

## PROTECTING PRENATAL PERSONS: DOES THE FOURTEENTH AMENDMENT PROHIBIT ABORTION?

What should the legal status of human beings *in utero* be under an originalist interpretation of the Constitution? Other legal thinkers have explored whether a national “right to abortion” can be justified on originalist grounds.<sup>1</sup> Assuming that it cannot, and that *Roe v. Wade*<sup>2</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>3</sup> were wrongly decided, only two other options are available. Should preborn human beings be considered legal “persons” within the meaning of the Fourteenth Amendment, or do states retain authority to make abortion policy?

### INTRODUCTION

During initial arguments for *Roe v. Wade*, the state of Texas argued that “the fetus is a ‘person’ within the language and meaning of the Fourteenth Amendment.”<sup>4</sup> The Supreme Court rejected that conclusion. Nevertheless, it conceded that if prenatal “personhood is established,” the case for a constitutional right to abortion “collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”<sup>5</sup>

Justice Harry Blackmun, writing for the majority, observed that Texas could cite “no case . . . that holds that a fetus is a person within the meaning of the Fourteenth Amendment.”<sup>6</sup>

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1. See Antonin Scalia, *God’s Justice and Ours*, 156 L. & JUST. - CHRISTIAN L. REV. 3, 4 (2006) (asserting that it cannot); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007) (arguing that it can).

2. 410 U.S. 113 (1973).

3. 505 U.S. 833 (1992).

4. *Roe*, 410 U.S. at 156. Strangely, the state of Texas later balked from the implications of this position by suggesting that abortion can “be best decided by a [state] legislature.” John D. Gorby, *The “Right” to an Abortion, the Scope of Fourteenth Amendment Personhood, and the Supreme Court’s Birth Requirement*, 4 S. ILL. U. L.J. 1, 9 (1979) (quoting ORAL ARGUMENTS IN THE SUPREME COURT: ABORTION DECISIONS 59 (1976)). It is possible that, in this respect, the state acted in its own interest rather than in the interest of the fetus.

5. *Roe*, 410 U.S. at 156–57.

6. *Id.* at 157. Of course, the counsel’s inability to cite such a case does not preclude the existence of such a case or legal principle. Blackmun engages in a falla-

Relying on other uses of the word “person” in the Constitution, including the qualifications for congressional representatives and the President, the Court concluded that “the use of the word is such that it has application only post-natally.”<sup>7</sup> Thus, there could be no “assurance[] that it has any possible pre-natal application.”<sup>8</sup> Relying on the notion that “throughout the major portion of the nineteenth century, prevailing legal abortion practices were far freer than they are today,” the Court concluded “that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”<sup>9</sup>

Even scholars who agree in principle with the outcome of *Roe* have criticized the Court’s blanket approach to creating a federally protected right to abortion.<sup>10</sup> Justice Blackmun’s assumption that “the lack of consensus” about when life begins

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cious argument from ignorance, since absence of evidence is not evidence of absence. Because the Court framed the case in terms of a right to privacy from the outset, it shifted the burden of proof to the state of Texas to prove that preborn human beings are indeed legal persons, whereas the presumption should have been in the state’s favor. See Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORDHAM L. REV.* 807, 849 (1973).

7. *Roe*, 410 U.S. at 157.

8. *Id.*

9. *Id.* at 158. The Court assumed its own conclusion that the unborn are not persons when it denied review to the Illinois abortion case *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971), *vacated sub nom. Hanrahan v. Doe*, 410 U.S. 950 (1973). In that case, a guardian *ad litem* had been appointed to represent the interests of the fetus in court. The Court never addressed the preborn individual’s standing since it assumed that he or she was not a “person.” See Gorby, *supra* note 4, at 8–9. The United States District Court for the Northern District of Georgia, in *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), *judgment modified sub nom. Roe v. Wade*, 410 U.S. 113 (1973), similarly denied the appointment of a guardian *ad litem* in the case that was brought to the Supreme Court, saying that “the court does not postulate the existence of a new being with federal constitutional rights at any time during gestation.” 319 F. Supp. at 1055 n.3.

These denials of representation rights are reminiscent of the arguments brought forth in *Bailey v. Poindexter’s Ex’r*, 55 Va. (14 Gratt.) 132 (1858), which determined that a slave could not choose freedom or sale after his master’s death since “in the eye of the law, so far certainly as civil rights and relations are concerned, the slave is not a person, but a thing . . . . The attribution of legal personality to a chattel slave . . . implies a palpable contradiction in terms.” 55 Va. (14 Gratt.) at 142–43. Recall also *Dred Scott v. Sandford*, 60 U.S. 393 (1857), which determined that a slave lacked standing to sue because his African descent excluded him from the “political community created by the Constitution of the United States.” 60 U.S. at 406, *superseded by* U.S. CONST. amend. XIV (1868).

10. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 922 (1973).

means that “abortion must be permitted,” rather than left to state legislatures, has been criticized as “arbitrary” and unwarranted.<sup>11</sup> When *Roe* determined that states could not protect preborn humans as persons, “the Court effectively decided that the Constitution requires their exclusion.”<sup>12</sup>

Other commentators have contested the central holding of *Roe* but do not believe the Constitution justifies a blanket policy prohibiting abortion either. Some in this camp have argued that a Human Life Amendment to the Constitution is the best or only way to respond to *Roe*’s inadequacies.<sup>13</sup> Some have advocated returning abortion policy to the states. The late Justice Antonin Scalia frequently noted his opposition to *Roe* and his belief that individual states should determine their abortion policy through democratic processes.<sup>14</sup> In either case, if *Roe*’s critics are correct, constitutional scholars must revisit whether the Fourteenth Amendment protects prenatal life or whether each state may choose to permit abortion.

This Note rejects arguments for returning abortion policy to the states—including those offered by Justice Scalia upon originalist grounds<sup>15</sup>—before investigating evidence that the

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11. Dennis J. Horan & Thomas J. Balch, *Roe v. Wade: No Justification in History, Law, or Logic*, in *ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS* 57, 76 (Dennis J. Horan et al. eds., 1987) (surveying criticisms of *Roe* by other legal scholars).

12. Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1278 n.130 (1975)

13. See, e.g., *id.* at 1339–40.

14. See, e.g., Scalia, *supra* note 1, at 4.

15. Originalism refers to the “family of related theories” in constitutional interpretation that emphasize “four core ideas”: (1) That “the meaning of each provision of the Constitution becomes *fixed* when that provision is framed and ratified;” (2) That “sound interpretation of the Constitution requires the recovery of its *original public meaning*;” (3) That “original public meaning has the *force of law*;” and (4) That “*constitutional construction*” (which ascertains the text’s legal effect) should be distinguished from “*constitutional interpretation*” (which discerns the linguistic meaning of the text) and supplement interpretation only where the textual provisions are “abstract and vague.” Lawrence B. Solum, *We Are All Originalists Now*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 1, 2–4 (2011) (emphasis in original). Originalist methodology discovers the original public meaning by looking at a term’s usage, its context within the Anglo-American common law tradition, and its historical interpretation in cases with precedential value. Justice Scalia associated himself with originalism. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

Fourteenth Amendment extends to prenatal human beings. These findings contest the reasoning of *Roe* and answer Justice Blackmun's objections to extending Fourteenth Amendment protections to the preborn. Based on the historical evidence, this Note presents an originalist argument that all prenatal life is included within the Fourteenth Amendment's existing guarantees of Due Process and Equal Protection.

### I. JUSTICE SCALIA'S STATES' RIGHTS VIEW

What does the Constitution say about abortion? According to the famed originalist and late Associate Justice Antonin Scalia, "the Constitution says absolutely nothing about it."<sup>16</sup> In Justice Scalia's judgment, the meaning of the term "person" at the time of the Fourteenth Amendment's adoption in 1868 did not include prenatal life:

There are anti-abortion people who think that the constitution requires a state to prohibit abortion. They say that the Equal Protection Clause requires that you treat a helpless human being that's still in the womb the way you treat other human beings. I think that's wrong. I think when the Constitution says that persons are entitled to equal protection of the laws, I think it clearly means walking-around persons.<sup>17</sup>

On this view, preborn human beings possess no constitutionally guaranteed rights to Equal Protection or Due Process. Replying to anti-abortion campaigners who "say that the Constitution requires the banning of abortion," Justice Scalia pointed to the varying degrees of protection extended to prenatal life in various state jurisdictions during the 1800s.<sup>18</sup> He observed that "some states prohibited [abortion], some states

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16. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in judgment in part and dissenting in part).

17. Interview by Lesley Stahl with Antonin Scalia (Apr. 24, 2008), in CBS NEWS, *Justice Scalia On The Record* (Apr. 24, 2008), <http://www.cbsnews.com/news/justice-scalia-on-the-record/2/> [<https://perma.cc/B2JN-WKRC>]. Of course, it is contradictory to say that the Constitution says nothing about the meaning of "persons," and then claim that the Fourteenth Amendment "clearly" refers to "walking-around persons." By implication, the Constitution would then have something to say about the meaning of personhood.

18. Interview by Piers Morgan with Antonin Scalia (July 19, 2012), in CNN, *Scalia: Roe v. Wade Theory Not Sound* (July 19, 2012), <http://www.cnn.com/videos/crime/2012/07/19/piers-scalia-roe-vs-wade.cnn> [<https://perma.cc/SAB3-9LQR>].

didn't . . . . It was one of those many things—most things in the world—left to democratic choice.”<sup>19</sup>

If the Constitution remains mute on abortion, it cannot grant the Federal Government power to decide the issue one way or the other. Justice Scalia wrote that “if a state were to permit abortion on demand, I would . . . vote against an attempt to invalidate that law . . . because the Constitution gives the federal government . . . no power over the matter.”<sup>20</sup> In Justice Scalia’s view, neither side should attempt to use the courts to enforce a national policy on abortion:

I will strike down *Roe v. Wade*, but I will also strike down a law that is the opposite of *Roe v. Wade*. You know, both sides in that debate want the Supreme Court to decide the matter for them. One wants no state to be able to prohibit abortion and the other one wants every state to have to prohibit abortion, and they’re both wrong . . . that’s how I read the Constitution.<sup>21</sup>

Justice Scalia is not alone in finding the Fourteenth Amendment irrelevant to prenatal life. Paul Linton, legal counsel for Americans United for Life, has written that of the seventeen Justices who have sat on the Supreme Court since *Roe*, “not one has ever stated that the unborn child is a constitutional person.”<sup>22</sup> Neither then-Justice Rehnquist nor Justice White, both dissenters in *Roe*, disputed the Court’s claim that unborn life is not encompassed in the term “person” as used in the Fourteenth Amendment.<sup>23</sup> Indeed, both Justices believed that states should retain authority to legislate on abortion. Justice Rehnquist wrote in his *Roe* dissent, “[T]he drafters did not intend to have the Fourteenth Amendment withdraw from the states the power to legis-

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19. *Id.*

20. Scalia, *supra* note 1, at 4.

21. Antonin Scalia, Remarks at the Pew Research Center Forum, A Call for Reckoning: Religion and the Death Penalty, Session Three (Jan. 25, 2002), <http://www.pewforum.org/2002/01/25/session-three-religion-politics-and-the-death-penalty/> [<https://perma.cc/S57Z-M7WS>].

22. Paul B. Linton, *How Not To Overturn Roe v. Wade*, FIRST THINGS (Nov. 2002), <https://www.firstthings.com/article/2002/11/how-not-to-overturn-roe-v-wade> [<https://perma.cc/D6TB-C4N2>]. Of course, even if Linton is correct, that fact is not dispositive for determining the meaning of the Constitutional text under an originalist framework.

23. *Id.*

late with respect to this matter.”<sup>24</sup> Likewise, Justice White wrote in his *Doe v. Bolton* dissent, “This issue, for the most part, should be left with the people and the political processes the people have devised to govern their affairs.”<sup>25</sup>

According to Justice Scalia, attempting to resolve the matter through judicial decree merely perpetuates social unrest “by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum . . . [and] by continuing the imposition of a rigid national rule instead of allowing for regional differences.”<sup>26</sup> Instead, “the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed.”<sup>27</sup>

In Justice Scalia’s view, apart from clear constitutional provisions granting protection, legal rights for a particular minority group exist only insofar as the majority determines that the minority group deserves protection.<sup>28</sup> Although rights explicit-

24. *Roe v. Wade*, 410 U.S. 113, 177 (1973) (Rehnquist, J., dissenting).

25. *Id.* at 222 (White, J., dissenting).

26. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in part and dissenting in part).

27. *Stenberg v. Carhart*, 530 U.S. 914, 956 (Scalia, J., dissenting).

28. See Antonin Scalia, Address at the Gregorian University, Symposium: Left, Right, and the Common Good: The Common Christian Good (May 2, 1996), *quoted in* HARRY V. JAFFA, *STORM OVER THE CONSTITUTION* 115 (1999). The majoritarianism expressed in this speech is striking:

It just seems to me incompatible with democratic theory that it’s good and right for the state to do something that the majority of the people do not want done. Once you adopt democratic theory, it seems to me, you accept that proposition. If the people, for example, want abortion the state should permit abortion. If the people do not want it, the state should be able to prohibit it. . . . You protect minorities only because the majority determines, that there are certain minority positions that deserve protection. . . . The minority loses, except to the extent that the majority, in its document of government, has agreed to accord the minority rights.

*Id.* In his judicial opinions, Justice Scalia expressed his views in a more circumspect manner. He seemed open to the existence of unenumerated rights, but foreclosed the possibility that judges could identify or enforce them, leaving them instead to the legislative process. See *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (“[T]he [Ninth Amendment’s] refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people.”); *City of Chi. v. Morales*, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting) (“The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set

ly enumerated in the Constitution are exempt from democratic purview, all others must be wrestled out in the majoritarian system. Because no constitutional guarantees explicitly apply to preborn human beings, “[t]he States may, if they wish, permit abortion on demand . . . The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.”<sup>29</sup> Justice Scalia’s view that abortion should simply be put to a democratic vote is worrisomely reminiscent of Senator Stephen Douglas’s advocacy of “popular sovereignty” to determine whether states could permit racial slavery in the antebellum period.<sup>30</sup>

Linton observed that Justice Scalia not only believed majorities ought to decide whether a fetus is a person, but also that “the determination of *when human life begins* is a question not capable of judicial resolution and instead must be left to the political process where compromise and accommodation of divergent views is possible.”<sup>31</sup> That position, however, “forecloses the possibility that any scientific proof or rational demonstration can establish that an unborn child is a human being.”<sup>32</sup> Indeed, that position also “forecloses the possibility that there can be any rational discussion of the matter at all,

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forth in the Bill of Rights (usually under the rubric of so-called ‘substantive due process’) is in my view judicial usurpation.”).

29. *Casey*, 505 U.S. at 979 (Scalia, J., concurring in part and dissenting in part).

30. Douglas proclaimed:

I look forward to a time when each state shall be allowed to do as it pleases. If it chooses to keep slavery forever, it is not my business, but its own. If it chooses to abolish slavery, it is its own business, not mine. I care more for the great principle of self-government, the right of the people to rule, than I do for all the [Negroes] in Christendom . . . let us maintain this government on the principles that our fathers made it, recognizing the right of each state to keep slavery as long as its people determine, or to abolish it when they please.

Stephen Douglas, Seventh Lincoln-Douglas Debate (Oct. 15, 1858), in *THE LINCOLN-DOUGLAS DEBATES* 251, 291–92 (Rodney O. Davis & Douglas L. Wilson eds., 2008).

31. Linton, *supra* note 22 (citing *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 520 (1990)) (emphasis added).

32. Nathan Schlueter & Robert H. Bork, *Constitutional Persons: An Exchange on Abortion*, *FIRST THINGS* (Jan. 2003), <https://www.firstthings.com/article/2003/01/002-constitutional-persons-an-exchange-on-abortion> [<https://perma.cc/B9K5-VM36>] (statements of Nathan Schlueter).

insofar as values by their very nature are subjectively determined.”<sup>33</sup> In this respect, Justice Scalia’s epistemic agnosticism in the courtroom resembled the relativism of Justice Kennedy’s “sweet-mystery-of-life passage,” which Justice Scalia so mercilessly mocked.<sup>34</sup>

Nevertheless, the case for state-by-state regulation of abortion appears at least plausible. Natural rights were not exhaustively enshrined in the federal Constitution.<sup>35</sup> Since the federal government is one of enumerated powers, “[i]t is the states, not the federal government, which have the primary duty to protect those unalienable rights.”<sup>36</sup> This position comports with the historical reality that states have traditionally decided the question of personhood.<sup>37</sup> States could adopt or modify the common law to suit the valid purposes of their respective localities, but “in so doing [they] cannot contravene the rights of persons under [the] common law in an arbitrary or unreasonable manner.”<sup>38</sup> The states have historically exercised their police powers to promote public health, safety, and morals—all of which could be valid justifications to regulate abortion. The states did exercise police powers over abortion policy, and the Constitution never explicitly mentions the issue. For Justice Scalia, the case was closed.

## II. INTERPRETING “PERSONS” IN THE FOURTEENTH AMENDMENT

A constitutional scholar seeking to establish an originalist interpretation of the Fourteenth Amendment must ascertain the meaning of the words at the time the Amendment was written and ratified.<sup>39</sup> One might look to dictionaries of legal and

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33. *Id.*

34. *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (citing *Casey*, 505 U.S. at 851).

35. As Chief Justice Marshall remarked, “a constitution, from its nature, deals in generals, not in detail.” *Bank of the U.S. v. Deveaux*, 9 U.S. 61, 87 (1809).

36. Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 *ISSUES L. & MED.* 185, 193 (2010).

37. *Id.* at 195. For an argument that states should continue to exercise this power to protect prenatal life, see T.J. Scott, *Why State Personhood Amendments Should Be Part of the Pro-life Agenda*, 6 *U. ST. THOMAS J.L. & PUB. POL’Y* 222 (2012).

38. Roden, *supra* note 36, at 234.

39. See Solum, *supra* note 15, at 2–4.



common usage, the context of the English common law tradition, and cases that attempted to construe the meaning of the text in a manner consistent with original meaning. Using this methodology, it is reasonable to construe the Fourteenth Amendment to include prenatal life.<sup>40</sup>

The structure of the argument is simple: The Fourteenth Amendment's use of the word "person" guarantees due process and equal protection to all members of the human species. The preborn are members of the human species from the moment of fertilization.<sup>41</sup> Therefore, the Fourteenth Amendment protects the preborn. If one concedes the minor premise (that preborn humans are members of the human species), all that must be demonstrated is that the term

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40. Justice Scalia argued, "A text should not be construed strictly, and it should not be construed leniently; it should be construed *reasonably*, to contain all that it fairly means." ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997) (emphasis added).

41. The scientific and medical answer as to whether a prenatal life qualifies as a distinct human being had been available for over a century at the time of *Roe*. See *infra* notes 77–81 and accompanying text. Dr. Patten of Michigan Medical School writes in his 1964 *Foundations of Embryology*, "The union of two such sex cells to form a zygote constitutes the process of fertilization and initiates the life of a new individual." BRADLEY M. PATTEN, FOUNDATIONS OF EMBRYOLOGY 3 (1964). Drs. Greenhill and Friedman write in their 1974 obstetrical textbook, "The term *conception* refers to the union of the male and female pronuclear elements of procreation from which a new living being develops . . . [T]he zygote thus formed represents the beginning of a new life." J.P. GREENHILL & EMANUEL A. FRIEDMAN, BIOLOGICAL PRINCIPLES AND MODERN PRACTICE OF OBSTETRICS 17, 23 (1974). As Dr. Mathews-Roth of Harvard University Medical School later said, "[I]t is incorrect to say that biological data cannot be decisive . . . it is scientifically correct to say that an individual human life begins at conception . . . and that this developing human always is a member of our species in all stages of its life." *The Human Life Bill: Hearing on S. 158 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 97th Cong. 17 (1981) (testimony of Dr. Micheline Mathews-Roth).

Both the *Roe* Court and the late Justice Scalia confused the scientifically and medically answerable question about when a new human organism's life begins with the ethical and legal question of whether that life possesses intrinsic value and demands protection. See Horan & Balch, *supra* note 11, at 75; Schlueter & Bork, *supra* note 32 (statements of Nathan Schlueter). But since the scientific discoveries of the nineteenth century, disagreement has existed only over the latter question. Judges need not inject their own values into that question, because, as will be shown, "[t]hat value judgment was made over one hundred years ago, on a constitutional level and as a matter of binding law, by the framers of the fourteenth amendment," who drafted it to cover every living human being. Byrn, *supra* note 6, at 840. Thus it may be said with confidence that "[o]ne's right to life . . . depend[s] on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

“person,” in its original public meaning at the time of the Fourteenth Amendment’s adoption, applied to all members of the human species.

The minor premise need not be lingered upon here. Nevertheless, we should observe that whether states historically believed that the preborn specifically were members of the human species is not dispositive, so long as they believed all human beings were entitled to protection under the Fourteenth Amendment. Just as “freedom of speech” protects movies and internet communication under an originalist interpretation<sup>42</sup> even though those technologies did not exist at the time of the First Amendment’s adoption, “person” protects every member of the human species, regardless of whether individuals were *recognized* as members of the human family at the time of the Fourteenth Amendment’s adoption.<sup>43</sup>

I will defend the major premise using four tools. First, I will employ textualist analysis, such as dictionary definitions from the period; second, common law precedent; third, inferences from state practice; and fourth, the anticipated legal application of the Amendment, to the extent that expected application is indicative of the public meaning.

#### A. *Text and Dictionary Usage*

First, let us recall the relevant text itself:

*All persons* born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State *deprive any person of life, liberty, or property, without due*

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42. See SCALIA, *supra* note 38, at 140 (“I take many things to be embraced within ‘the freedom of speech,’ for example, that were not in fact protected, because they did not exist, in 1791—movies, radio, television, and computers, to mention only a few. The originalist must often seek to apply that earlier age’s understanding of the various freedoms to new laws, and to new phenomena, that did not exist at the time.”). In Justice Scalia’s view, the meaning of the relevant text does not evolve, it is simply applied to a new set of circumstances or new information. He applied the same principle in *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008), writing, “Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way.”

43. See Schlueter & Bork, *supra* note 32 (statements of Nathan Schlueter).

*process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*<sup>44</sup>

According to dictionaries of common and legal usage at the time of the Fourteenth Amendment's adoption, the term "person" was largely interchangeable with "human being" or "man."<sup>45</sup> The 1864 edition of Noah Webster's *American Dictionary of the English Language* defined the term "person" as relating "especially [to] a living human being; a man, woman, or child; an individual of the human race."<sup>46</sup> The entry for "human" included all those belonging to "the race of man."<sup>47</sup> No dictionary of the era referenced birth or the status of being born in its definition of "person," "man," or "human being."<sup>48</sup> Although dictionaries did not address the preborn by name, the term "person" included all human beings, which necessarily included prenatal human beings.

In legal usage, the term person had expansive scope. In his discourse on "The Rights of Persons," Blackstone wrote that "[n]atural persons are such as the God of nature formed us."<sup>49</sup>

44. U.S. CONST. amend. XIV, § 1 (emphasis added).

45. See e.g., 2 ALEXANDER M. BURRILL, *A NEW LAW DICTIONARY AND GLOSSARY* 794 (1851) ("A human being, considered as the subject of rights, as distinguished from a *thing*."); 3 THOMAS EDLYNE TOMLINS & THOMAS COLPITTS GRANGER, *THE LAW-DICTIONARY* 104 (1st Am. ed. 1836) ("A man or woman."); *Person*, 2 NOAH WEBSTER ET AL., *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (1828) ("An individual human being . . . [i]t is applied alike to a man, woman or child.").

46. 1 NOAH WEBSTER ET AL., *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* 974 (1864).

47. *Id.* at 643. "Man" is in turn defined as, "An individual of the human race; a human being; a person." *Id.* at 806.

48. See Gorby, *supra* note 4, at 23.

49. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*119. Blackstone's choice of phrase evokes the words of the Psalmist: "you formed my inward parts; you knitted me together in my mother's womb." *Psalms* 139:13 (ESV); see also Michael S. Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 24 (2013).

Blackstone goes on to distinguish "natural persons"—that is, human beings—from "artificial" persons, which "are created and devised by human laws for the purposes of society and government; which are called corporations or bodies politic." 1 BLACKSTONE, *supra*, at \*119. In accordance with this distinction, the Supreme Court has determined that the constitutional usage of "person" includes corporations, which exist as artificial persons. See *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886). If, relying on Blackstone's distinction between kinds of persons to determine the term's scope of meaning, the term "person" includes corporations as "artificial persons," then it should *a fortiori* include prenatal members of the human family as "natural persons."

Thus, for Blackstone, there was “no distinction . . . between *biological* human life and *legal* personhood.”<sup>50</sup> He considered all members of the human species to be legal persons. Blackstone declared that “[l]ife is . . . a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother’s womb.”<sup>51</sup> Mention of the preborn child’s stirring was intended to protect prenatal life as soon as it could be discerned, not to exclude human life from protection prior to that point. The principle of Blackstone’s rule was that “where life can be shown to exist, legal personhood exists.”<sup>52</sup>

*Roe* reached the wrong conclusion in light of these definitions. Justice Blackmun used an intratextual methodology to explicate the meaning of “person” instead of exploring the term’s original meaning as understood in 1868.<sup>53</sup> It is difficult to prove what a term *cannot* mean through negative inferences alone,<sup>54</sup> but Justice Blackmun did just that when he concluded that “person” cannot include the preborn.<sup>55</sup> The constitutional clauses Justice Blackmun analyzed limited the broader and more indeterminate category of “persons” to narrower and specific categories of persons eligible for particular purposes. For instance, the clause specifying that only persons thirty-five years of age or older are eligible for the Presidency indicates that other individuals exist who do not meet the qualifications, but who are still persons.<sup>56</sup> That clause gives no indication about *when* one becomes a person, and it certainly does not

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50. Paulsen, *supra* note 49, at 26.

51. 1 BLACKSTONE, *supra* note 49, at \*125.

52. Paulsen, *supra* note 49, at 28 (summarizing Blackstone’s rule).

53. Intratextualism compares the uses of a term within a document to infer that term’s meaning. See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (defending this mode of interpretation).

54. See *id.* at 792 (“[I]f we try to prove that a word *cannot* mean Y, examples drawn from the Constitution are *weaker*” than “when we seek to prove that a word *could* mean X.”).

55. See *Roe v. Wade*, 410 U.S. 113, 157 (1973); see also Amar, *supra* note 53, at 792 (“[I]f Blackmun is seeking to prove that ‘person’ *must* mean post-natal humans . . . even a slew of examples from the Constitution may prove unavailing.”). Notably, the Supreme Court did not use *Roe*’s intratextual reasoning that “person” has “application only post-natally” to arrive at its conclusion that corporations are persons. See Destro, *supra* note 12, at 1284.

56. See Gorby, *supra* note 4, at 12.

suggest that one becomes a person “at birth or at any other particular stage of one’s development.”<sup>57</sup>

The other clauses Justice Blackmun relied on also fail to support his conclusion. The phrase “persons born or naturalized in the United States and subject to the jurisdiction thereof” does not *define* the scope of the class “persons.”<sup>58</sup> Rather, “born or naturalized” and “subject to the jurisdiction thereof” serve to narrow the broader class of persons to which the term refers.<sup>59</sup> Likewise, the Apportionment Clause cannot be construed to exclude prenatal life from the term person, since it also excludes “Indians not taxed” and persons outside the “several states,” such as residents of Puerto Rico or the District of Columbia, who are surely persons protected by the Fourteenth Amendment.<sup>60</sup>

Justice Blackmun’s observation that the usage of “person” has “application only post-natally” therefore draws an unsupported conclusion from the text.<sup>61</sup> An opposite and perhaps equally tentative conclusion can be drawn from the text through the use of the phrase “persons born or naturalized” in Section 1 of the Fourteenth Amendment. The adjective “naturalized” indicates that there are persons who are not naturalized. If “born” functions the same way and also limits the category of persons eligible for citizenship, it indicates that there are persons who are not born.<sup>62</sup>

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57. *Id.*

58. Foreign nationals, Indian tribesmen, and even African slaves were considered persons, even though in most cases they were not citizens. See Paulsen, *supra* note 49, at 20. The term “person” has always been larger than its subset, “citizen,” and the Supreme Court’s longstanding interpretation of the Fourteenth Amendment reflects that traditional understanding. See *Plyler v. Doe*, 457 U.S. 202, 212 (1982) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

59. See Paulsen, *supra* note 49, at 36.

60. See Roden, *supra* note 36, at 191. In the *Insular Cases*, the Supreme Court curtailed aspects of the Bill of Rights in unincorporated territories for reasons unrelated to the meaning of the term person. See, e.g., *Balzac v. Porto Rico*, 258 U.S. 298, 311 (1922). Even after the *Insular Cases*, however, guarantees of “fundamental personal rights” remained, including the protection against deprivation of life without due process. *Id.* at 312–13.

61. See Gorby, *supra* note 4, at 12–13. Though Justice Blackmun examined many constitutional passages in his intratextual quest, he conveniently omitted the Preamble’s explicit declaration that the protection of posterity was one of the purposes of adopting the Constitution. See Roden, *supra* note 36, at 191.

62. See Gorby, *supra* note 4, at 13 n.67.

The meaning of “person” in the Fourteenth Amendment cannot be confined by how the term is used in specific applications elsewhere in the Constitution. As Professor Ely scornfully put it, he “might have added that most of [the constitutional provisions] were plainly drafted with *adults* in mind, but I suppose that wouldn’t have helped.”<sup>63</sup> Textual analysis and examination of dictionary usage support the conclusion that the Fourteenth Amendment protects preborn humans.

*B. Common Law Precedent and State Practice*

Historic recognition of the preborn as persons is not necessary to prove that they are included within the meaning of that term in the Fourteenth Amendment.<sup>64</sup> Nevertheless, the development of the common law and state practices related to abortion leading up to 1868 shed light on the meaning of “person” at that time. After all, many of the same state legislatures that passed criminal codes prohibiting abortion also ratified the Fourteenth Amendment. Since state understanding is often a significant factor when ascertaining original meaning, state understandings of unborn personhood in criminal law help illuminate the original meaning of “person” in the Fourteenth Amendment.

By the time of the Fourteenth Amendment’s adoption, “nearly every state had criminal legislation proscribing abortion,”<sup>65</sup> and most of these statutes were classified among “offenses against the person.”<sup>66</sup> The original public meaning of the term “person” thus incontestably included prenatal life. Indeed, “there can be no doubt whatsoever that the word ‘person’ referred to the fetus.”<sup>67</sup> In twenty-three states and six territories, laws referred to the preborn individual as a “child.”<sup>68</sup> Is it reasonable to presume that these legislatures would have used this terminology if “they had not considered the fetus to be a ‘person’”?<sup>69</sup>

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63. Ely, *supra* note 10, at 925–26.

64. See *supra* notes 42–43 and accompanying text.

65. Gorby, *supra* note 4, at 15.

66. James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY’S L.J. 29, 48 (1985).

67. *Id.* at 49.

68. See *id.* at 48. This terminology is striking compared to that of today’s advocates for legal abortion, who prefer to use the term “fetus” rather than “child.”

69. *Id.*

The adoption of strict anti-abortion measures in the mid-nineteenth century was the natural development of a long common-law history proscribing abortion. Beginning in the mid-thirteenth century, the common law codified abortion as homicide as soon as the child came to life (animation) and appeared recognizably human (formation), which occurred approximately 40 days after fertilization.<sup>70</sup> Lord Coke later cited the “formed and animated standard,” rearticulating it as “quick with childe.”<sup>71</sup>

These standards were difficult to enforce, however, due to the burden of proof necessary to secure conviction for homicide under the common law. It was hard to prove that a woman was actually pregnant at the time of the abortion, that the fetus was alive when the abortion was committed, and that the abortion killed the fetus.<sup>72</sup> Furthermore, under the common law rule of *corpus delicti*, a corpse was nearly always required to prove homicide, and even then, causation was especially difficult to demonstrate. Without such evidence, convictions were seldom secured.

Lord Coke attempted to ameliorate these evidentiary difficulties in the late seventeenth century. He identified abortion as a “great misprision”—that is, a serious misdemeanor—subject to a lower burden of proof if the child died before birth, but murder if the child died from the abortion attempt after being born alive.<sup>73</sup> Coke’s “innovations” at common law were “not substantive, but evidentiary.”<sup>74</sup> Thus, the common law consistently prohibited abortion of human beings *in utero* according to the best medical knowledge of the day, and viewed abortion as the wrongful killing of a human being.<sup>75</sup>

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70. See Byrn, *supra* note 6, at 816.

71. See *id.* at 819–20 (quoting EDWARD COKE, 3 INSTITUTES 50 (1644)).

72. See Witherspoon, *supra* note 66, at 31.

73. See Byrn, *supra* note 6, at 819–20 (quoting COKE, *supra* note 71, at 50–51).

74. *Id.* at 821.

75. The *Roe* Court relied extensively on a brief submitted by NARAL attorney Cyril Means regarding the state of common law protections for prenatal life. See JUSTIN B. DYER, SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING 107, 110–11 (2013). Subsequent scholarship has since exposed that the historiography contained therein, particularly as it related to *The Twinslayer’s Case*, 1 Edw. 3 (1327), and *The Abortionist’s Case*, 22 Edw. 3 (1348), was deeply flawed, inaccurate, and misleading. See Byrn, *supra* note 6, at 817–23; Destro, *supra* note 12, at 1267–78; DYER, *supra*, at 105–132. See generally JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY (2006).

In the eighteenth century, Coke's description "quick with child" (the point at which the child is first *able* to move, then considered to be the beginning of existence) was equated with "quickening" (the point at which the mother first *feels* fetal movement).<sup>76</sup> This distinction was intended to protect prenatal life as soon as it could be discerned, not to exclude human life from protection prior to that point. Once again, "quickening was a flexible standard of proof—not a substantive judgment on the value of unborn human life."<sup>77</sup> The *Roe* Court made much of the quickening rule in its rush to dismiss the personhood of the preborn,<sup>78</sup> but failed to see that the rule was merely a tool of criminal law, not a statement about the value of life prior to perceptible movement in the womb.

The "quickening" distinction survived in common law until emergent medical science discovered "that human life began at fertilization,"<sup>79</sup> allowing medical examiners to prove prenatal life and cause of death due to abortion with greater certainty. After this discovery in the early nineteenth century, British courts instructed jurors that "quick with child," which had earlier meant "formed and animated," now meant "from the moment of conception."<sup>80</sup> When determining whether to grant temporary reprieve from execution for a pregnant woman, for example, the court in *Regina v. Wycherley*<sup>81</sup> reinterpreted common law to reflect that new scientific fact in 1838.<sup>82</sup>

This revision of the common law to conform to this basic principle—that human life, where it exists, must be protected—*informed* the meaning of the term "person" in the United States at

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Another brief, which essentially recapitulated the same arguments and suffered from the same defects, was filed in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). Laurence Tribe and Ronald Dworkin both relied on the same modified historiography in their arguments against extending legal personhood to preborn human beings. See John Keown, *Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions*, 22 ISSUES L. & MED. 3, 4 (2006).

76. See Byrn, *supra* note 6, at 824.

77. *Id.* at 825.

78. See *Roe v. Wade*, 410 U.S. 113, 132–39 (1973).

79. See Keown, *supra* note 75, at 6.

80. See Byrn, *supra* note 6, at 825.

81. 173 Eng. Rep. 486 (1838).

82. See *id.* at 486–87. Temporary reprieve from execution arising from a plea of pregnancy is a common law tradition of ancient origin. See Byrn, *supra* note 6, at 825–27 n.125.



the time of the Fourteenth Amendment's adoption. Thomas Percival's influential and widely circulated nineteenth century work *Medical Ethics* declared, "[T]o extinguish the first spark of life is a crime of the same nature, both against our maker and society, as to destroy an infant, a child, or a man."<sup>83</sup> The American Medical Association's 1859 report on abortion considered the human being *in utero* a person, and it called for protection of the "independent and actual existence of the child before birth, as a living being."<sup>84</sup> They decried the "unnecessary and unjustifiable destruction of human life" both before and after quickening, and they urged state legislatures to reform their abortion statutes.<sup>85</sup> The Medical Society of New York in 1867 "condemned abortion at every stage of gestation as 'murder.'"<sup>86</sup>

In the mid-nineteenth century, American courts began to discard the obsolete "quickening" rule in order to "protect the unborn from [the point of] fertilization."<sup>87</sup> The Pennsylvania Supreme Court's ruling in 1850 that "the moment the womb is instinct with embryo life, and gestation has begun, the crime [of abortion] may be perpetrated . . . [There] was therefore a crime at common law,"<sup>88</sup> is indicative of the national mood regarding abortion in that era.<sup>89</sup> The Supreme Judicial Court of Maine similarly upheld a statute repudiating the quickening standard in *Smith v. State*.<sup>90</sup>

Meanwhile, state legislatures also took action to prohibit abortion from the point of fertilization. At the end of 1849, "no fewer than 18 of the 30 states had enacted anti-abortion statutes; by the end of 1864, 27 of the 36; by the end of 1868, 30 out of 37,"<sup>91</sup> in addition to six territories.<sup>92</sup> Of those thirty states, "twenty-seven punished abortion before and after quickening" and twenty applied the same punishment "irrespective of

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83. THOMAS PERCIVAL, *MEDICAL ETHICS* 135–36 (Chauncey D. Leake ed., 1975) (1827).

84. 12 *TRANSACTIONS OF THE AMERICAN MEDICAL ASSOCIATION* 76 (1859).

85. *Id.*

86. Byrn, *supra* note 6, at 836.

87. Keown, *supra* note 75, at 6.

88. *Mills v. Commonwealth*, 13 Pa. 631, 632–33 (1850).

89. See Gorby, *supra* note 4, at 15.

90. 33 Me. 48 (1851).

91. Keown, *supra* note 75, at 27.

92. See Witherspoon, *supra* note 66, at 33.

quickenings.”<sup>93</sup> In other words, although minor policy-driven differences existed among states in the treatment of abortion at common law, a general consensus treated preborn human beings as “persons.”<sup>94</sup> These statutes indicate that the preborn were included within the public meaning of the term “person” at the time the Fourteenth Amendment was adopted.

When the Amendment was adopted in 1868, the states widely recognized children *in utero* as persons. Twenty-three states and six territories referred to the fetus as a “child” in their statutes proscribing abortion.<sup>95</sup> At least twenty-eight jurisdictions labeled abortion as an “offense[] against the person” or an equivalent criminal classification.<sup>96</sup> Nine of the ratifying states explicitly valued the lives of the preborn and their pregnant mothers equally by providing the same range of punishment for killing either during the commission of an abortion.<sup>97</sup> The “only plausible explanation” for this phenomenon is that “the legislatures considered the mother and child to be equal in their personhood.”<sup>98</sup> Furthermore, ten states (nine of which had ratified the Fourteenth Amendment) considered abortion to be either manslaughter, assault with intent to murder, or murder.<sup>99</sup> New York joined them in 1869, and the number grew to seventeen jurisdictions in the period shortly after the adoption of the Fourteenth Amendment.<sup>100</sup> A significant number of states also considered actions that, while not intended to cause abortion, caused the death of a child *in utero* to be manslaughter as well.<sup>101</sup>

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93. Keown, *supra* note 75, at 27.

94. Moreover, since abortion was never a common law liberty, “it cannot be considered to be a ninth amendment right retained by the people.” Destro, *supra* note 12, at 1282.

95. Witherspoon, *supra* note 66, at 48.

96. *Id.* at 48 n.59.

97. *Id.* at 40.

98. *Id.* at 42.

99. *See id.* at 44. That some states treated abortion as manslaughter rather than murder does not indicate that the unborn child had less value or lacked personhood. Rather, it suggests the perpetrator was less culpable in some way, or that policy reasons dictated a lesser punishment. *See infra* Part III–B.

100. *See* Witherspoon, *supra* note 66, at 42, 44.

101. *See id.* at 43–44.

Some scholars have suggested that this trend was motivated by concern for women's health or distrust of women's reproductive choices rather than by recognition of fetal humanity.<sup>102</sup> But most anti-abortion statutes "increased the penalty for abortion if it were proved to have caused the unborn child's death and a majority did so irrespective of the age of gestation."<sup>103</sup> The statute at issue in *Smith v. State* specifically evinced concern for the child *in utero* by deeming prosecution for abortion "fatally defective for not charging the essential element of the crime" if it "did not allege the destruction of the child."<sup>104</sup> This strongly suggests that state legislatures intentionally designed the statutes to protect the life of the child *in utero* and not merely to protect the mother's health. Thus, contra the historiography presented by Cyril Means and adopted by the *Roe* Court, "it is beyond reasonable doubt" that the primary purpose—perhaps the only purpose—of this late nineteenth century wave of anti-abortion legislation was to protect the preborn.<sup>105</sup> Quite simply, these statutes were enacted in recognition of unborn human beings' full and equal membership in the human family.

Several states also left clear documentary evidence about their legislative purposes, which shed light on how lawmakers viewed the relationship between these statutes and the Fourteenth Amendment.<sup>106</sup> For example, after ratifying the Fourteenth Amendment in January 1867, the Ohio legislature took up a bill to amend their 1834 anti-abortion statute.<sup>107</sup> The committee that reviewed the bill was composed of several Senators that had voted for ratification of the Amendment.<sup>108</sup>

Their Senate report elucidated the purposes of the statute, observing "the alarming and increasing frequency" of abortion

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102. See, e.g., Reva Siegal, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 318 (1992).

103. Keown, *supra* note 75, at 27.

104. Destro, *supra* note 12, at 1278.

105. Keown, *supra* note 75, at 28.

106. This evidence is contrary to the *Roe* Court's erroneous assertion that little legislative history remained of the adoption of mid-nineteenth-century anti-abortion statutes. See *Roe v. Wade*, 410 U.S. 113, 151 (1973).

107. See Witherspoon, *supra* note 66, at 61.

108. See *id.* at 62.

by “a class of quacks who make child-murder a trade.”<sup>109</sup> Pointing out that “[p]hysicians have now arrived at the unanimous opinion that the foetus in utero is alive from the very moment of conception,” the committee repudiated the “ridiculous distinction in the punishment of abortion before and after quickening.”<sup>110</sup> They asserted that “no opinion could be more erroneous” than to think “that to destroy the embryo before that period [of quickening] is not child-murder.”<sup>111</sup> They concluded their report: “Let it be proclaimed to the world, and let it be impressed upon the conscience of every woman in the land ‘that the willful killing of a human being, at any stage of its existence, is murder.’”<sup>112</sup> The bill passed both houses of the Ohio legislature by April 1867.<sup>113</sup>

The Ohio legislature that ratified the Fourteenth Amendment obviously thought preborn human beings were “persons in the full sense.” Otherwise it would not have declared abortion to be “child-murder” or reiterated Thomas Percival’s declaration that abortion was a crime commensurate to the murder of an infant, child, or adult. Other state legislatures that both enacted anti-abortion laws and approved of the Fourteenth Amendment must also have “shared the views of the Ohio legislature on the personhood of unborn children,” given their use of statutory language comparable to that of Ohio, the success of the various state medical societies’ lobbying in favor of such laws in order to protect the unborn, and the absence of any serious doubt within the legislatures regarding the constitutionality of the statutes.<sup>114</sup>

At the time of the Fourteenth Amendment’s adoption, nearly every state understood “person” to include prenatal life. The inclusive meaning of “person” in 1860s state law should thus shape an originalist understanding of the Amendment.<sup>115</sup>

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109. 1867 OHIO SENATE J. APP’X 233.

110. *Id.*

111. *Id.*

112. *Id.*

113. See Witherspoon, *supra* note 66, at 63.

114. *Id.* at 65–69.

115. One might pursue an even stronger claim. If the power to define personhood belonged to the states prior to its federalization in the Fourteenth Amendment, then the definition of “personhood ‘within the language and meaning of the Fourteenth Amendment’ is to be derived from the municipal law of the states.” Roden, *supra* note 36, at 198 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505

C. *Anticipated Legal Application*

The legislatures that in short sequence adopted anti-abortion statutes and ratified the Fourteenth Amendment saw no conflict between their actions to defend prenatal life and their Fourteenth Amendment obligations.<sup>116</sup> Indeed, they may have even viewed such legislation as required by the Amendment. The Framers of the Amendment certainly thought it required protection of every human being. Although the intentions and statements of the drafters of the Fourteenth Amendment do not govern the meaning of the text, an exploration of what these individuals believed the text meant is relevant to an originalist interpretation because it may shed light on the Amendment's public meaning at the time of adoption.

The Framers expected the Fourteenth Amendment to protect every member of the human species.<sup>117</sup> The Amendment was carefully worded to "bring within the aegis of due process and equal protection clauses every member of the human race, regardless of age, imperfection, or condition of unwantedness."<sup>118</sup> Senator Jacob Howard, who sponsored the Amendment in the Senate, declared the Amendment's purpose to "disable a state from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty and property without

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U.S. 833, 913 (1992) (Stevens, J., concurring in part and dissenting in part)); *see also id.* at 195 (observing that "[t]he states had historically decided the question of personhood of unborn children"). Thus, the historical affirmation and recognition of preborn personhood could compel an interpretation of the term "person" under which any permissible view of the scope of the Amendment's guarantees must include, at a minimum, protections for the unborn.

116. *See* Witherspoon, *supra* note 66, at 65–69.

117. Once again, it is not necessary to demonstrate whether the authors of the Fourteenth Amendment consciously intended its protection to extend to the unborn specifically; all that must be shown is that the Framers intended the Amendment to protect all members of the human family. *See supra* note 42 and accompanying text.

118. Byrn, *supra* note 6, at 813. The drafters of the Fourteenth Amendment certainly had the issue of race foremost in mind, but it would be erroneous to believe that the guarantees of due process and equal protection were limited exclusively to black Americans. Such an interpretation is "supported by neither the text of the Amendment, the history of its framing, nor its subsequent application." Schlueter & Bork, *supra* note 32 (statements of Nathan Schlueter). The Fourteenth Amendment was drafted to create "a constitutional remedy for protecting the rights of persons when the states failed to do so. For this reason, they chose to use the term 'person' rather than 'blacks' as the object of protection in the text of the Constitution." *Id.*

due process.”<sup>119</sup> Even the lowest and “most despised of the [human] race” were guaranteed equal protection.<sup>120</sup> Representative Thaddeus Stevens called the Amendment “a superstructure of perfect equality of every human being before the law; of impartial protection to everyone in whose breast God had placed an immortal soul.”<sup>121</sup> Representative James Brown simply put it: “Does the term ‘person’ carry with it anything further than a simple allusion to the existence of the individual?”<sup>122</sup>

The primary Framer of the Fourteenth Amendment, Representative John Bingham, intended it to ensure that “no state in the Union should deny to any human being . . . the equal protection of the laws.”<sup>123</sup> He described the Amendment as a remedy to the denial of basic human rights:

[B]y putting a limitation expressly in the Constitution . . . so that when . . . any other State shall in its madness or its folly refuse to the gentleman, or *his children or to me or to mine*, any of the rights which pertain to American citizenship or to common humanity, there will be redress for the wrong through the power and majesty of American law.<sup>124</sup>

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119. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866). Howard went on to say that the Amendment “abolishes all class legislation in the States and does away with the injustice of subjecting one class of persons to a code not applicable to another.” *Id.* Extending this reasoning to the matter at hand, legalization of abortion subjects a class of human beings, the preborn, to the life-or-death decision-making power of the mother. Legalized abortion contradicts the expected legal application of the Amendment.

120. *Id.*

121. Thaddeus Stevens, Address at Bedford, Pa. (Sept. 4, 1866), reprinted in SACRAMENTO DAILY UNION, Oct. 3, 1866, at 1.

122. CONG. GLOBE, 38th Cong., 1st Sess. 1753 (1864).

123. John Bingham, Address at Bowerston, Ohio (Aug. 24, 1866), reprinted in *The Constitutional Amendment Discussed by its Author*, CINCINNATI COMM., Sept. 11, 1866, at 19.

124. CONG. GLOBE, 40th Cong., 2nd Sess. 514–15 (1868) (emphasis added). Just a few years earlier, Bingham expressed his view that the term “person” as used in the Fifth Amendment included all human beings:

[N]atural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guaranteed by the broad and comprehensive word ‘person,’ as contradistinguished from the limited term citizen—as in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race . . . . No State may rightfully, by constitution or statute law, impair any of these guaranteed [sic] rights, either political or natural.

Though Bingham never explicitly addressed the issue of abortion, the general consensus in 1868 was that prenatal life was human and therefore included within common humanity.<sup>125</sup> The Amendment cannot, therefore, be legitimately interpreted “to exclude a group of individuals who were regarded as human beings at the time the fourteenth amendment was written . . . .”<sup>126</sup>

Certainly the Framers of the Amendment did not promote an understanding of “legal personhood” separate from biological humanity.<sup>127</sup> Indeed, they might have relied upon the long-established precedent set in *United States v. Palmer*,<sup>128</sup> in which Chief Justice Marshall acknowledged that the terms “person or persons” were broad enough to include “every human being” and “the whole human race.”<sup>129</sup> The authors of the Amendment designed it to protect all biological human beings, regardless of their origin or circumstance. As Justice Hugo Black later put it: “the history of the [Fourteenth] Amendment proves that the people were told that its purpose was to protect weak and helpless human beings.”<sup>130</sup>

The original public meaning of the term “person,” the contemporaneous anti-abortion statutes enacted to protect prenatal life, and the public explanations given by the Framers of the Fourteenth Amendment as to the Amendment’s scope of meaning all support extending protections to prenatal life on originalist grounds. To suppose that the Framers meant to exclude the unborn from the Amendment’s protections and instead ensure abortion as a protected liberty “would be to ig-

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They may not rightfully or lawfully declare that the strong citizens may deprive the weak citizens of their rights, natural or political . . . .

CONG. GLOBE, 35th Cong., 2nd Sess. 983 (1859). Bingham modeled the language of the Fourteenth Amendment on that of the Fifth, including its usage of the term “person.”

125. See *supra* Part II-B.

126. Destro, *supra* note 12, at 1289. The appellee in *Roe* “assumed that the term ‘human being’ was, in fact, synonymous with ‘person,’” just as the Congressmen who explained the Fourteenth Amendment to the public had a century before. See *id.* at 1334.

127. See Paulsen, *supra* note 49, at 51.

128. 16 U.S. 610 (1818).

129. *Id.* at 631–32 (interpreting a statutory provision).

130. *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938) (Black, J., dissenting).

nore the tenor of the times.”<sup>131</sup> The Fourteenth Amendment was to be a new birth of freedom for *all* human beings.

### III. ADDRESSING COUNTER-ARGUMENTS RAISED IN *ROE*

How did the *Roe* Court avoid the strong historical basis for considering prenatal life “persons” protected by the Fourteenth Amendment? Besides relying on the inaccurate Means brief,<sup>132</sup> Justice Blackmun examined: (1) narrow exceptions to the common law rule against abortion, such as to save the life of the mother;<sup>133</sup> (2) varying degrees of punishment for the crime of abortion, including occasional immunity for women who procured abortions;<sup>134</sup> and (3) the supposed lack of contemporary consensus about the status of preborn humans, to determine that human beings *in utero* were never “recognized in the law as persons in the whole sense.”<sup>135</sup> These arguments against constitutional personhood for the preborn have been repeated by advocates of a state-by-state approach to abortion.<sup>136</sup> I will address each in turn.

#### A. *The “Life of the Mother” Exception*

The *Roe* Court supposed that narrow exceptions in state abortion statutes for the life of the mother indicated that prenatal human beings were considered nonpersons.<sup>137</sup> But these exceptions were not based “on a legislative preference for the life of the mother over the life of the child, but on the general defense of ‘legal necessity,’” which is connected to self-defense.<sup>138</sup> Only the impending death of the mother was considered a grave enough reason to consider abortion. The acknowledgement of these rare circumstances “does not demonstrate a lack of legislative recognition of the personhood of the unborn

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131. See Destro, *supra* note 12, at 1290.

132. See *supra* note 75.

133. See *Roe v. Wade*, 410 U.S. 113, 157 n.54 (1973).

134. See *id.*

135. See *id.* at 162.

136. See, e.g., Schlueter & Bork, *supra* note 32 (statements of Robert H. Bork).

137. See *Roe*, 410 U.S. at 138–39, 157 n.54.

138. Witherspoon, *supra* note 66, at 47.



child.”<sup>139</sup> Even if Justice Blackmun were correct that Texas’s exception for the life of the mother violated equal protection guaranteed by the Fourteenth Amendment, it would not indicate that prenatal life is excluded from the Amendment’s protections. It would only show that Texas inconsistently applied the protections of the Amendment.<sup>140</sup>

*B. Variance Among Criminal Punishments for Abortion*

The *Roe* Court pointed to the varying severity of charges and punishments among state laws proscribing abortion prior to and after the adoption of the Fourteenth Amendment as evidence that states did not believe in preborn personhood.<sup>141</sup> In some jurisdictions, the maximum sentence for abortion was less severe than for murder.<sup>142</sup> The Court believed this suggested that the law did not include fetuses as persons during this period.<sup>143</sup> But the principle permitting legislatures to determine how to classify and punish different types of unlawful killing is one of historical provenance. It says nothing about the personhood status of the victim. In his *Lectures on Law*, the early American legal scholar and founding father James Wilson recognized that policy-driven ranges of punishment for crimes of killing were permissible.<sup>144</sup> He wrote that “grades of solicitude, discovered, by the law, on the subject of life” exist, and he acknowledged that the law may consider “different degrees of aggression” against life.<sup>145</sup> How these various “degrees may be justified, excused, alleviated, aggravated, redressed, or pun-

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139. *Id.* Today, experts in obstetrics and gynecology believe that “direct abortion,” the purposeful destruction of the unborn child, is not medically necessary to save the life of a woman,” and affirm “a fundamental difference between abortion, and necessary medical treatments that are carried out to save the life of the mother, even if such treatment results in the loss of life of her unborn child.” See COMM. ON EXCELLENCE IN MATERNAL HEALTHCARE, DUBLIN DECLARATION ON MATERNAL HEALTHCARE (2012), <http://www.dublindeclaration.com/> [<https://perma.cc/X75K-MRLJ>].

140. See Francis J. Beckwith, *The Supreme Court, Roe v. Wade, and Abortion Law*, 1 LIBERTY U. L. REV. 37, 51 n.46 (2006).

141. See *Roe*, 410 U.S. at 151–52, 157 n.54.

142. *Id.* at 158 n.54.

143. *Id.*

144. James Wilson, *Lectures on Law*, in 2 COLLECTED WORKS OF JAMES WILSON 747, 1068 (Kermit L. Hall & Mark D. Hall eds., 2007).

145. *Id.*

ished," he said, "will appear both in the criminal and in the civil code of our municipal law."<sup>146</sup>

Indeed, many examples may be drawn from analogous instances in criminal law. In some states, for example, a young minor who intentionally kills another human being cannot be convicted of homicide.<sup>147</sup> By establishing infancy as an absolute defense, lawmakers have accounted for the special circumstances of such cases, including the minor's immaturity and incapacity to reason through the consequences of his actions.<sup>148</sup> Such provisions do not suggest that the victim of a minor's deadly attack is not a constitutionally protected person. Even if infancy were not permitted as a defense, prosecutions against minors would likely be rare based on the same considerations. Likewise, lawmakers and prosecutors in some jurisdictions took into account the pregnant woman's stress and other extenuating circumstances of "unwanted pregnancy" which favored reduced punishment for abortion.<sup>149</sup> Much like infancy, the woman who had an abortion was historically "not deemed able to assent to an unlawful act against herself" and "incapable of consenting to the murder of an unborn infant."<sup>150</sup> Thus, the woman was often treated as "a victim rather than a perpetrator of the act."<sup>151</sup>

Factoring in the actor's degree of culpability does not indicate "unconstitutional discrimination against the victim or the negation of his personhood."<sup>152</sup> Killing a police officer or killing under provocation, for example, may be evaluated with greater or lesser degrees of culpability and warrant different sentences without implying anything about the intrinsic personhood of

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146. *Id.*

147. *See, e.g.*, Infancy, 720 ILCS 5/6-1 (1962) ("No person shall be convicted of any offense unless he had attained his 13th birthday at the time the offense was committed."); *see also* 4 BLACKSTONE, *supra* note 49, at \*23 ("By the antient Saxon law, . . . under twelve it was held that he could not be guilty . . . of any capital crime which he in fact committed. But by the law, as it now stands . . . [u]nder seven years of age, indeed, an infant cannot be guilty of a felony . . .").

148. *See* Gorby, *supra* note 4, at 20.

149. *See id.*

150. *State v. Farnam*, 161 P. 417, 419 (Ore. 1916). This is not to imply that lawmakers historically believed the pregnant woman was the *only* victim of abortion. Both mother and child were treated as victims of abortion.

151. Witherspoon, *supra* note 66, at 59.

152. *Id.* at 51.

the victim. Both contemplation of social cost and awareness of juries' reluctance to pass harsh sentences upon aggrieved women influenced legislative decisions regarding the range of punishment for abortion.<sup>153</sup>

Justice Blackmun thought it significant that some states in the mid-nineteenth century did not prosecute women who procured abortion, and found this policy incompatible with prenatal life being included within the scope of the Fourteenth Amendment.<sup>154</sup> As already mentioned, however, this immunity likely stemmed from the notion that women were victims of abortion rather than perpetrators.<sup>155</sup> On a practical level, the most likely witness against a criminal abortionist was a woman upon whom an abortion had been performed. Therefore, the legislature may have granted immunity to women in the interest of convicting criminal abortionists. Lending credence to this position is that nearly all states that *did* impose criminal penalties on abortive women offered immunity to those women who testified against an accused abortion provider.<sup>156</sup> Despite all these considerations, at least seventeen states imposed criminal sanctions upon women who underwent surgical or chemical abortion.<sup>157</sup>

### C. *Purported Disagreement About When Life Begins*

Pointing to a lack of contemporary consensus about pre-born personhood, the *Roe* Court asserted that they "need not resolve the difficult question of when life begins,"<sup>158</sup> thereby failing to resolve the crucial question at the crux of the case. Much like the hunter who shoots into a quivering bush without identifying his target, the Court decided, in effect, that the human being *in utero* "is a non-person without stopping to consider whether or not he is a human being."<sup>159</sup> Admitting its ignorance on this important question, the Court's only legally sound response would have been to "err

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153. *See id.* at 51–52.

154. *See Roe v. Wade*, 410 U.S. 113, 151 (1973).

155. *See supra* notes 150–51 and accompanying text.

156. *See Witherspoon*, *supra* note 66, at 59.

157. *See id.*

158. *Roe*, 410 U.S. at 159.

159. Charles E. Rice, *Overruling Roe v. Wade: An Analysis of the Proposed Constitutional Amendments*, 15 B.C. INDUS. & COM. L. REV. 307, 311 (1973).

on the side of life, and therefore to legally prohibit virtually all abortions.”<sup>160</sup> After all, the Constitution expressly prohibits deprivations of life without due process of law, while notions of a right to privacy or a liberty interest protecting so-called reproductive rights are at best implied and unenumerated. As explained in Part II, originalist methodology establishes that the Fourteenth Amendment protects every biological member of the human family. Thus, authorizing the killing of a living organism “without knowing whether that being is a human being with a full right to life” would constitute willful judicial recklessness, “even if one later discovered that the being was not fully human.”<sup>161</sup>

The *Roe* Court could have turned to its own precedent instead of punting the question. The Supreme Court had previously extended equal protection guarantees to illegitimate children in *Levy v. Louisiana*.<sup>162</sup> There, the Court reasoned that equal protection extends to all who “are humans, live, and have their being.”<sup>163</sup> If Justice Blackmun had applied the *Levy* standard in *Roe*, “the Court could not have avoided passing on the factual ‘biological’ question of whether unborn children are live human beings.”<sup>164</sup> But the *Roe* Court ignored *Levy*.

Rather than weighing the interests of the preborn human being, the Court half-heartedly advocated for the interests of viable fetuses capable of “meaningful life outside the mother’s womb.”<sup>165</sup> The arbiter of whether life is meaningful or not goes unnamed, but in practice the Court acts as the final decision-maker. The wisdom of the Framers of the Fourteenth Amendment is evident: protecting *all* human beings through use of the term “person” avoids troubling inquiries about what consti-

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160. Beckwith, *supra* note 140, at 56.

161. *Id.* Recall that knowledge of the preborn child’s biological status as a living member of the human family was widespread at the time *Roe* was decided. See PATTEN, *supra* note 41, at 3 (presenting this as a medical fact in 1964).

162. 391 U.S. 68 (1968) (determining that the Equal Protection Clause prohibits invidious discrimination against illegitimate children and rejecting the premise that such children are “nonpersons” for Fourteenth Amendment purposes).

163. *Id.* at 70.

164. Byrn, *supra* note 6, at 842.

165. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

tutes a “meaningful life” worth protecting, and who has the authority to answer such existential questions.<sup>166</sup>

In fact, the *Roe* Court’s determination in this respect was inconsistent with the direction of past precedent. Just a few years after the adoption of the Fourteenth Amendment, the Supreme Court held that the child *in utero* is entitled to secure inheritance and property rights in *McArthur v. Scott*.<sup>167</sup> There, the Court determined that an Ohio probate court had violated the rights of the decedent’s grandchildren (then *in utero*) by failing to afford them adequate representation as parties in interest.<sup>168</sup> The Court enforced the common law principle of “treating a child in its mother’s womb as in being” for purposes of the rule against perpetuities, and found that the grandchildren’s rights had vested *in utero* at the time of their grandfather’s death.<sup>169</sup> If the Due Process Clause protects unborn children’s representational rights in a probate hearing, should not a preborn child be even more entitled to due process to secure her life? As Judge John T. Noonan puts it: “it would be odd if the fetus had property rights which must be respected but could himself be extinguished.”<sup>170</sup>

*Roe*’s legal judgment about the meaning of the term “person” was far from inevitable. A pre-*Roe* federal district court decision determined that the rationale of *Griswold v. Connecticut*<sup>171</sup> did not extend to abortion and distinguished between contraception, which prevents the creation of human life, and abor-

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166. Rice, *supra* note 159, at 319 (“What about the retarded, the sick, and the senile?”). Recall that the Nazi party initiated euthanasia for Jews deprived of their political rights so as to achieve “the destruction of life devoid of value.” KARL BINDING & ALFRED HOCHÉ, *THE RELEASE OF THE DESTRUCTION OF LIFE DEVOID OF VALUE* (Robert L. Sassone trans., 1975) (1920). Rice draws the parallel that “abortion inflicts the same inequality that the Nazis inflicted on the Jews” and predicts the trend of prenatal testing and systematic abortion of “undesirables” discovered to possess a disability. Rice, *supra* note 159, at 319.

167. 113 U.S. 340, 382 (1885); *see also* Roden, *supra* note 36, at 224–35.

168. *See McArthur*, 113 U.S. at 404.

169. *Id.* at 382.

170. David W. Louisell & John T. Noonan, Jr., *Constitutional Balance*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 220, 246 (John T. Noonan, Jr., ed., 1970).

171. 381 U.S. 479 (1965).

tion, which destroys existing human life.<sup>172</sup> Rejecting the privacy argument, the three-judge panel ruled:

[T]he legal conclusions in *Griswold* as to the rights of individuals to determine without governmental interference whether or not to enter into the process of procreation cannot be extended to cover those situations wherein, voluntarily or involuntarily, the preliminaries have ended, and a new life has begun. Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it.<sup>173</sup>

The facts cannot be honestly evaded: either the *Roe* Court “arbitrarily denied the unborn the constitutional protections due it or . . . the fourteenth amendment is inadequate as a legal device to protect the fundamental rights of all members of the human family, the avowed purpose of the drafters of the fourteenth amendment.”<sup>174</sup>

#### IV. CONCLUSION

The *Roe* decision by Justice Blackmun, as well as the dissents by then-Justice Rehnquist and Justice White, with which Justice Scalia agreed, “are constitutionally unsound.”<sup>175</sup> All permit “violation of the fetus’s constitutionally protected right to life without due process of law.”<sup>176</sup> Returning abortion policy to the states would “leave considerable doubt as to the extent to which human life would receive affirmative protection under the laws of the several states.”<sup>177</sup> The extent to which prenatal life would be protected or not would be dictated by “political pressure and popular senti-

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172. *Steinberg v. Brown*, 321 F.Supp. 741, 746 (N.D. Ohio 1970) (“The difference between this case and *Griswold* is clearly apparent, for here there is an embryo or fetus incapable of protecting itself. There, the only lives were those of two competent adults.”).

173. *Id.* at 746–47. Ironically, this case—decided only three years prior to *Roe*—was cited by Justice Blackmun. See *Roe v. Wade*, 410 U.S. 113, 155 (1973). He left the federal district court’s reasoning unmentioned and unrefuted.

174. Gorby, *supra* note 4, at 35.

175. *Id.* at 4.

176. *Id.*

177. Destro, *supra* note 12, at 1320.

ment,"<sup>178</sup> potentially "constitutionaliz[ing] the mass murder of millions" of human beings in the womb.<sup>179</sup>

What would happen if a state permitted abortion? Based on the historical evidence, "such action would be a violation of the Constitution."<sup>180</sup> If prenatal life is to be protected under the Fourteenth Amendment, Congress or the courts must intervene in states that do not guarantee equal protection and due process to preborn human beings. After all, "the [Fourteenth] amendment was designed to limit state power and authorize Congress to enforce such limitations."<sup>181</sup> Should a state refuse to protect prenatal life, it would be a violation of equal protection as understood in the *Civil Rights Cases*<sup>182</sup> and later reiterated in Justice Goldberg's concurring opinion in *Bell v. Maryland*:

"Denying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection." These views are fully consonant with this Court's recognition that state conduct which might be described as "inaction" can nevertheless constitute responsible "state action" within the meaning of the Fourteenth Amendment.<sup>183</sup>

If a state chose not to prosecute the "intentional [and] unjustified . . . killing of unborn persons while prosecuting for the killing of all other classes of persons" then "such official inaction denies the child in the womb equal protection of the laws."<sup>184</sup> *Reitman v. Mulkey*<sup>185</sup> determined that statutes permissive of individual discriminatory actions can constitute state action violat-

178. *Id.* at 1321.

179. Rice, *supra* note 159, at 322. Natural law scholars critical of Justice Scalia's position argue that it is "indefensible to condition" the right to life "on the concurrence of the legislature in each state." *Id.* From this perspective, returning abortion to the states would be like "contending that each locality in Germany during World War II should have been allowed to decide whether or not to have a death camp to exterminate undesirables." *Id.*

180. Louisell & Noonan, *supra* note 170, at 244.

181. Paulsen, *supra* note 49, at 59.

182. 109 U.S. 3 (1883).

183. 378 U.S. 226, 309–11 (1964) (Goldberg, J., concurring) (quoting *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (citing *Marsh v. Alabama*, 326 U.S. 501 (1946); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Terry v. Adams*, 345 U.S. 461 (1953); *Barrows v. Jackson*, 346 U.S. 249 (1953)).

184. Rice, *supra* note 159, at 336.

185. 387 U.S. 369 (1967).

ing the Equal Protection Clause.<sup>186</sup> This reasoning has been relied upon by inferior court decisions requiring life-saving blood transfusions for fetuses, even against their parents' religious objections.<sup>187</sup> In one such case, the justices were unanimously "satisfied that the unborn child is entitled to the law's protection" from inaction that would deprive her of life.<sup>188</sup> Applying the same principle, a state's consistent and systematic failure to act, "depriving some persons within their jurisdiction of the equal protection of the laws,"<sup>189</sup> warrants federal intervention. Given the broad agreement among the states which held that unborn children are "persons under criminal, tort, and property law, the text of the Equal Protection Clause of the Fourteenth Amendment compels federal protection of unborn persons."<sup>190</sup>

Tragically, *Roe v. Wade* allowed the judiciary to regulate which classes are worthy of receiving the "protection of fundamental liberties."<sup>191</sup> Bound only by its own sense of self-restraint, the Court asserted its absolute authority to define "'person' narrowly to fit its perceptions of acceptable public policy" and to "control[] the applicability of the due process

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186. See *id.* at 373; see also John E. Archibold, *Re-examine State Abortion Law, Opponent Urges*, DENVER POST, July 7, 1968, at 5G (applying *Reitman* to the abortion context). Typically, "a State's failure to protect an individual against private violence [does] not constitute a violation of the Due Process Clause." Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, 291 (2006) (citing *DeShaney v. Winnebago Cnty. Dep't of Soc. Serv.*, 489 U.S. 189, 197 (1989)). Nevertheless, the *DeShaney* Court qualified its holding by recognizing that "the State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." 489 U.S. at 197 n.3 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). The Court's reference to *Yick Wo* is telling. In that case, which extended Fourteenth Amendment guarantees to noncitizens, the Court condemned the "unjust and . . . discriminat[ory]" exercise of "purely personal and arbitrary power" over weak and disfavored groups. 118 U.S. at 369-70; see also Lugosi, *supra*, at 291. These precedents establish that if states were to systematically deny human beings *in utero* the protection of generally applicable laws against homicide it would violate equal protection.

187. See, e.g., *Raleigh Fitkin-Paul Mem'l Hosp. v. Anderson*, 201 A.2d 537 (N.J. 1964).

188. *Id.* at 538.

189. Brief of Amici Curiae Professor Hadley Arkes and The Claremont Institute Center for Constitutional Jurisprudence, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (No. 05-1382), 2006 WL 2252506, \*11.

190. Roden, *supra* note 36, at 186 (footnotes omitted).

191. Destro, *supra* note 12, at 1260.



clause to specific classes.”<sup>192</sup> The Supreme Court’s abortion jurisprudence demonstrates the need to reexamine the Court’s role as “sole arbiter of the existence of fundamental rights” based on “its own perception of the relative worth of the parties whose rights are asserted.”<sup>193</sup>

That institutional introspection seems unlikely. The Supreme Court’s defense of the central holding in *Roe* indicates its unwillingness to reverse course and enforce equal protection for prenatal life.<sup>194</sup> Likewise, legislative attempts to ban abortion are unlikely to withstand judicial scrutiny,<sup>195</sup> unless invalidating such legislation would threaten the Court’s credibility. In the absence of departmental enforcement of the Fourteenth Amendment’s guarantees, a new constitutional amendment explicitly protecting prenatal life is likely necessary.<sup>196</sup>

Until the Court, the people, or their elected representatives dismantle the “discriminatory legal system of separate and unequal” treatment for unborn human beings, there can be no true equal protection under the law.<sup>197</sup> The legal regime that discriminates against preborn human beings should be abolished on originalist grounds. Until all human beings are recognized as legal persons, bringing science and law into consonance, “the dissonance between truth and fiction will increase, rather than diminish.”<sup>198</sup>

Joshua J. Craddock\*

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192. *Id.*

193. *Id.* at 1260–61.

194. *See, e.g.,* *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

195. *See Rice, supra* note 159, at 320.

196. *See id.* at 321.

197. Lugosi, *supra* note 186, at 120.

198. *Id.* at 152.

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