before or after a woman was "quick with child", 43 Geo. III c. 58. The former type of abortion was made punishable by fine, imprisonment, and other lesser penalties. The latter type was made punishable by death. The enactment of this statute may have been a part of the movement

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[1]Blackstone's Commentaries on the Law. Bernard C. Gavit, Ed. Washington: Washington Law Book Co., 1941. 70

[2]Boorstin, supra, at 202.

of replacing the jurisdiction of the ecclesiastical courts, which covered the offense of abortion in a similar way, by enactment of statutes defining crimes to be handled by the common law courts.[1]

We have established that the unborn child or foetus was considered by the Founding Fathers and their fellow citizens to be a person; a subject of rights against its parents from and after their act of begetting or procreating the child until it was born and thereafter until it could shift for itself; a person who was created by the act of God in infusing it with a soul consequent upon the act of procreation; a person, like its parents, endowed by God with unalienable rights to life, liberty and pursuit of happiness and the qualities of being free, equal, and independent; and a person who could not be deprived of these rights and qualities by their parents through a compact or constitution or any other means. This concept of the person was drawn by colonial Americans from their predominantly Christian background; from political philosophers and especially from their principal mentor in political philosophy, John Locke; from ministers and educators like Dr. John Witherspoon of Princeton University; from legal scholars like Blackstone; and especially from their intuition as reinforced by their difficulties and opportunities in dealing with a hostile but bountiful environment.

Since this was the colonial concept of the person, the Founding Fathers who framed the Constitution and their fellow citizens who adopted it must be understood to have employed the word "person" in the constitutional safeguards of the person in what was for them its eminently "natural sense" so as to include the unborn child or foetus. This sense reinforces and supports their goal of wanting to ordain and establish a Constitution not only for themselves but also for their posterity and to

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[1]See, Bernard M. Dickens, Abortion and the Law, Bristol: MacGibbon & Kee, 1966. 22.

secure from the action of wilful men "certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity: namely, the enjoyment of life and liberty." It was the "original right" of the Founding Fathers to adopt such a meaning for the term "person" and to impress it on the Constitution. If effect is to be given to the foundational criterion, established by Marbury v. Madison, supra, for assigning meaning to a constitutional provision- the natural sense in which words are employed and the sense that will promote the objects expressed in the Constitution itself - this Court must hold that the unborn child or foetus is a person within the constitutional safeguards of the person.

Similarly, if effect is to given to the presumption for constitutional interpretation established by Boyd v. United States, supra, that a constitutional provision for the security of the person should be liberally construed, then the term "person" should certainly be extended to cover the unborn child or person, there being so many other good reasons for this construction.

Finally, if effect is to be given to the third basic principle for constitutional interpretation, also articulated in the Boyd case, supra, that contemporary conceptions of personal freedom are to be regarded and particularly those framed in the leading expositions of those conceptions, then the term "person" in the Constitution must clearly be held to cover the unborn child or foetus. The leading expositions were contained in Locke's Second Treatise of Civil Government, supra,; Blackstone's Commentaries on the Law, supra; the Virginia Bill of Rights, and Hamilton's Paper No. 84 in the Federalist, supra. All of these highlighted the position of the unborn child as a person and the duty of parents and political society to provide for its care. The latter two expositions extended this duty to those who make and administer constitutions.

C. Regard for the Context of the Constitution, in the sense of its whole framework in relation to

its various parts and especially those provisions providing safeguards for the person, such as the Fourth, Fifth, Ninth and Fourteenth Amendments, argues strongly for holding that an unborn child or foetus is a person within the meaning of those safeguards.

1. The concept of context in constitutional interpretation.

The value of an examination of the context in which a statutory provision is set for determining the appropriate meaning to be assigned to it has long been recognized. Justice Frankfurter, in a dissenting opinion in United States v. Monia, 317 U. S. 424 at 431, (1942), gave classic formulation to this value:

> "A statute like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process, having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. On the historic process of which such legislation is an incomplete fragment--that to which it gave rise as well as that which gave rise to it-- can yield its true meaning."

Since McCulloch v. Maryland, 4 Wheat. 316, it has been well established that the context in which a term is used in the Constitution must be closely regarded in assigning meaning to it. In construing the word "necessary" in the "necessary and proper" clause of Article I, section 8 of the Constitution, Chief Justice Marshall stated that:

> "...in its construction, the subject, the context, the intention of the person using them, are all to be taken into view." 4 Wheat. at 407.

A recent example of the context of the Constitution for this purpose was provided in Duncan v. State of Louisiana, 391 U. S. 145 (1968), where this Court pointed out that, in construing a particular constitutional safeguard of the person, such as the Due Process Clause of the Fourteenth Amendment, "it has looked increasingly to the Bill of Rights for guidance..."[1]

As demonstrated by Chief Justice Marshall's opinion for the Court in the McCulloch case, the concept of context includes not only the immediate context of a provision whose meaning is drawn in question but also the more remote context of the whole Constitution, including other parts likely to throw light upon the usage in that provision.

2. The unborn child has a constitutional right to application of state common law in diversity of citizenship actions at common law under Article III and to a jury trial under the Seventh Amendment.

As construed by this Court Article III, Section 2 of the Constitution, which extends the jurisdiction conferred upon the courts of the United States to controversies between citizens of different states, necessarily provides extensive protection for the unborn child or foetus. In Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938), this Court held that Article III of the Constitution required federal courts exercising jurisdiction in diversity of citizenship cases to apply as their rules of decision the law of the state in which they sit, unwritten as well as written, except in matters governed by the Federal Constitution or by Acts of Congress. Mr. Justice Brandies, in the opinion for the Court, stated that the prior practice of the courts in disregarding the decisional law established by a state's highest court in favor of a federal general common law, was quoting

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[1]Dickens, Abortion, pp 148.