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.[1] Assuming that it cannot, and that *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[3] 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."[4] 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."[5]

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."[6]

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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."[7] Thus, there could be no "assurance[] that it has any possible pre-natal application."[8] 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."[9]

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.[10] 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.[11] When *Roe* determined that states could not protect preborn humans as persons, "the Court effectively decided that the Constitution requires their exclusion."[12]

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.[13] 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.[14] 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[15]—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."[16] 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.[17]

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.[18] He observed that "some states prohibited [abortion], some states

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."[19]

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."[20] 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.[21]

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."[22] 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.[23] 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."[24] 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."[25]

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."[26] 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."[27]

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.[28] Although rights explicit-

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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."[29] 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.[30]

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."[31] That position, however, "forecloses the possibility that any scientific proof or rational demonstration can establish that an unborn child is a human being."[32] 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."[33] 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.[34]

Nevertheless, the case for state-by-state regulation of abortion appears at least plausible. Natural rights were not exhaustively enshrined in the federal Constitution.[35] 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."[36] This position comports with the historical reality that states have traditionally decided the question of personhood.[37] 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."[38] 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.[39] 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 Prolife 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.[40]

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.[41] 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 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[42] 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.[43]

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*

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*.[44]

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."[45] 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."[46] The entry for "human" included all those belonging to "the race of man."[47] No dictionary of the era referenced birth or the status of being born in its definition of "person," "man," or "human being."[48] 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."[49]

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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." *Psalm* 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."