BASIC RIGHTS AND INITIATIVE PETITION 23-07: ARE THE PREBORN "NATURAL PERSONS" UNDER THE FLORIDA CONSTITUTION?

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An initiative petition entitled "Amendment to Limit Government Interference with Abortion" has been circulating in Florida since May 2023. The proposed amendment, which would effectively ban pro-life legislation, recently garnered enough signatures to trigger review by the Florida Supreme Court. At oral argument, Florida's Chief Justice asked whether an unborn child is covered by the basic equality provision of the Florida Constitution, Article I, section 2. Neither the proponents nor the opponents of the initiative supplied a satisfying answer. A new article aims to address the Florida Chief Justice's question and another question left unasked: whether preborn human beings are "persons" for purposes of Article I, section 9—the due process provision of the Florida Constitution.[1]

The article proceeds by examining the historical context and development of Florida's basic equality and due process provisions, the former's relationship to the "equality principle" articulated in the Declaration of Independence, transcripts and journals from the relevant constitutional conventions and Constitution Revision Commissions, contemporaneously enacted statutes, interpretive canons, and dictionary definitions from the years surrounding the Florida Constitution's ratification.

Beginning with the plain text of Article I, section 2, the article explains that contemporaneous dictionaries from the time period when the Florida constitution was ratified define the terms "person" and "natural person" as any living human being. It next turns to context and history, which confirm that "natural persons" was understood to include every human being, including those in utero. The article traces the advent of the constitutional provision that eventually became Article I, section 2, pinpointing notable aspects of its drafting history. While "natural persons" replaced "all men" in 1968, the change was not intended or understood to affect the meaning of the section.

The article then stretches back further, grounding the provision ratified in 1968 in both the Founding and Reconstruction eras. It discusses that language's relationship to the statement of equality in the Declaration of Independence, and the influence of debates over slavery on its terms. After a detailed discussion of this evidence, the section on historical context concludes that the delegates who gathered to ratify the Florida Constitution in Tallahassee in 1868—most of

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[1] The full article is available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4753223.

whom were freed slaves or Union army veterans—rejected anything less than complete equality of the races. The cornerstone of Florida's new constitution was therefore a basic rights provision that used language that had been fully expounded over the previous half century in the courts, through the public discourse, and, ultimately, on the battlefield—language that could not have been understood but to embrace the entire human family.

The article next turns to the question left unasked by the Chief Justice of the Florida Supreme Court: whether the Due Process Provision of Article I, Section 9 also encompasses preborn children. This provision appears just a few sections after the basic rights provision of Article I, Section 2, and provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." The article finds solid grounding in text and historical context to conclude that whoever is a "natural person" in Article I, Section 2 is also a "person" for purposes of the Due Process Provision. This reading is bolstered by the fact that Florida courts have taken note of the "shared and overlapping history" between the basic equality and due process provisions in Article I, sections 2 and 9 and their analogues in the Fourteenth Amendment of the United States Constitution.

Because the article finds that Article I, Sections 2 and 9 of the Florida Constitution guarantee the rights to life, basic equality, and due process to all human beings, all that is left is to determine whether a preborn child is, in fact, a human being. Plenty of evidence suggests that the Floridians who drafted and ratified the basic equality and due process provisions understood that preborn children are among the "men" and "natural persons" endowed with inalienable rights. Notably, preborn life was regarded as inherently valuable under the common law's criminal provisions. This tradition became echoed in statutes passed by the same Florida legislature that ratified the Fourteenth Amendment to the United States Constitution. Following the lead of other states, that legislature rapidly moved to criminalize conduct against pregnant mothers that also affects a child in utero. The trend continued in the years leading up to and including the year when Florida ratified the current version of Article I, Sections 2 and 9. All of these laws would have presumably been known to those who ratified the Constitutional provisions referencing "natural persons" and "person."

After sifting through all these sources, the article concludes that when the Florida Constitution was ratified in 1968, the original public meaning of the words "natural person" and "person," as used in Article I, sections 2 and 9, includes preborn children. Of course, this finding leads to the inescapable conclusion that the initiative petition cannot survive the Florida Supreme Court's review. For it would be clearly invalid for failure to identify substantially affected provisions of the Constitution—i.e., Article I, sections 2 and 9. Under Florida law, ballot initiatives must disclose any "material effects" on other existing areas of the law. As such, any initiative that repeals or curtails another section of the constitution must say so in its ballot summary. More than that, though, any attempt to create a constitutional right to abortion would violate the Florida Constitution's "single subject" rule by attempting to revoke multiple fundamental rights guaranteed by different sections of the Constitution. A long line of Florida Supreme Court precedent holds that such "cataclysmic" change may not be accomplished by initiative petition.

In sum, the key issue is what the people of Florida believed when the still-controlling language of sections 2 and 9 of Article I was drafted and ratified. The historical record is

unequivocal: they believed that conception creates a legal "person" bearing an inalienable right to life and entitled to state protection from private violence. As the law stands, those wishing to write the preborn out of their charter may not do so by citizen initiative.