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ARTICLE

The Ninth Amendment and Conceived Children: Legal Theory and Civil Action

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The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.[1]

Abstract

This article proposes that the people have an unenumerated right to legally define themselves under the Ninth Amendment. Part I lays the legal foundation for this right. Part II discusses legal, peaceful civil actions by which people may exercise their Ninth Amendment rights based upon Supreme Court precedents.

Keywords: Ninth amendment; human rights; Roe v. Wade; pro-life; abortion

[1] U.S. CONST. amend. IX.

Introduction

The definition of who a legal "person" is, is not up to the government of the United States. In Part I, this article documents that as stated in the Constitution and the Bill of Rights, certain rights do not belong to the government, the branches of government, or their departments. The people's right to define themselves is an inherent and unalienable right. This right belongs to the people of the nation, not the government of the nation. No government is so powerful that it can presume to define its creator, the people.

This fundamental right, protected under the Ninth Amendment, has its foundation in the Declaration of Independence and is built into the Constitution - "We the People" - via the remarkable basis upon which our government was founded. The Bill of Rights and the Ninth Amendment in particular, support this right by virtue of our Founders' political philosophy and Supreme Court precedents. These precedents, as discussed in Part II, offer a practical, civil and peaceful path for people to define themselves as legal "persons".

PART I

Legal Theory and Foundation

In order to understand how the Ninth Amendment protects a fundamental right of the people to define themselves, it is first necessary to consider the philosophy and founding documents that led to its being included in the Bill of Rights as a right of the people; as purposeful and as legally powerful as any other right in the Constitution.[2]

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A. "The People" are Creators of the Government and Separate from it.

We The People of the United States, in Order to form a more perfect Union…and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[3]

The Constitution begins with the plural of the word "person", "people". The heart of the legal issue discussed in this article is the meaning of the term "person" as used in the Constitution of the United States *and who has the legal right to interpret or define it*. This point is key to understanding the place and power that the Ninth Amendment has in our ability as a people to continue to be self-governing.

"We The People" makes clear that the government of the United States was being founded by people. In this statement it is clear that: 1. the people knew who they were, especially given their history up to that point, and 2. the people were sovereign and separate from the government they were creating.

Justice Joseph Story, who later presided over the *Amistad*[4] trial as Chief Justice, said of the Preamble, "...its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution".[5] The people could not have "expound[ed]...the nature of the powers" if they did not know who they were and if they were not separate from the government.

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involved a child who was dealing with her brother's homicide. This Ninth Amendment article has been reviewed by a number of attorneys, local and national. It has been supported and edited by a retired Spokane County Superior Court Judge.

[2] Marbury v. Madison, 5 (1 U.S. Cranch) 175 (1803). Chief Justice John Marshall, "It cannot be presumed that any clause in the Constitution is intended to be without effect."

[3] U.S. CONST. pmbl.

[4] United States v. The Amistad, U.S. 518 (1841).

[5] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1933).

Almost one-hundred and fifty-years later, this point was made by Adler and Gorman, summarizing their conference's many distinguished participants in their discussion of the Preamble for the 200th anniversary of our nation, "The distinctiveness lay in its...bringing to effective, symbolic and historical actuality doctrines about the sovereignty of the people, about the people as the original fount of all power in governments....about a fundamental law antecedent to government because constitutive of government, a law different in kind and in force from the statutes that would issue from constituted government."[6]

1. The people knew who they were: John Adams, fifteen years before the start of the Revolutionary War, "Now to what greater Character, can any Mortal aspire, than to be possessed of all this Knowledge, well digested, and ready at Command, to assist the feeble and Friendless, to discountenance the haughty and lawless, to procure Redress of Wrongs, the Advancement of Right, to assert and maintain Liberty and Virtue, to discourage and abolish Tyranny and Vice?"[7]

And thirty-two years after the war ended: "What do we mean by the Revolution? The war? That was no part of the revolution; it was only an effect and consequence of it. The revolution was in the minds of the people, and this was effected from 1760–1775, in the course of fifteen years, before a drop of blood was shed at Lexington."[8]

In order for people to create a Constitution and a new nation, people must know who they are. Implied in the law, "We the People", is the fact

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[6] MORTIMER ADLER AND WILLIAM GORMAN, THE AMERICAN TESTAMENT 67-68 (1975). In 1974, Adler and Gorman, two esteemed professors of law, moderated a conference at the Aspen Institute--historians, lawyers, writers, educators, government and business leaders--on the significance of three historical documents: The Declaration of Independence, The Preamble to the Constitution and The Gettysburg Address. This book is a summary by them of the joint efforts of those many distinguished individuals who participated in their review of these documents.

[7] John Adams, Letter to Jonathan Sewell (October 1759), https://www.masshist.org/digitaladams/archive/doc?id=D4&hi=1&query=Letter%20to%20Jonathan%20Sewell,%20Octobere%201759&tag=text&archive=all&rec=4&start=0&numRecs=1324 (last visited November 3, 2018).

[8] John Adams, Letter to Thomas Jefferson (August 24, 1815), https://founders.archives.gov/documents/Jefferson/03-08-02-0560 (last visited November 3, 2018).

that they and now we--know who "people" or "persons" are. The people *must define themselves*, as they are separate from the government they create.

2. *The people were and are sovereign and separate from the government:* As James Madison, author of the Bill of Rights, including the Ninth Amendment said, "The powers delegated by the proposed Constitution to the federal government are few and defined." And, "…the ultimate authority….resides in the people."[9]

In the United States in 2021, we the people, are still creating the government, as we have been doing since 1776. We are still sovereign and separate from it.

If the people are not sovereign and separate from the government, then the government controls the people. And if the government defines who legal people are, instead of the people themselves, then the people lose all sense of their identity, and with their identity, all of their rights and all of their power. The people become just another part of the government. The government becomes all powerful and no longer controlled by the people. James Madison stated this quite clearly, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[10]

This political philosophy, as stated in the Preamble, has been put into practice in Supreme Court cases over the last two hundred years. One of the most legally precedential was written by Chief Justice John Marshall, "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

[9] THE FEDERALIST NOS. 45, 46 (James Madison).

[10] THE FEDERALIST NO. 47 (James Madison).

American fabric has been erected. . . . The principles . . . so established are deemed fundamental. . . ."[11]

A few years later Marshall clarified who is sovereign, the states or the people, "The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained "in order to form a more perfect union, establish justice, ensure domestic tranquility, and secure the blessings of liberty" to themselves and to their posterity."[12]

Later, in the same century, in 1886, the Supreme Court stated, "Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with *the people*, by whom and for whom all government exists and acts."[13]

And more recently in 1936:

> [T]he Constitution itself is in every real sense a law—the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks….The Constitution speaks for itself in terms so plain that to misunderstand their import is not rationally possible. 'We the People of the United States,' it says, 'do ordain and establish this Constitution.' Ordain and establish! These are definite words of enactment, and without more would stamp what follows with the dignity and character of law."[14]

From a very different perspective, *the people did not found a government in order for the government to define who the people were*. Realistically, naturally and morally, the right and authority to define ourselves could not have been turned over to the government, because the people create the government. The Founders did not say to the government, "Tell us

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[11] *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 176 (1803).
[12] M'Culloch v. Maryland, 17 U.S. 316, 403 (1819).
[13] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).
[14] Cf. Carter v. Carter Coal Co., 298 U.S. 238, 296 (1936).

who we are?" How can the people do so, or accept such, now? This is both unreasonable and unnatural. The people have rights and powers inherent within themselves to define themselves. The people knew this before the government of the United States existed. And the people know it now.

The people alone and not the Government of the United States, have the right to define who a "person" is, legally. This right of the people to define themselves, which is protected by the Ninth Amendment, has its legal rationale in our country's founding. From its creation, there have been limits to the rights and powers of our government because all power and authority belong to and originate in the people. Those limits are implicit in the laws of our nation and all nations.[15]

In our form of government, there is a creator of the government*, the people*, and the created entity, *the government*, forever dependent on its ongoing creator, *the people.* This separate nature of the people and the government is implicit in all three of our founding legal documents:

The Declaration of Independence: "Governments are instituted among Men, deriving their just Powers from the Consent of the Governed……whenever any Form of Government becomes destructive to these Ends, it is the Right of the People to alter or abolish it, and to institute new Government…."[16]

If the "Governed" are not separate, how can they give their "consent"? Similarly, the people must be separate from the government in order for them to "alter and …institute new Government".

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[15] Pope Francis, Speech before the United Nations, New York City, New York (September 25, 2015). "…justice is an essential condition for achieving the ideal of universal fraternity. In this context, it is helpful to recall that the limitation of power is an idea implicit in the concept of law itself." The Pope is the leader of the Roman Catholic Church and oversees the Canon Laws of the Church, as they relate to its 1 billion members. He is ruler of the city-state of the Vatican, and responsible for the enforcement of the state's laws. His authority, influence and power are recognized in the secular and spiritual lives of billions of individuals.

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

The Ninth Amendment, which is discussed in the next sections, follows logically from the Declaration, "…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…" It is clearly implied that there are other "unalienable Rights….among these". The people, not the government have unalienable rights. It is to these unenumerated rights that the Ninth Amendment refers.

Adler, Gorman and participants interpreted this, the Declaration's historic point, as follows, "To say that certain rights are inalienable is to say that their possession by men does not depend upon legislation of any kind. They are inalienable because they are inherent in the nature of man. They belong to human beings in virtue of their being human. They have moral force and impose moral obligations even when they lack legal force and lack legal sanctions." [17]

The Constitution. The first three words reiterate this distinct separateness of the people stated in the Declaration, "We the People…in order to form a more perfect Union….do ordain and establish this Constitution for the United States of America."[18] The people and the "Union" are separate entities, as discussed above. One creates the other. The people are not creating a government in order to have the government tell them who they are or what their rights are. They know who they are and they are surrendering only certain rights and powers that have been inherently theirs prior to the government being created. The entity that is created, the government, cannot define its creator, the people.

The Bill of Rights. Certain inherent rights were clearly stated, as follows from the Constitution, which gave only limited powers to the government. The Founding Fathers wisely knew that there may be rights and powers of which they did not yet have awareness of, or that may occur in the future. Those "retained by the people "under the Ninth Amendment were in addition to the rights and powers that were stated in the Bill of Rights.

[17] ADLER AND GORMAN, THE AMERICAN TESTAMENT 34-35 (1975).
[18] U.S. CONST. pmbl.

From a different perspective, the right to define our true nature, as "people" or "persons", was never ceded to the government. It remains an inherent right of the people. Alexander Hamilton, "It merits particular attention in this place, that the laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial in each State will be bound by sanctity of an oath."[19]

This separate nature of the people and the government and the rights and powers of each were also discussed in detail in The Federalist Papers, written by James Madison, Alexander Hamilton and John Jay, at the time the Constitution's passage was being debated, for the purpose of convincing the colonies and the people to pass the Constitution.

Hamilton was clear on the role of people compared to a government,

> There is no position which depends on clearer principle than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.[20]

And Madison provides one of the most eloquent summaries of what government is:

> But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor

[19]THE FEDERALIST NO. 27 (Alexander Hamilton) (original italics). Note:"Confederacy" here refers to the United States Government: the Civil War was 73 years later.
[20] THE FEDERALIST NO. 78 (Alexander Hamilton).

> internal controls on government would be necessary…..A dependence on the people is, no doubt, the primary control on the government…..[21]

If the government has the power to define who "persons", people, are, the government is no longer dependent on the people.

During this same time period, Madison wrote to his friend, Thomas Jefferson, "Altho' it be generally true as above stated that the danger of oppression lies in the interested majorities of the people rather than in usurped acts of the Government, yet there may be occasions on which the evil may spring from the latter source; and on such, a bill of rights will be a good ground for an appeal to the sense of the community."[22]

In this letter, Madison acknowledges that the government may overstep its bounds. The Bill of Rights was included to protect the people from the government's "usurped acts" or power. It is of interest that Madison uses the word "evil" to describe this.

Many years later, in 1863, in the midst of our country's survival, Abraham Lincoln understood Madison's and the Founders' political philosophy, stated as the final words of the Gettysburg Address, "…that government of the people, by the people, for the people, shall not perish from the earth."[23]

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[21] THE FEDERALIST NO. 51 (James Madison).

[22] Letter from James Madison to Thomas Jefferson, October 17, 1788, *in* 11 ROBERT A. RUTLAND & CHARLES F. HOBSON, THE PAPERS OF JAMES MADISON 295-300 (1977). Eleven years later, James Madison took great pains to expand upon these statements. Exasperated at times, he set out the correct legal construction to be used in interpreting the Constitution and the Bill of Rights. *See* James Madison, *Report on the Resolutions* (1799-1800) before the Commonwealth of Virginia's General Assembly, in GAILLARD HUNT, 6 WRITINGS OF JAMES MADISON (1900).

[23] Abraham Lincoln, President of the United States, The Gettysburg Address, Dedication of the Soldiers' National Cemetery, Gettysburg, Pennsylvania (November 19, 1863).

B. The Ninth Amendment and "Person"

John Adams, "You have rights antecedent to all earthly governments: rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe."[24]

The words "people" or "person" occur fifty times in the Constitution and Bill of Rights. The words "person", "people" or "persons", have never been legally defined by the people. The people have attempted to do so, but have failed. These failed attempts have been initiatives by the people themselves and/or state legislative actions aimed at defining who people are, who a "person" is legally. These are discussed later in this article. The government, however, has defined the word "person", even though it does not have the Constitutional authority to do so.

The government, the U.S. Supreme Court, has defined the word "person" on two occasions--- in *Dred Scott v. Sandford* [25] *and Roe v. Wade* [26] by stating what a "person" *was not*. In *Dred Scott*, Chief Justice Taney stated, "The words 'people of the United States' and 'citizens'….mean the same thing". Taney then went on to state "that a slave, the *peculium* of a master, and possessing within himself no civil nor political rights or capacities, cannot be a citizen."[27] The Court defined a "person" as *someone other than a slave.*

In *Roe v. Wade*, we see a similar type of definition as in *Dred Scott*, concluding, after their interpretation of abortion history and the Fourteenth Amendment, "All this, together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that

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[24] John Adams, *A Dissertation on the Canon and Feudal Law* (1765), in Bennett B. Patterson, *The Forgotten Ninth Amendment*, in RANDY BARNETT, THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 108 (1989).

[25] Dred Scott v. Sandford, 60 U.S. 393, 404, 496 (1857).

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

[27] *See Dred Scott v. Sandford*, 60 U.S. at 404, 496.

the word "person" as used in the Fourteenth Amendment, *does not include the unborn*."[28] This definition of "person" occurred after the Court, just a few pages earlier, stated that "We need not resolve the difficult question of when life begins."[29] If the court cannot decide by their own admission, when life begins, how can they decide who a "person" is?

In upholding *Roe* and the above language, the Supreme Court in *Planned Parenthood v. Casey* made the following remarkable statement regarding "The root of American governmental power…",

> So, indeed, must be the character of a Nation of people who aspire to live according to the *rule of law*. Their *belief in themselves* as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability *to see itself* through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible. [30]

In stark contrast to the writings of Adams, Madison, Hamilton and Lincoln discussed earlier in this paper, the Court states that *the people are not separate from the government.* Neither can the people believe in themselves nor "see", i.e., understand themselves, *except through the government*, in this case the Judicial Branch.

Our country was founded on the political philosophy that *the government's well-being is dependent upon the people.* In *Casey*, the Supreme Court places itself above the people: the people's well-being is *dependent upon the government.*

The Supreme Court's words in *Casey* are frighteningly similar to Justinian, who Adler and Gorman discuss as an opposition to Constitutional government, "Whatever pleases the emperor has the

[28] *See Roe v. Wade,* 410 U.S. at 158 (emphasis added).
[29] *See Roe v. Wade*, 410 U.S. at 113, 159-160.
[30] Planned Parenthood v. Casey, 505 U.S. 833, 865, 868. (1992). (emphasis added).

force of law, since by the royal law, which has been laid down concerning his authority, the people conceded to him and into his hands all its authority and power."

Adler and Gorman clearly represent their participants' opinion when they describe the difference between an Empire and Constitutional government,

> The transition from the Republic to the Empire was pictured as a point of no return, the people pictured as having completely abdicated their sovereignty….. A government instituted by the people and deriving its just powers from their consent, would continue and might endure so long as it earns that consent. But precisely because the consensual transmission of authority was not final or irrevocable, the people retain, as part of their original and standing right to self-rule, the right to alter and abolish a government that departs from or transgresses the ends for which a form of government has been instituted in the first place. [31]

The people have continuing and ongoing unalienable rights. The rule of law depends upon these inherent rights, not upon the Judicial Branch of the U.S. Government. Farber states this most eloquently in his commentary on the Ninth Amendment, "The Framers took seriously the idea that government has no legitimate authority to violate human rights, regardless of what specific laws might say. We can never understand the Ninth Amendment until we grasp that basic premise of the Founding Fathers: human rights come first, and legal regimes come second."

Quoting John Locke, Farber continues, "The law of nature stands as an eternal rule to all men, legislators as well as others."[32]

If the reasoning of the Supreme Court in *Casey* is true, then the Ninth Amendment is false, which accepts the existence of other rights

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[31] ADLER AND GORMAN, THE AMERICAN TESTAMENT 47-48 (1975).

[32] DANIEL FARBER, RETAINED BY THE PEOPLE, THE "SILENT "NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE 6-7 (2007).

"retained by the people." The people do not need the government, the Judiciary, to *believe in themselves*. The people believed in themselves before the government existed. The Court has placed its own power and legitimacy above the Constitution, to which it has taken an oath to uphold.[33]

And, evidently the Court did not remember that its "legitimacy" was not undermined when they reversed other decisions, such as *Plessy v. Ferguson* and "separate but equal"[34]. From our present historical perspective, the Court's legitimacy was enhanced, not harmed, by this decision.

Adler and Gorman summarize clearly and succinctly for themselves and their participants the meaning of the Bill of Rights, "These constitutional limitations intended to provide basic security for one freedom, fundamental throughout the revolutionary era---freedom from arbitrary power...Their posterity should not be exposed to arbitrary power exercised by the government the Founding Fathers were here ordaining."[35]

As a result of *Roe* and *Casey*, the Supreme Court has violated the people's Constitutional rights by assuming powers they do not have, in two legal areas:

1) They have defined the word "person" or *assumed* who legal "persons" are. In *Roe*, just a few sentences after stating, "The Constitution does not define "person" in so many words.", the Court says, "…that the word "person"…does not include the unborn."[36] If there is no definition of "person" in the Constitution, how can the Supreme Court provide this one? The government does not have the power to create a partial, or negative definition, when none exists.

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[33] 28 USC § 453 Federal Judges take a Federal Oath of Office to "administer justice …under the Constitution….".

[34] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). Plessy v. Ferguson, 505 U.S. 833 (1896).

[35] ADLER AND GORMAN, THE AMERICAN TESTAMENT 11 (1975).

[36] *See Roe v. Wade,* 410 U.S. at 157-158.

2) In court cases in 2012 and 2013, the people failed in attempts to define themselves: the Oklahoma and Alaska State Supreme Courts halted or prevented initiative actions of the people to do so. This is a violation of *Roe* itself, which allowed that "If this suggestion of personhood is established, the appellant's case, of course, collapses."[37]This is exactly what the people were trying to do. The Oklahoma case was denied certiorari by the U.S. Supreme Court.[38] The Alaska case was not appealed, perhaps due to the Oklahoma decision a few months earlier.[39]

In 2015, in a Federal Appeals Court case, *Edwards v. Beck*, the U.S. Court of Appeals for the Eighth Circuit affirmed that The Arkansas Human Heartbeat Act, violated *Roe v. Wade*. The Arkansas Act, passed by the legislature, said that physicians "shall not perform an abortion on a pregnant woman before the person tests the pregnant woman to determine whether the fetus that pregnant woman is carrying possesses a detectible heartbeat."[40] If there was a heartbeat, an abortion could not be performed. An appeal by the State of Arkansas was again denied certiorari by the U.S. Supreme Court in January, 2016.

The Supreme Court need not have ruled in the manner described. Salman Chase, later to become Chief Justice, argued in a Supreme Court case, "No Court is bound to enforce unjust law; but on the contrary, by prior and superior obligations, to abstain from enforcing such law." And, "It must be a clear case, doubtless, which will warrant a court in pronouncing a law so unjust that it ought not to be enforced; but, in a clear case, the path of duty is plain."[41]

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[37] *See Roe v. Wade*, 410 U.S.at 156.

[38] *In Re* Initiative Petition No. 395, State Question No. 761**,** 2012 OK 42**,** 286 P.3d 637, Supreme Court of Oklahoma (2012).

[39] Clinton Desjarlais v. State of Alaska, No. S–14535, Supreme Court of Alaska (2013).

[40] The United States Court of Appeals for the Eighth District, *Edwards v. Beck*, 786 F. 3d 1113-2015 (June 2015), reversing the Arkansas State Legislature's Human Heartbeat Protection Act, Arkansas Code Ann. §§ 20-16-1301-1307 (2013).

[41] S.P. Chase, An Argument for the Defendant, submitted to the Supreme Court of the United States, at the December term, 1846, in the case of *Wharton Jones v. VanZandt* 72 (1847), in DANIEL FARBER, RETAINED BY THE PEOPLE 48-49 (2007).

Very recently, the Court ruled against the State of Louisiana, which was trying to limit physicians performing abortions without appropriate hospital admitting rights, as they had ruled against the State of Texas in a similar case.[42]

Chief Justice Roberts, concurring, makes some remarkable statements regarding *Stare decisis. Stare decisis* was prominently discussed by members of the *Casey*[43] Court as a principal justification for that decision. Roberts defines *Stare decisis* as per "Black's Law Dictionary, 1696 …."to stand by things decided". "The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana's law cannot stand under our precedents."

However, he continues on the next page, "*Stare decisis* is not an "inexorable command"....But for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly. The Court accordingly considers additional factors before overruling a precedent, such as its administrative nature, *its fit with subsequent factual and legal developments,* and the reliant interests that the precedent has engendered."[44] The author would argue that the present discussion meets the criteria laid out by the Chief Justice for the people defining themselves under the Ninth Amendment.

It is clear that as a result of these cases upholding *Roe,* the people have no realistic legislative power within any state to define themselves. The Founding Fathers experiment in government established that the real power lies with the people, even if it does not always exist in the State governments. In the two legal areas discussed above, the Judiciary's powers exceeded those defined in the Constitution, as they are limited

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[42] June Medical Services L.L.C.et al. v. Russo, Interim Secretary, Louisiana and Department of Health and Hospitals (Slip Opinion), June 29, 2020 and Whole Woman's Health v. Hellerstedt, 579____, (Slip Opinion), June 27, 2016.

[43] *See Planned Parenthood v. Casey, 505 U.S. (1992).*

[44] *See June Medical Services L.L.C.et al. v. Russo, Interim Secretary, Louisiana and Department of Health and Hospitals,* slip op., pages 2-3 (2020) (emphasis added).

as stated in the Constitution itself, including under the Ninth Amendment itself.[45]

1. Review of the literature

A review of the literature regarding the Ninth Amendment turns up just a few cases upon which the literature is based. Two of the best and varied overviews are by Randy Barnett (1989) and Daniel Farber (2007). Over the course of our nation's history only a few Supreme Court cases have relied on the Ninth Amendment. In *United Public Workers v. Mitchell,* Justice Reed commented on the limits of federal power, which includes the Judiciary:

> When objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the *granted power* under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved to the Ninth and Tenth Amendments, must fail.[46]

In one of our nation's earliest cases, Chief Justice Marshall stated the same idea, "The Duties of this court, to exercise jurisdiction where it is conferred and not to *usurp* it where it is *not conferred*, are of equal obligation."[47]

The people have never *granted power* or "conferred" to the government, the Federal Judiciary, the right to legally define people or a "person". However, as we have seen, it has been usurped in *Dred Scott* and *Roe v. Wade.*

In addition to *United Public Workers v. Mitchell*, the most prominent Ninth Amendment case is *Griswold v. Connecticut*,[48] the primary source for "the right to privacy", upon which *Roe* is based. In his concurring

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[45] Federal Oath of Office, *supra* note 34.

[46] United Public Workers v. Mitchell, 330 U.S. 75 (1947) (emphasis added).

[47] Bank of the United States v. Deveaux, 9 U.S. 61 (1809) (emphasis added).

[48] Griswold v. Connecticut, 381 U.S. 479 (1965).

opinion in *Griswold,* Justice Goldberg makes a number of important insights, to which Chief Justice Douglas and Justice Brennan also concurred: "This Court, however, has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name."[49]

Quoting James Madison and Chief Justice Story, who presided at the Amistad Ship's Slaves' Trial in 1838,[50] Goldberg concludes:

> These statements of Madison and Story make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people." And,
>
> While this Court has had little occasion to interpret the Ninth Amendment, "it cannot be presumed that any clause in the constitution is intended to be without effect." Marbury v. Madison, 1803. In interpreting the Constitution, "real effect should be given to all the words it uses." Myers v. United States, 1926. The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold.[51]

In regards to which rights can be protected or are "fundamental" Goldberg says,

> Judges…must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] …as to be ranked as fundamental". Snyder v. Massachusetts. The injury is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'…., Powell v. Alabama. 287 U.S. 45, 67."[52]

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[49] *Id.*

[50] *See United States v. The Amistad*, U.S. 518 (1841).

[51] *See Griswold v. Connecticut,* 381 U.S. at 490, 491.

[52] *Id.* at 494.

Given this discussion in *Griswold,* it is clear that the right of the people to define themselves is a "fundamental right" of the people. It is fundamental because it is inherent to human nature and *unalienable*--all of us are granted our identities, who we are, by the Creator, not by the government. They, therefore, cannot be taken away by the government. "Life, Liberty and the Pursuit of Happiness"[53] are not possible and therefore not rights, if the people cannot define themselves. The Supreme Court does not have the power to deprive the "unborn" of their "person" or their "person's" rights.

From a larger perspective one can ask: how can judges perform their primary role in our government: to "interpret" the Constitution and "say what the law is", when they themselves do not know who the law applies to, who legal "persons" are?[54] Lacking a legal definition or interpretation as to *who a person is*, as the Supreme Court *has never ruled* on this point, not just who they *are not*, the courts *assume* that a born individual is a "person" and they *have ruled* that "unborn" are not. They do not have the Constitutional right to do either.

If the people alone have an unenumerated right to define themselves, then they must have the power to somehow make it happen. In discussing 'rights' and 'powers', it is inconceivable that the Founding Fathers would write the first eight amendments, granting the Judiciary all necessary power to interpret and enforce them over time, but exempt the Ninth and Tenth.[55]

The first Chief Justice, John Marshall clarified this in an early case, "The Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a

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

[54] *See Marbury v. Madison,* 5 U. S. Cranch 137 at 176-180 (1803).

[55]Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment* in BARNETT, *supra* note 28, at 304-307.

vested legal right.".[56] A person's Ninth Amendment right must be as enforceable as all other rights

Again, from Farber, "The Ninth Amendment tells us that basic rights are not a gift to the American people from legal documents like the Bill of Rights. Instead, these rights existed before the Constitution was even adopted. In enforcing these rights in its decisions, the modern Supreme Court is merely being true to the Framer's vision. [57]

PART II
Legal, Peaceful and Civil Action

A. The Legal and Moral Justification for the Peaceful Use of Civil Action as a Means for People Defining Themselves

> "Human law is law inasmuch as it is in conformity with right reason and thus derives from the eternal law. But when a law is contrary to reason, it is called an unjust law; but in this case it ceases to be a law…", [58]
>
> Thomas Aquinas, 13th century philosopher and jurist.

Alexander Hamilton five hundred years later, agreed, "The Sacred Rights of Mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole

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[56] *See Marbury v. Madison*, 5 U.S. 1 Cranch 137 163.

[57] DANIEL FARBER, RETAINED BY THE PEOPLE, THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE 96 (2007).

[58] THOMAS AQUINAS, SUMMA THEOLOGIAE, I-II, q. 93, a. 3, ad 2um, (1265). Compare this to the following statement from a highly respected moral leader of the 20th century:

> Abortion and euthanasia are…crimes which no human law can claim to legitimize. There is no obligation in conscience to obey such laws; instead there is *a grave and clear obligation to oppose them by conscientious objection*…. When conscience, this bright lamp of the soul (cf. *Mt* 6:22-23), calls "evil good and good evil" (*Is* 5:20), it is already on the path to the most alarming corruption and the darkest moral blindness. POPE JOHN PAUL II, THE GOSPEL OF LIFE (1995).

volume of human nature, by the hand of Divinity itself, and can never be erased or obscured by mortal power."[59]

The people have a natural and human right to assert the true definition of themselves in Federal Court under the Constitution and the Ninth Amendment. So, how does any individual or group of individuals access their Ninth Amendment rights? The author suggests two possible peaceful, civil approaches, both of which are legal and supported by Supreme Court precedents.

1. A group of pregnant women, of varying ages and backgrounds; or a group of men and women who have survived abortion as conceived children; or the fathers of conceived children not yet born, or all three, peacefully trespass at a place of abortion. They are brought to trial on "trespassing" charges. They state their Ninth Amendment rights in Court;

2. Individuals, or a group of individuals presently involved in a Pro-life case, with the same status and backgrounds as the first individuals, state their Ninth Amendment rights in Court.

Such a Ninth Amendment right's statement may read as follows:

> *Your Honor, we hereby exercise our right under the Ninth Amendment to the Constitution, to legally define ourselves, persons: as human beings from conception until death. We ask Your Honor and this Court to assent to and affirm this legal definition from this day forward. The people, who created the government have the right to define themselves. The government cannot define its creator, the people. The government does not possess the right or power to do so. Certain rights and powers do not belong to the government, but are retained by the people, as the Constitution clearly states.*

Is the author advocating illegal activity here? If one looks to Supreme Court precedents the above scenario is clearly, legally defensible. Even more so, it is *promotable* by the Supreme Court itself, discussed in the

[59] ALEXANDER HAMILTON, THE FARMER REFUTED, Papers 1: 86-89, 121-22, 135-36 (1775).

next section. It has occurred before in multiple Civil Rights cases as a peaceful, civil means to establish rights under the Fourteenth Amendment discussed in the next section. And it has occurred in cases establishing rights under the First Amendment.[60]

It is necessary, according to Article III of the Constitution, to have a "case" in order to assert one's rights in any court.[61] This is true of all rights. If people are seeking freedom to assemble or to speak, or to print material and distribute it, someone or some group of people must step forward, assemble, speak or print and distribute material. Will they be arrested for doing so? Are they guilty of an illegal act?[62]

In the early 1960's, in *Edwards v. South Carolina*, African-American "students, peacefully assembled to express their grievances…" They were arrested and convicted of the "crime of breach of the peace." The Supreme Court ruled that, "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views….. *Terminiello v. Chicago,* 337 U. S. 1, 337 U. S. 5. [63] The Court ruled that no crimes had been committed.

In one of our country's most important First Amendment cases, regarding the Pentagon Papers, the Supreme Court ruled in favor of the

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[60] U.S. CONST. amend. I. *See* Texas v. Johnson, 491 U.S. 397 (1989) (Freedom of Speech); and Edwards v. South Carolina, 372 U.S. 229-230, 237-238 (1963) (Freedom of Assembly, Petition); Lovell v. City of Griffin, 303 U.S. 444, 453 (1938) (Freedom of the Press).
In *Lovell*, Alma Lovell was arrested for distributing religious pamphlets without first getting a permit from the city. The Supreme Court ruled, "As the ordinance is void on its face, it was not necessary for appellant to seek a permit under it. She was entitled to contest its validity in answer to the charge against her. *Smith v. Cahoon,* 283 U. S. 553, 283 U. S. 562."(Chief Justice Hughes). The Court ruled that no crimes had been committed.

[61] U.S. CONST. art. III § 2.

[62] *See Texas v. Johnson,* 491 U.S. 397; *Edwards v. South Carolina*, 372 U.S. at 229-230, 237-238*; Lovell v. City of Griffin,* 303 U.S. at 444, 453 at *supra* note 62.

[63]*See Edwards v. South Carolina,* 372 U.S. 229-230, 237-238 (1963). The Supreme Court went on to say,
"…. As in the *Terminiello* case, the courts of South Carolina have defined a criminal offense so as to permit conviction of the petitioners if their speech "stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand." For these reasons, we conclude that these criminal convictions cannot stand…."

Washington Post and New York Times publishing companies. Justice Black, with Justice Douglas concurring, said,

> Our Government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including the First Amendment, followed in 1791. Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment *does not mean what it says,* but rather means that the Government can halt the publication of current news of vital importance to the people of this country….
>
> *The amendments were offered to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution.* The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly.
>
> In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors.[64]

Throughout our history, if individuals and organizations had not had the courage to assert their rights under the Bill of Rights, they would never have enjoyed them, nor established them for others. If the First Amendment is meant "to serve the governed, not the governors", so are the other nine.

These legal precedents speak to the right of the people to establish their Ninth Amendment rights. The path forward is inherent within the Ninth Amendment itself as discussed in Part 1 and as legally established by the Supreme Court in the Fourteenth Amendment cases discussed in this Part.

B. SUPREME COURT PRECEDENTS

[64] New York Times vs. Co. v. United States, 403 U.S. 714-717 (1971) (emphasis added).

In February, 1960, a group of four students from North Carolina's A & T College met a few times and decided to sit down in the "white's only" section of the Woolworth's lunch counter in Greensboro, North Carolina. They were supposed to sit in the "coloreds" section. Franklin McCain, one of the students, speaking years later recalled,

> Fifteen seconds after I sat on that stool, I had the most wonderful feeling. I had a feeling of liberation, restored manhood…. It's a feeling that I don't think that I'll ever be able to have again. It's the kind of thing that people pray for ... and wish for all their lives and never experience it. And I felt as though I wouldn't have been cheated out of life had that been the end of my life at that second or that moment.[65]

Mr. McCain states a wonderful Truth: "manhood" and the human dignity of a man, woman or a child are not dependent upon any government to define.

The African-American students defined who they were by their presence in the "whites only" section. By this action and others they confirmed their *already existing* equality with all other people. As a result, the restaurant eventually: 1) allowed that the students' had a right to do so and 2) allowed that they were equal persons. Within two months, 54 cities in nine states had similar "sit-ins" taking place. The Woolworth's was desegregated six months later, as were eventually, all restaurants.[66]

These precedents, and others discussed herein, which include the "sit-ins" at the Woolworth's counter in Greensboro, North Carolina, morally and legally justify peaceful civil actions taken in existing Federal cases or to begin new cases, in order for people to establish their Ninth Amendment rights.

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[65] Interview by Michele Norris with Franklin McCain on *National Public Radio All Things Considered* , *The Woolworth Sit-in That Launched a Movement* (Feb. 1, 2008). http://www.npr.org/templates/story/story.php?storyId=18615556&ps=rs (last visited November 3,2018).

[66] *The Greensboro Chronology*, INTERNATIONAL CIVIL RIGHTS CENTER AND MUSEUM, https://www.sitinmovement.org/history/greensboro-chronology.asp (last visited November 3, 2018).

On August 9th, 1960, a few months after the Greensboro Woolworth's events in February, "Petitioners, ten Negroes entered a store in Greenville, S.C. and seated themselves at the lunch counter." They refused to leave when the captain of the police, at least four other officers and two state agents approached them. They were arrested for trespassing. The U.S. Supreme Court ruled in this case that the Petitioners' convictions for failure to leave the lunch counter violated the Equal Protection Clause of the Fourteenth Amendment…..

> For the convictions had the effect, which the State cannot deny, of enforcing the ordinance passed by the City of Greenville, the agency of the State. When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators.[67]

In a second related case heard at the same time, Fred Shuttlesworth, an African-American minister was charged with inciting, aiding and abetting a violation of the city trespass ordinance by working with these same youth. The Supreme Court ruled: "It is generally recognized that there can be no conviction for aiding and abetting someone to do an innocent act."[68]

Shuttleworth's conviction was overturned, as the trespassing of the youth at the lunch counter in the *Peterson* case was deemed to be "an innocent act".

These individuals were arrested for "trespassing", but they were doing so as a means—a peaceful, non-violent and non-cooperative civil action--to claim their Constitutional right to be treated equally in society. There was no criminal behavior or intent in their actions.

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[67] *Id.*

[68] Shuttlesworth v. City of Birmingham, 373 U.S. 262, 265. (1963).

The young people of Greenville established their own individual equality, but through their legal acts, they also established this equality for all other people. In light of these cases people are within their rights to take peaceful civil action to establish their Constitutional rights under the Ninth Amendment, as was legally accomplished under the Fourteenth.

This argument was recognized by both sides in *Peterson* and ultimately affirmed by the Supreme Court. Matthew J. Perry, attorney, arguing for the trespassers,

> So that the evidence is that though petitioners were convicted of the crime of trespass---in the name of the crime of trespass, they were in fact convicted of violating the segregation policy of the City of Greenville and of the State of South Carolina as is reflected by the ordinance which makes it a crime for white persons and Negroes to be given food accommodations in the same room unless those provisions are settled.[69]

Attorney Theodore A. Snyder, Jr., stated his opposing argument for the prosecution, the City of Greenville,

> We submit that in this---in the case that is presented here and under its facts that the court should decide that the property right of the owner of this property is paramount to the right of the petitioners to have liberty there, on these premises, for the purposes for which they were present.[70]

The Supreme Court ruled in favor of the petitioners, "for the purposes for which they were present", i.e., trespassing in a segregated restaurant in order to obtain equal treatment under the law, was protected by the Fourteenth Amendment.

In a third case, the Supreme Court made a powerful ruling regarding any state's judicial power. African-Americans were again convicted for trespassing in a restaurant that same year, on September 17, 1960, in New Orleans, Louisiana. In this case there was no specific law which

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[69] Oral Argument, Peterson v. City of Greenville, 373 U.S. (Nov. 6th, 1962). https://www.oyez.org/cases/1962/71.

[70] *Id*. November 7, 1962.

was broken. Rather a "local custom" was being enforced by the Mayor and Police Department, even though no signs or laws prohibited African-American customers from seeking service. The Louisiana State Supreme Court upheld the convictions of these youth for trespassing. The U.S. Supreme Court again found the State Court ruling unconstitutional, stating,

> …But we have 'state' action here, wholly apart from the activity of the Mayor and police, for Louisiana has interceded with its judiciary to put criminal sanctions behind racial discrimination in public places. She may not do so consistently with the Equal Protection Clause of the Fourteenth Amendment.[71]

Prior to these cases, the Missouri and California Supreme Courts had been found in violation of the Constitution by the U.S. Supreme Court. These cases involved "occupancy of real estate" as compared to "trespassing", also covered under the Fourteenth Amendment. The Supreme Court ruled in *Shelley*,

> Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of a judicial branch of the state government.…….And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the Constitutional commands.

The people's exercise of their Ninth Amendment rights in new or existing Pro-life cases is legal civil action by which the people can access their rights under the Ninth Amendment. Ultimately the trespassing and occupancy convictions of the civil rights activists were overturned, even where State Supreme Courts had upheld such arrests and

[71] Lombard et al., v. State of Louisiana, 373, U.S. 267 (1963).

convictions. Just as the State Supreme Courts were not "immunized" from such unconstitutional actions, the Federal Courts cannot immunize themselves from their own unconstitutional actions.

A more recent Supreme Court case continued to make the same points stated in the Civil Rights cases. In *Obergefell v. Hodges*,[72] the Court established the right for legalized gay marriage,

> But as Schuette also said, '[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power.'….Schuette v. BAMN, 572 U.S.___ (slip op. at 15) (2014). Thus, when the rights of persons are violated, "the Construction requires redress by the courts." notwithstanding the more general value of democratic decision making. *Id*. at___ (slip op. at 17).[73]

Over 50 million individuals have been "injured" by the U.S. Supreme Court's *Roe v. Wade* decision. They have died.[74] The U.S. Supreme Court cannot be "immune" from its own "unlawful exercise of governmental power", any more than any other court.

The Supreme Court in *Obergefell* describes how injury, noted in their citation of "Schuette" above, or harm can be countered by individuals:

> The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the

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[72] Obergefell v. Hodges, 576 U.S. slip op. (2015).

[73] *Id*. slip op. 24.

[74] The Des Moines Register reported in 2015, "Data from the Guttmacher Institute--a research organization that supports legal access to abortion--does indeed show more than 50 million abortions were performed between 1973 and 2011. Those findings are peer-reviewed and have been cited by proponents and opponents of legal access to abortion alike." https:www.desmoineregister.com/story/news/politics/reality-check/2015/03/06/million-abortions-claim-checks/24530159/. (last visited June 11, 2019).

> Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. V. Barnette,* 319 U.S. 624, 638 (1943). This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Ibid."* [75]

Here the Court is clearly *promoting,* as mentioned earlier, that individuals, people, can assert a fundamental right. Under the Ninth Amendment, the people can invoke the right to protect themselves--conceived children. They are not asking the Court for a ruling. They are asking the Court *to give up their power to rule, to assent* to the people's right under the Ninth Amendment. The author strongly agrees with the dissenting Justices in *Obergefell* regarding the assumed power of the Court, which is again, frighteningly reminiscent of *Casey*.[76]

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[75] *See Obergefell v. Hodges,* 576 U.S. slip op. (2015). The "fundamental right" is life itself. "Harm" in the present discussion includes the deaths of over 50 million people. This constitutes an average loss per born person of one-sixth of their friends, acquaintances, teachers, doctors, potential spouses, etc., since 1973. In sum, this is the loss of one-sixth of all of an individual's "Blessings of liberty" via lost "Posterity" during his or her lifetime, which is one of the reasons given for the Constitution itself, stated in the Preamble. "Life, Liberty and the Pursuit of Happiness", as stated in the Declaration of Independence, are all intimately connected with family, friends, relationships and community. "Harm" also includes unequal treatment as compared to other persons, as discussed in this case and the civil rights cases, under the Fourteenth Amendment.

[76] *See Obergefell v. Hodges,* 576 U.S. slip op. (2015). (Roberts, 3; Alito, 7; Thomas, 2 and Scalia, 1-2, 5, dissenting).

Chief Justice John Roberts:

> The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent….Just who do we think we are?….If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can?...Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable judges and unelected judges.

The assumption of power in *Roe v. Wade,* power which the Court did not possess, is the reason for the people asserting their Ninth Amendment rights. The people are asking the Court to submit to its clearly stated Constitutional duty: to acknowledge and allow individuals, people, to legally define themselves, to insure that the people's rights are not denied or disparaged under the Ninth Amendment.

1. *Roe* Created Two Classes Of Human Beings, Separate And Unequal

Since 1973 the Federal Courts have been functioning similarly to the segregated restaurants of the early 1960's. The Federal Courts have an "unborn" section and a born section, similar to the "colored" and "whites only" sections of the restaurants. There are actually two "unborn" sections: those who can be killed by their parents by abortion as established by *Roe*, and those who cannot be killed purposely by anyone else, established by the fetal homicide laws that exist in the majority of the states.[77]

Justice Samuel A. Alito, Jr.: "Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed."

Justice Clarence Thomas: "Yet the majority ….rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that *it comes from the government.* This distortion…*inverts the relationship between the individual and the state* in our Republic. I cannot agree with it."(emphasis added). Compare with THE FEDERALIST NO.78 (Alexander Hamilton), *supra* at note 21.

Justice Antonin Scalia:

> I write separately to call attention to this Court's threat to American democracy….Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court….This practice of constitutional revision….always accompanied(as it is today) by extravagant praise of liberty, robs the people of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.
>
> This is a naked judicial claim to legislative-indeed, *super*-legislative power; a claim fundamentally at odds with our system of government….

[77] PAUL LINTON, THE LEGAL STATUS OF THE UNBORN CHILD UNDER STATE LAW, VI U. St. Thomas, J.L.P.P. 141-155 (2011).

In *Roe v. Wade,* the Supreme Court did not interpret *who a "person" is*. *Roe* stated that the "unborn" are not legal "persons". However, the Court has never interpreted that the born are.[78] No Federal Court standard exists regarding who a legal "person" is.

However, by stating that "…the word "person", as used in the Fourteenth Amendment, does not include the unborn, the Court created a legal separation between the born and the "unborn". Roe had the effect of creating a new class[79] of human beings, the "unborn", with separate legal rights from the "born". The *Roe* decision is remarkably similar to the ruling in *Plessy v. Ferguson*,[80] where the Supreme Court established the "separate but equal doctrine". The *Plessy* decision affirmed separate services and facilities for two classes of human beings, the "coloreds" and the "whites".[81] This was also accomplished by the Plessy Court without a legal interpretation or definition of the word "person" as used in the Fourteenth Amendment.

Over the years "coloreds and whites"' eating, drinking, riding trains, education, etc., were allowed or mandated to exist separately and presumably, equally. The *Plessy* Court documented how this system of separation of the races legally existed via states' legislation, from the end of the Civil War to their time (1896). In using the terms "colored" and "white" liberally throughout the decision, more than ten state statutes were cited in their argument that "equal, but separate" does not violate the Fourteenth Amendment. At the Federal level, *Plessy* served to put into writing what was already happening legally in many states via legislation, separation of people based on whether they were "colored" or "white". [82]

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[78] *See Roe v. Wade*, 410 U.S. at 158.

[79] *Class Definition*: "…Also a group of persons or things, taken collectively, having certain qualities in common, and constituting a unit for certain purposes; e.", Black's Law Dictionary Online, 2nd Edition, 2018, https://thelawdictionary.org/class/ (last visited November 3, 2018).

[80] Plessy v. Ferguson, 163 U.S. 537 (1896).

[81] *Id.*

[82] *See Plessy v. Ferguson*, 163 U.S. 537, 541-552.

Similar to *Plessy's* references to "coloreds" and "whites", *Roe* describes the "unborn" as a separate category of individual. In a remarkable paragraph, the Court acknowledges that, although not "persons",[83] the "unborn" have legal rights. The Court states, "… the law has been reluctant to …accord legal rights to the unborn except in narrowly defined situations…" However immediately following this statement, the Court recognizes unborn rights for "prenatal injuries", "wrongful death" and "… rights or interests by way of inheritance…property, and have been represented by *guardians ad litem*". The Court concludes, "In short, the unborn have never been recognized in the law as persons in the whole sense." [84]

Lacking a legal definition of "persons in the whole sense", it is arguable that "unborn" individuals *do meet* the "whole sense" criteria. As there is no legal standard for a "person in the whole sense", the Court has no authority to assert that they don't.

In any case, *Roe* acknowledges in this one paragraph, that the "unborn" have similar, if partial rights in comparison to the born. Yet the Court is clearly stating that the "unborn" are not equal to the born and are separate from them.

This paragraph is remarkable for another reason. *The Court's own citations belie what this paragraph argues.* For example, Maledon's article, cited by the Court, includes over ninety citations involving state case law and state legislation showing that the "unborn" had numerous legal rights beginning as early as 1634.

Many of the court cases discussed in the article, from 1634 up through the early 1960's, state unequivocally that the "unborn" are equal to born or living "persons" in their rights.[85] Maledon concludes, "Social and economic pressures are probably the main impetus for the liberalized abortion statutes: surely there is no legal precedent."[86]

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[83] *See Roe v. Wade,* 410 U.S. at 158.
[84] *See Roe v. Wade,* 410 U.S. at 161-163.
[85] *Contra* WILLIAM J. MALEDON, LAW AND THE UNBORN CHILD, 46 NOTRE DAME LAW, 351-354 (1971).
[86] *Id.* at 372.

In addition to Maledon, Prosser, another source cited by the Court agrees, "Medical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law. The criminal law regards it as a separate entity, and the law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent.."[87]

And Prosser states in direct contradiction to the Court's assertions regarding prenatal injuries in cases after 1946, "But when actually faced with the issue for decision, almost all of the jurisdictions have allowed recovery even though the injury occurred during the early weeks of pregnancy, *when the child was neither viable nor quick*."[88]

And Louisell, another author cited by the Court,

> The progress of the law in recognition of the fetus as a human person for all purposes has been strong and steady and roughly proportional to the growth of knowledge of biology and embryology. In earlier times the uncertain knowledge of embryology inevitably caused some doubt as to whether or not the unborn child was a human person. Yet even the early English cases resolved scientific, as well as moral and philosophical, doubts in favor of the unborn.

And he concludes, "Easy legal abortion presents a genuine and disturbing reversal of the law's steady progress toward recognition of the dignity, value and essential equality of human life. It is the negation of the constitutional guarantee of equal protection of the law."[89]

As noted in the Court's own citations of Prosser, Maledon and Louisell, many of the court and state actions over the past 300 years, supported the idea that the "unborn" was an equal human being to the born, having the same rights as the born[90] and argued against any differentiation in

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[87] *Contra* W. PROSSER, THE LAW OF TORTS, 4th ed., 335 (1971).
[88] *Id.* at 336-337 (emphasis added).
[89] *Contra* DAVID LOUISELL, ABORTION, THE PRACTICE OF MEDICINE AND THE DUE PROCESS OF LAW, 16 U.C.L.A. L. Rev., 233-238, 253 (1969).
[90] *Contra: See* MALEDON, supra note 89; PROSSER, supra note 91; LOUISELL, supra note 93.

equality between the two. This is additionally true regarding the fetal homicide laws at the time of *Roe.*[91]

Roe discusses the "unborn" as not quite equal to "live birth", or born individuals, based on state legislation. This is similar to what the *Plessy* Court did.[92] However, the ten state fetal homicide laws that existed at the time clearly leaned toward equalizing the "unborn" and the born.[93] And although sixteen states had changed their abortion laws to make abortion more legally accessible in the few years leading up to *Roe*, no state had legislated that there were two different types of human beings, the "born" and the "unborn", with different sets of rights.[94,95] Given the history outlined in the above discussion, the opposite was true in the majority of the states.

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[91] *See* MALEDON at 365-372.

[92] *See Roe v. Wade,* 410 U.S. at 161-163.

[93] *See* MALEDON at 368-372 and 365 n.118, "….some statutory protection for the unborn child after quickening provided by feticide statutes in several states. *Arkansas:* ARK. STAT. ANN. §§ 41-2223, 41-2224 (1964); *Florida:* FLA. STAT. ANN. §§ 782.09, 782.10 (1965); *Georgia:* GA. CODE ANN. §§ 26-1101 to 1104, 26-9921a (1969 Revision); *Michigan:* MICH. STAT. ANN. §§ 28.554, 28.555 (1954); *Mississippi:* MISS. CODE ANN. § 2222 (1956); *Missouri:* MO. ANN. STAT. §§ 559.090, 559.100 (Vernon 1953); *Nevada:* NEV. REV. STAT. §§ 200.210, 200.220 (1967); *New York:* N.Y. PENAL CODE § 125.00 (McKinney 1967); *North Dakota:* N.D. CENT. CODE ANN. §§ 12-2502, 12-2503 (1960); *Oklahoma:* OKLA. STAT. ANN. tit. 21, §§ 713,714 (1958)."

[94] *Id.* at 365 n.3, "Abortion statutes have recently been revised in some sixteen states. 3 *Alaska:* ALASKA LAWS 1970 ch. 103; *Arkansas:* ARK. STAT. ANN. §§ 41-301 to 310 (1969); *California:* CAL. HEALTH & SAFETY CODE §§ 25950-54 (West 1969); *Colorado:* COLO. REV. STAT. ch.40, §§ 2-50, 51 (Cum. Supp. 1969); *Delaware:* DEL. LAWS 1969, vol. 57, ch. 145; *Georgia:* GA. CODE ANN. §§ 26-1201 to 1203, 26-99 2 0a, 21a, 25a (1969 Revision); *Hawaii:* House Bill No. 61 (1970); *Kansas:* KANSAS LAWS 1969 ch. 180, sec. 21-3407; *Maryland:* MD.CODE ANN. art. 43, § 149E (Supp. 1969); *New Mexico:* N.M. STAT. ANN. §§ 40A-5-1 to\5-3 (Supp. 1969); *New York:* NEW YORK: LAWS 1970 ch. 127; *North Carolina:* N.C. GEN.STAT. ANN. § 14-45.1 (1969 Replacement Volume); *Oregon:* OREGON LAWS 1969 cb. 684,§ 17; *South Carolina:* S.C. CODE ANN. § 16-87 (1970); *Virginia:* VA. CODE ANN. § 18.1-62.1 Supp. 1969); *Washington:* WASHINGTON LAWS 1970 ch. 3, second extraordinary session (approved by Nov., 1970 referendum)."

[95] PAUL LINTON, THE LEGAL STATUS OF ABORTION IN THE STATES IF ROE V. WADE IS OVERRULED, 23 Issues Law and Medicine 3, 3-41 and 42-43 (2007). This paper includes "Section 230.3 Model Penal Code (1962), American Law Institute". Many of the fifty states' pre-*Roe* abortion laws summarized here, were based on this code, which uses the term "child" for someone not yet born.

Roe clearly established the "unborn" as separate from those born by ruling "that the word "person" as used in the Fourteenth Amendment, does not include the unborn."; and by acknowledging that the "unborn" have legal rights, if only in "narrowly defined situations", which however, according to their own citations, contradicts this and documents "unborn" rights in many and diverse areas of the law.[96]

As the judicial branch of our government under the Constitution, the Supreme Court does not have the authority to *legislate* the creation of a separate class of human beings—the human "unborn".[97] The Court's constitutional function is judicial, not legislative. The Court overstepped its authority under the Constitution by legislating this separate and unequal class of individuals into law.[98] In his dissent, Justice Rhenquist agreed with this assessment in a related area, dividing the "unborn's" life into three parts: "The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the drafters of the Fourteenth Amendment."[99,100]

Since *Roe*, many more states have acted to increase the rights for the "unborn" class via the fetal homicide laws. Thirty-eight states now have fetal homicide or similar laws, compared to ten at the time of *Roe.* These have been overwhelmingly upheld by the Federal Courts.[101]These rights

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[96] *Contra:* MALEDON at 368-372 and 365 n.118.; PROSSER at 336-337; LOUISELL at 233-238, 253; Note, 56 Iowa Law Review 994-1014 (1971).

[97] *See Roe v. Wade,* 410 U.S. at 158.

[98] U.S. CONSTITUTION, art. III.

[99] *See Roe v. Wade*, 410 U.S. at 174.

[100] CLARKE D. FORSYTHE, HOMICIDE OF THE UNBORN CHILD: THE BORN ALIVE RULE AND OTHER LEGAL ANACHRONISMS, 21 Valparaiso University Law Review, 609-610 (1987). From the perspective of the history of "homicide" laws as applied to "an unborn child", Clarke, quoting Black's Law Dictionary states,

> A homicide statute, by definition, punishes "the killing of one human being by the act, procurement, or omission of another." A homicide statute protects all human beings. To construe a homicide statute in such a manner as to exclude an entire class of human beings is to defeat the intention of the legislature.

[101] *See* PAUL LINTON, *supra* note 82.

are separate but not equal to the born class and the "unborn" are not equal to themselves in different states. In a majority of the thirty-eight states with fetal homicide laws, the "unborn" rights include: 1) the right to live if threatened by someone other than their mother obtaining an abortion, as it is a crime to commit homicide against the "unborn"; 2) homicide is a crime no matter what the gestational age; 3) viability is rejected as a cutoff for determining liability for non-fatal injuries; 4) recovery under wrongful death is allowed for prenatal injuries where the injury causing death occurs after viability. In all states, 5) a guardian *ad litem* may be appointed to recognize an unborn child in various matters, including estates and trusts. In some states, 6) conceived children have property rights if the parents die after the conception.[102]

The Federal Courts' upholding the fetal homicides laws is irrational on two counts with the Courts' also upholding *Roe:* 1) as the "unborn" are not "persons", according to *Roe v. Wade*[103], how can the Federal Courts uphold the crime of "homicide", which means the "killing of one human being ....by another"?[104] According to the Constitution, which protects "persons", how can the crime of "fetal homicide", a type of "homicide", be committed against an individual who is not a "person"? [105]; 2) the second reason is well stated by Maledon, "Will the pregnant woman who is hit by a negligent driver while she is on her way to the hospital to have an abortion still have a cause of action for the wrongful death of her unborn child? If so, how is it possible for the law to say that a child can be wrongfully killed only hours before he can be rightfully killed?"[106]

Just as *Plessy* created "separate but equal" without defining or interpreting the meaning of the word "person", so was *Plessy* overturned fifty-eight years later by *Brown v. Board of Education,* as depriving students of "equal protection" under the Fourteenth Amendment, also

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[102] *Id.*

[103] *See Roe v. Wade,* 410 U.S. 113 at 158.

[104] *Homicide Definition*: "The killing of any human creature. 4 Bl. Comm. 177. The killing of one human being by the act, procurement, or omission of another. Pen. Code N. Y.", Black's Law Dictionary Online, 2nd Edition, 2018, https://thelawdictionary.org/homicide/ (last visited November 3, 2018).

[105] U.S. CONSTITUTION.

[106] *See* MALEDON at 369.

without an interpretation or definition of the word "person". [107] Just as it was not grounded in the Constitution for the *Plessy* Court to establish "separate but equal", it cannot be grounded in the Constitution for the *Roe* Court to create a separate, unequal "unborn" individual, with some legal human rights. This violates the Fourteenth Amendment's guarantee of equal protection, just as certainly as *Plessy*.

As, since 1973, the Supreme Court has created a *Plessy* type of doctrine, the courts have been and are now, places of segregation and discrimination, just as certainly as our courts and society were under *Plessy*.[108] There is no difference between peaceful civil action taken on behalf of conceived children, because the Federal Courts have varying and unequal definitions and assumptions of who a legal person with rights is, i.e., *assumed* "born" and "unborn", and the peaceful civil actions taken in a segregated restaurant based upon "separate but equal". The Courts are presently in as much violation of the law as were the restaurants.

2. STANDING

In order for people to assert their Ninth Amendment rights they must have legal standing to define who they are.[109]

As discussed at the beginning of this section, there are at least two processes that can be established by people to assert their Ninth Amendment rights. The first would be to create a new "trespassing" or similar case. The second would be for individuals to assert their right in existing Pro-life court cases related to defending theirs or others peaceful Pro-life actions. In either type of case, both defendants and/or witnesses for the defendants could assert their rights under the Ninth Amendment. In either scenario the most powerful individuals who can testify would be pregnant women, individuals who have been conceived and survived abortion, or fathers of conceived children, acting to protect

[107] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
[108] U.S. CONST. amend. XIV.
[109] U.S. CONST. art. III.

the rights of their minor children (not their own rights),[110] or a combination of all three.

Barrows v. Jackson,[111] set an important precedent in regards to legal standing in such cases. In *Barrows,* which involved "occupancy of real estate by non-Caucasians", rather than "trespassing", the Supreme Court allowed standing to certain parties in order to protect fundamental rights and prevent harm to others who were not part of the case, as protected under the Fourteenth Amendment.[112] In discussing standing, the Court said,

> (c) The principle that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation has no application to the instant case….
>
> This is a salutary rule, the validity of which we reaffirm. But in the instant case, we are faced with a unique situation in which it is the action of the state *court* which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. Cf. *Quong Ham Wah Co.* v. *Industrial Acc. Comm'n,* 184 Cal. 26, 192 P. 1021.[113]

Conceived children cannot "stand" for themselves, however, based on *Barrows*, *Pierce v. Society of Sisters,*[114]other conventional standing

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[110] *See Brown v. Board of Education of Topeka,* 347 U.S. 483 at 487. The parents and other adults involved with the children at the center of this case did so for the benefit of the minor children. They were advocating for the minor children's rights not to be discriminated against. They were not doing this for themselves as parents, ministers, attorneys, supporters, etc.. School children or conceived children cannot take a case to court on their own.

[111] Barrows v. Jackson, 346 U.S. 249. 254-257 (1953).

[112] *See Obergefell v. Hodges*, 576 U.S. slip op. 24 at *supra* note 77.

[113] *See Barrows v. Jackson*, 346 U.S. 249. 254-257.

[114] Pierce v. Society of Sisters, 268 U.S. 510, 534-536 (1925).

cases[115],[116]and the civil rights cases discussed above, if those who take peaceful civil action under the Ninth Amendment in existing or new Federal Court cases include pregnant women, a woman with child would have standing to protect her conceived child and other conceived children from harm. Survivors of abortion would represent all those in danger of suffering injuries from abortion now or in future. A father would have standing to act on behalf of his minor conceived child and other conceived children.[117]

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115 Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 771. (2000).

> As we have frequently explained, a plaintiff must meet three requirements in order to establish Article III standing….First, he must demonstrate "injury in fact"-a harm that is both "concrete" and "actual or imminent, not conjectural or hypothetical."…. Second, he must establish causation-a "fairly ... trace[able]" connection between the alleged injury in fact and the alleged conduct of the defendant….And third, he must demonstrate redressability-a "substantial likelihood" that the requested relief will remedy the alleged injury in fact. *Id.,* at 45. These requirements together constitute the "irreducible constitutional minimum" of standing…..which is an "essential and unchanging part" of Article Ill's case-or controversy requirement, *ibid.,* and a key factor in dividing the power of government between the courts and the two political branches, see *id.,* at 559-560.

In addition to summarizing the requirements for standing, the Court is also making a connection between "injury" and "harm". See discussion of "harm" at *supra* note 79, based upon *Obergefell v. Hodges*.

[116] The United States Court of Appeals for the Tenth District, *Planned Parenthood of Kansas and Mid-Missouri; Planned Parenthood of St. Louis Region v. Jeff Andersen, Kansas Department of Health and Environment,* No. 16-3249 (February 2018). Regarding "injury in fact":

> For standing, a plaintiff's injury must be "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). "An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a "'substantial risk" that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n.5 (2013)).

[117] *See Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

An ideal civil action would be to trespass in a place of abortion. This would be a powerful statement that living, conceived legal persons, are equal to those conceived persons being killed at the same place and time. The presence of living children, together--some being killed, others alive and growing--would make visible the worst form of discrimination possible: the deaths of innocent people vs. the continued life of similar innocent people.

These 1) mothers and conceived children, 2) the survivors of abortion and 3) fathers and conceived minor children, would be no different from the students fighting discrimination in the restaurants and then in the Federal Courts. The students were sitting down in the "whites" section in order to be treated equally in terms of eating in a restaurant, ultimately under the Fourteenth Amendment; the mothers and their conceived children, survivors and fathers are trespassing in order that the "unborn" are equal to the "born" in living, in a place where that is not so, via their legal right to define "person", ultimately under the Ninth Amendment.

The people's right to define themselves under the Ninth Amendment is the basis for this peaceful civil action. In the court case that would follow the conceived child would be present in court as a legal person. And the conceived children would be entitled to legal representation as a result of this Ninth Amendment case and all cases that would follow.[118]

3. The Supreme Court Can Legally Use the Ninth Amendment but the People Cannot

In comparison to the people, the government--the Supreme Court, can and has accessed the Ninth Amendment. They did so to define a "right to privacy" in *Griswold*, a foundational case for *Roe v. Wade*. How can the government acknowledge an unenumerated right under the Ninth Amendment, but the people cannot? This is particularly poignant in that the Bill of Rights was written for the purpose of protecting the people from the government.

[118] *See Obergefell v. Hodges*, 576 U.S. at slip op. 2, 24.

However, if according to the Court in *Planned Parenthood v. Casey*, the government and the people are not separate, then there is no need for the Bill of Rights, as the people and the government are one entity. [119]

There can be no equal justice when the *government* uses the *people's* rights under the Ninth Amendment to recognize a "fundamental" right, but the *people* themselves are without any "due process"[120] to legally define their fundamental, unenumerated rights, including who they legally are.

At the present time there is no process for the exercise of Ninth Amendment rights. If a process is never established, then the Ninth Amendment will never exist for the people, but it will continue to exist for the government. Imagine if our other rights: "freedom of speech", the"right….to assemble", the "right… to keep and bear arms", existed for the government, but not for the people.[121]

4. The Ninth Amendment and Federal and State Legislative Action

Calvin Massey said, "If they be paramount to legislative action, it is no accident that the framers selected the phrase "retained by the people" to describe these rights."[122]

Massey was alluding to the fact that the framers did not say "retained by the states". Massey provides an insightful and compelling Constitutional rationale as to why the Federal Judiciary should acquiesce to the people asserting their Ninth Amendment rights. There are other compelling reasons for this to take place in both Federal and State judiciaries.

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[119] *See Planned Parenthood v. Casey*, 505 U.S. 833, 865, 868.
[120] U.S. CONST. amends. V, XIV.
[121] *Id*; *See New York Times Co. v. United States*, 403 U.S. 714-717 (1971), *supra* note 66.
[122]Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment* in BARNETT, *supra* note 57 at 330.

Federal

In order to access their Ninth Amendment rights, the people will have a case never brought before, based on their inherent, fundamental and antecedent right to define themselves, separate from any branch of the government. This has never been attempted. *Dred Scott, Roe v. Wade* and the Fourteenth Amendment trespassing cases had never been attempted before either.

And, in *Dred Scott* and *Roe v. Wade* the courts did not require more individuals than those in attendance, to state that African-Americans were not citizens or people, or that abortion could be legalized. Neither Supreme Court said to the plaintiffs, Dred Scott or 'Roe', "Go away and come back with more people to support your case and we will reconsider." And in neither case did the Court rule that it was a matter for the Legislative or Executive Branches. They did not mandate that the Constitutional amendment process be tried first. Each was a 'case' and they made a decision.

The same is true for the civil rights cases in 1960. The U.S. Supreme Court precedent set in the Fourteenth Amendment "trespassing" trials is equally applicable to the Ninth Amendment. The Court did not require that the trespassers try legislative means first, as a requirement for a ruling in these cases. Federal legislation, "The Civil Rights Act of 1964", was not passed until four years later.

This point has also been made by the Legislative Branch itself. In the Senate debate on the "Partial-Birth Abortion Ban",[123] the last major pro-life legislation that Congress passed, Senator Rick Santorum stated during the debate, "It really is quite amazing that a right that was created, as I understand, by judicial fiat, *not by the legislative process and not by the constitutional amendment process*—I dare anyone to look at the U.S. Constitution and find the right to abortion. It does not exist

[123] The Partial-Birth Abortion Ban Act of 2003, Pub.L.108–105, 117 Stat. 1201, 18 U.S.C. § 1531, PBA Ban (2003). This law was upheld by the Supreme Court in Gonzales v. Carhart, 550 U.S. 124 (2007).

in the U.S. Constitution. But by judicial fiat, by an act of judicial activism, this right was created."[124]

The Judicial Branch has no legitimate reason to mandate that the people go to another branch of government in order to claim their "right to define themselves" via legislation or a Constitutional amendment. This is so because of the existence of the Ninth Amendment and because the courts did not do so themselves. This approach however, was suggested by the dissenting judges in *Griswold*, upon which *Roe* is based. Justices Black and Stewart argued against the Court using the Ninth Amendment, "The people can freely exercise their Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it." The Court majority rejected this reasoning and made the decision on a "right to privacy" themselves, citing the Ninth Amendment.[125] They cannot ask the people to do the same thing which they themselves rejected. The people must have access to exercising their Ninth Amendment rights if they are to retain their antecedent and inherent rights.

State

Viewed in the light of the 1960 civil rights cases, the Supreme Courts of Oklahoma (2012)[126] and Alaska (2013)[127] violated the people's inherent and unenumerated right to define who they are under the Ninth

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[124] 108 CONG. REC. S3456, (March 11, 2003) (emphasis added). Senator Santorum eloquently continued,

> We are endowed by our Creator with life, liberty, and the pursuit of happiness. Not liberty, life. You have to have life to enjoy liberty. What the Supreme Court did was put some person's liberty ahead of another person's life. That is fundamentally wrong… But that is what they did in the 1840s and 1850s. They put in the Dred Scott case that *the liberty rights* of the slaveholder trump *the life rights* of the slave. The slave was property. The child in the womb, under the Supreme Court Roe v. Wade decision, is property. Look at this case with open eyes….. It is the same reason— the same reason. It is the same case. It is Dred Scott, and for some reason we just choose not to see it. (emphasis added).

[125] *See Griswold v. Connecticut,* 381 U.S. at 531.

[126] *See In Re* Initiative Petition No. 395*,* Oklahoma State Supreme Court.

[127] *See Clinton Desjarlais v. State of Alaska*, No. S-14535 Supreme Court of Alaska.

Amendment. The individuals in Oklahoma and Alaska violated no law, initiated no civil action, but tried to begin a legal initiative. The U.S. Supreme Court refused to hear the Oklahoma case and the Alaska case was not appealed, one may reasonably conclude, because of the Court's decision not to hear the Oklahoma case. The states' powers and the people's power via the states, have effectively been eliminated via these and recent decisions discussed earlier.[128]

SUMMARY

As there is no established process for the people to assert their Ninth Amendment right to define themselves, it must be initiated by some type of peaceful civil action, as has been done before under the First and Fourteenth Amendments. This right cannot be established via state initiative, legislative action or Congressional action. It does not belong within the Executive Branch of government. This right does not belong within the government's rights and powers at all.

The Constitution provides *both* the Ninth Amendment in the Bill of Rights and a process for amending the Constitution in Article V.[129] *The Constitution does not mandate that one or the other be used.* Both are available to the people.

Given the above legislative cases, Federal cases and Constitutional facts the Federal Courts cannot mandate that the people use the legislative or amendment process instead of or before accessing their Ninth Amendment rights. They did not do so in the Civil Rights cases. And as we have seen, they rejected this argument for themselves in *Griswold v.*

[128]*See Edwards v. Beck* 786 F. 3d 1113-2015, regarding the Arkansas Legislature's, "Human Heartbeat Protection Act".
[129] U.S.CONST. art. V.

Connecticut. And they rejected it in *Dred Scott v. Sandford,*[130] *Roe v. Wade*[131] and most recently in *Obergefell v. Hodges*.[132]

A Brief Speculation

It is of course likely that if this approach is taken, others will come forward to challenge the people 'standing' to establish *their inherent right* under the Ninth Amendment to define *themselves* as "person".

Let us consider for a moment what their arguments might look like.

Would they follow Justinian[133] and argue against the people's inherent right under the Ninth Amendment to define themselves? This would grant the government the power to define their creators, define "person"

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[130] *See Dred Scott v. Sandford,* 60 U.S. at 393, 542, 547. Justice McLean, dissenting,

> This court says, in <u>*McCulloch v. The State of Maryland,*</u> 4 Wheat. 316, "If a certain means to carry into effect any of the powers expressly given by the Constitution to the Government of the Union be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance." And,
>
> It is unnecessary to say what legislative power might do by a general act in such a case, but it would be singular if a freeman could be made a slave by the exercise of a judicial discretion. And it would be still more extraordinary if this could be done not only in the absence of special legislation, but in a State where the common law is in force.

Justice McLean *was arguing in favor of State Legislative powers*, *which the majority rejected*, in favor of their own power, the power of the Supreme Court.

[131] *See Roe v. Wade*, 410 U.S. at 833, 173. Justice Rehnquist, dissenting,

> If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson, supra.* But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

[132] *See Obergefell v. Hodges,* 576 U.S. at slip. Op. 24.

[133] ADLER AND GORMAN, THE AMERICAN TESTAMENT 47-48 (1975).

and "people", as they have done and may continue to do in the future. This may also set another, more long-reaching and dangerous precedent: the people willingly granting the government power over other inherent rights that people may possess now or in the future.

Or, would they join the standing individuals and agree with the people's inherent right, but argue the living *moment* of when an individual is legally a "person"? If this be the approach, then there necessarily become questions of fact: at what point and based on what evidence? If it is a different point than conception, this argument would still leave two definitions and two separate classes of human beings, persons, within our society, with different rights attached to each as discussed earlier. Ultimately, those favoring "separate but equal" as under *Plessy,* a similar situation involving two definitions of human beings, failed to argue that equality existed under that system.[134] What would their argument be in this case?

The author has argued that the Court needs to ultimately *assent* to the people defining who they are, as offered in the suggested statement to the Court, or one like it. This Court *assent* would be based on the facts brought forward, similar arguments and discussions as provided in this paper, as well as others not yet developed. It would be arrived at it in the same manner as all Civil Rights, First Amendment and other profound Supreme Court cases have been arrived at.

No one can predict all of the actions of individuals, organizations, or the government. No one could predict the actions of the courts involved in the First or Fourteenth Amendment cases discussed earlier. No matter their potential actions, it is the duty and obligation of people to stand before the government and state their inherent, antecedent and unenumerated right to define who they are, "persons", the people; who created and continue to create the government before which they stand.

CONCLUSION

As the violation of the people's right to define themselves originated in 'cases' at the Supreme Court and has continued in the Federal and State Courts' cases, it must be resolved in a case. This legal process will begin

[134] *See Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954).

and end in a case as a result of individuals exercising their Ninth Amendment rights in an existing Pro-life case, or in a new, peaceful civil action brought before a Federal Court.

Some Federal Courts may decide that such peaceful civil actions must be quashed in order to maintain law, order and the government's prestige and power. This occurred repeatedly in the 1960 cases and in many other civil rights actions by all three branches of the government: police, mayors, courts and legislatures. One of the best arguments against this approach is found in *Civil Disobedience*, Henry Thoreau's honored treatise on government:

> There will never be a really free and enlightened State until the State comes to recognize the individual as a higher and independent power, from which all its own power and authority are derived, and treats him accordingly. I please myself with imagining a State at last which can afford to be just to all men, and to treat the individual with respect as a neighbor….[135]

The Ninth Amendment is the Highest Expression of Moral Trust between a People and a Government.[136]

The government, the Federal Judiciary, must be willing to acknowledge the limits of their power, which is written into the Constitution and the Bill of Rights. This acknowledgement necessarily involves trust *in the people by the government*. Taking this kind of peaceful, civil action before the Federal Courts involves trust *in the government by the people.* The Ninth Amendment was not written in order to divide the people and the

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[135] HENRY DAVID THOREAU, CIVIL DISOBEDIENCE AND OTHER ESSAYS 18 (Philip Smith ed., Dover Publications, 1993) (1849).

[136]John Adams, Letter from John Adams to Massachusetts Militia, (October 11, 1798). "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." *Founders Online,* National Archives. http://founders.archives.gov/documents/Adams/99-02-02-3102 (last visited August 7, 2017).

government, but to assure the rights of the people within an established and trusted framework for our government, the Constitution.

Certain of the Founding Fathers did not trust governments nor governments' survival. And, in fact, they continue to be right. Our Constitution is the oldest, written, still functioning constitution in the world.[137] Since 1787, all other nations' constitutions have failed. People survive, governments don't. Based on the history of previous governments and their own experiences, the Founding Fathers did everything in their power to assure that the government they created would be successful and under the control of the people. Yet, once created, they realized that the people and the government, including the Judiciary, must have the insight and the courage to correct their errors within a Constitutional framework, written by fallible human beings.

It is to be hoped that the Court will be open to peaceful civil action and, as in many other cases, in the end, will acknowledge a right of the people--to define themselves, guaranteed them under the Constitution and the Ninth Amendment. The acknowledgement of this inherent and unenumerated right will ultimately save millions of human lives by providing equal justice under law at all Federal and State Courts, including the Supreme Court.

Some Final Thoughts

Engraved on the marble entrance to the School of Law at Gonzaga University, in Spokane, Washington, is the following quotation, "A certain lawyer asked Him, "Teacher, which commandment in the law is the greatest?" "He answered regarding the first, and, "…The second is like it: You shall love your neighbor as yourself."[138] Our closest neighbor is the conceived child within us.

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137 https://www.senate.gov/artandhistory/history/common/generic/ConstitutionDay.htm (last visited August 4, 2020).

138 Jesus Christ, *The New Testament*, Matthew, 22: 34-40 in THE NEW AMERICAN BIBLE (1991).

"All Men are created equal", a political statement, has the same meaning as, "Love your neighbor as yourself", a moral statement.[139]

The *Roe v. Wade* Supreme Court decision means that you, I and every person who is alive now, are not equal to our living selves at conception. How can this be? We must be equal to our conceived selves. And, therefore, every conceived person is equal to each of us.

HOKKU: *Dragonfly catcher, where today, have you gone* [140]

[139] Thomas Jefferson, THE DECLARATION OF INDEPENDENCE para 2 (1776).
[140] ANTHONY & BEN HOLDEN, POEMS THAT MAKE GROWN MEN CRY (2014).