

## LEGAL MEMORANDUM

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# Can the Fourteenth Amendment Be Used to Protect Human Life Before Birth?

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### KEY TAKEAWAYS

The Fourteenth Amendment empowers Congress to enforce its guarantees of due process and equal protection on behalf of “any person.”

With *Roe v. Wade* overruled, Congress may define “person” to include all human beings.

Congress may require states to treat persons equally by, for example, prohibiting abortion when it also prohibits homicide after birth.

### Abortion: A Historical Overview

Legislatures began protecting the lives of human beings in the womb long before American independence.<sup>1</sup> During the 19th century, leading feminists such as Susan B. Anthony and Elizabeth Cady Stanton condemned abortion as “child murder,”<sup>2</sup> and the American Medical Association launched a national campaign to combat the “unwarrantable destruction of human life.”<sup>3</sup> As a result, by the 1960s, every state prohibited abortion, most allowing it only to save the mother’s life.<sup>4</sup>

Abortion advocates pushed back, persuading 13 states to allow abortion in additional circumstances and four states to allow it for any reason during early pregnancy.<sup>5</sup> Neither the older, near-complete abortion bans nor the more recent “reform” laws, however, survived *Roe v. Wade*.<sup>6</sup> In 1973, the Supreme Court held that the word “liberty” in the Fourteenth

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Amendment's Due Process Clause includes a woman's right to decide "whether or not to terminate her pregnancy."<sup>7</sup> The Court then issued rules for protecting this right from different kinds of government interference at different stages of pregnancy.<sup>8</sup>

**Roe v. Wade.** *Roe v. Wade* immediately became one the Court's most controversial decisions, and the first constitutional amendment to reverse it was introduced in Congress just eight days later.<sup>9</sup> Constitutional scholars, including those supporting abortion rights, called *Roe* "a very bad decision,"<sup>10</sup> "barely coherent,"<sup>11</sup> "totally unreasoned,"<sup>12</sup> and "a raw exercise in judicial fiat"<sup>13</sup> that "failed to yield a reasonable justification...for protection of the woman's interest in terminating her pregnancy."<sup>14</sup> Rather than attempt to defend what the Court actually held, scholars have tried "rewriting"<sup>15</sup> the decision or proposing "what *Roe v. Wade* should have said."<sup>16</sup>

Some abortion advocates, for example, argued that the Supreme Court should have based the right to abortion on the Fourteenth Amendment's Equal Protection, rather than its Due Process, Clause. In lectures and interviews before<sup>17</sup> and after<sup>18</sup> joining the Supreme Court, for example, the late Justice Ruth Bader Ginsburg opined that the Equal Protection Clause would have been a better choice. Nonetheless, in *Planned Parenthood v. Casey*,<sup>19</sup> the Court reaffirmed that "[c]onstitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."<sup>20</sup> While it had "reaffirm[ed] *Roe v. Wade*" itself in 1983,<sup>21</sup> however, the Court in *Casey* adhered only to what it called *Roe*'s "essence,"<sup>22</sup> that "it is a constitutional liberty of the woman to have *some* freedom to terminate her pregnancy."<sup>23</sup> *Roe*'s "central holding," that a woman has a constitutional right "to choose to have an abortion before viability,"<sup>24</sup> survived.

**Dobbs v. Jackson Women's Health Organization.** In *Dobbs v. Jackson Women's Health Organization*,<sup>25</sup> a Mississippi abortion clinic challenged a state law prohibiting most abortions after 15 weeks, more than two months before the generally accepted point of viability. Both sides agreed that the case required the Court not simply to apply *Roe* and *Casey*, but to "either reaffirm or overrule" those precedents.<sup>26</sup> The Court chose the latter, overruling *Roe* and *Casey* in their entirety and holding that neither the Due Process Clause<sup>27</sup> nor the Equal Protection Clause<sup>28</sup> of the Fourteenth Amendment protects a right to abortion. In his majority opinion, Justice Samuel Alito wrote that *Roe* had been "egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences."<sup>29</sup> With no special constitutional status, the Court said, abortion can be restricted or prohibited "if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."<sup>30</sup>

*Dobbs* “return[ed] the power to [regulate abortion] to the people and their elected representatives,”<sup>31</sup> and pro-life advocates are encouraging state legislatures and Congress to expand legislative efforts to protect human beings before birth. State legislatures’ constitutional authority to do so, as they had done before *Roe*, is clear. Under the Tenth Amendment, states may exercise powers that are neither “delegated to the United States by the Constitution, nor prohibited by it to the States.” They have, for example, the power to provide for “[p]ublic safety, public health, morality, peace and quiet, [and] law and order.”<sup>32</sup> This broad “police power” also includes regulating the medical profession.<sup>33</sup>

Congress, in contrast, “can exercise only the powers granted to it” by the Constitution.<sup>34</sup> America’s Founders intended these delegated powers to be “few and defined. Those which are to remain in the state governments are numerous and indefinite.”<sup>35</sup> The powers delegated to Congress include those enumerated in Article I, Section 8, and the power to “make all Laws which shall be necessary and proper for carrying into Execution [these] Powers.”<sup>36</sup> Congress can, for example, use its powers to “provide for the... general Welfare”<sup>37</sup> or to “regulate Commerce...among the several States”<sup>38</sup> to protect the unborn.

This *Legal Memorandum* examines whether Congress can also use its delegated power to enforce the Fourteenth Amendment for this purpose. It addresses three questions: (1) Are human beings before birth properly considered “persons” within the meaning of the Fourteenth Amendment? (2) If so, does Congress’ authority to enforce the Fourteenth Amendment include legislatively defining the unborn as Fourteenth Amendment persons? (3) What kind of enforcement legislation could Congress pursue to protect prenatal persons? The observations and conclusions about these complex questions offered here are necessarily tentative<sup>39</sup> and should be the basis for further debate, scholarship, commentary, legislative hearings, and, ultimately, judicial consideration.

## Are Human Beings Fourteenth Amendment “Persons” Before Birth?

Two sections of the Fourteenth Amendment, each with a critical term, are relevant to this analysis.

- Section 1: “No State shall...deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws.”

- Section 5: “The Congress shall have the power to *enforce*, by appropriate legislation, the provisions of this article.”

**The Wrong Answer: *Roe v. Wade* and Personhood.** *Roe v. Wade* was first argued on December 13, 1971, when the Supreme Court had only seven members; Justices Hugo Black and John Marshall Harlan had retired three months earlier. A few months after their replacements, Lewis Powell and William Rehnquist, took the judicial oath, Justice Harry Blackmun proposed re-arguing the case. That re-argument took place on October 11, 1972. The question whether human beings before birth are Fourteenth Amendment persons was raised both in briefs and at oral argument, and the Court gave its answer in its final opinion.

*Briefs of the Parties and Amici Curiae.* Texas, for example, argued that “it would be a denial of equal protection of law not to accord protection of the life of a person who had not yet been born but [is] still in the womb of its mother.”<sup>40</sup> In its *amicus curiae* brief, Americans United for Life similarly argued that every living human being is “a person within the meaning of the Equal Protection Clause” and that “permit[ting] the child in the womb to be killed in such a case improperly discriminates against him on account of his age and situation.”<sup>41</sup> And in another *amicus curiae* brief, physicians, medical school professors, and fellows of the American College of Obstetrics and Gynecology argued that the “unborn offspring of human parents” is “a ‘person’ within the meaning of the Fifth and Fourteenth Amendments” and, therefore, “is entitled, like all other persons’ lives, to equal protection of the law.”<sup>42</sup>

*Oral Argument.* During the *Roe* re-argument, one Justice suggested that whether the Fourteenth Amendment applies to human beings in the womb was the “basic constitutional question”<sup>43</sup> in the case. Sarah Weddington, representing Jane Roe, conceded that she would have a “difficult case” if “it were established that an unborn fetus is a person within the protection of the Fourteenth Amendment.”<sup>44</sup> Similarly, Texas Assistant Attorney General Robert Flowers asserted that “a fetus being within the concept of a person, within the framework of the United States Constitution and the Texas Constitution, is an extremely fundamental thing.”<sup>45</sup> He agreed that he would lose the case “if the fetus or the embryo is not a person.”<sup>46</sup>

*Roe v. Wade’s Conclusion.* Writing for the Supreme Court’s 7–2 majority, Blackmun stated that “[i]f this suggestion of [fetal] personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”<sup>47</sup> He concluded, however, that “the word ‘person,’ as used in the Fourteenth

Amendment, does not include the unborn.”<sup>48</sup> Blackmun, however, made no attempt to interpret the Fourteenth Amendment. Instead, he asserted that the word “person” in the Fourteenth Amendment does not include the unborn because its use in *other* constitutional provisions does not indicate “with any assurance that it has any possible pre-natal application”<sup>49</sup> in *those* provisions.

Blackmun’s observation amounts to nothing more than acknowledging the obvious, that human beings cannot serve in Congress,<sup>50</sup> as a presidential elector,<sup>51</sup> or as President<sup>52</sup> until after they are born. In one of the first scholarly critiques of *Roe* by a scholar favoring abortion rights, Professor John Hart Ely suggested that “[the Court] might have added that most of [these other] provisions were plainly drafted with *adults* in mind.”<sup>53</sup> Even then, a 23-year-old cannot serve in the House of Representatives, a 28-year-old cannot serve in the Senate, and a 33-year-old cannot serve as President.

No one could possibly think, however, that none of these individuals was a “person” within the meaning of the Fourteenth Amendment. Similarly, none of the uses of “person” elsewhere in the Constitution can apply to a corporation, but, as discussed below,<sup>54</sup> the Supreme Court held nearly a century before *Roe* that a corporation is indeed a Fourteenth Amendment person. These other constitutional provisions use the word, writes Professor John Gorby, but “do not define ‘person,’” and Blackmun’s approach “offers nothing to support the Court’s conclusion that ‘person’ has only postnatal application.”<sup>55</sup> In any event, with *Roe* now overruled, its flawed conclusion that human beings before birth are not Fourteenth Amendment persons no longer exists.

**The Right Answer: Original Public Meaning and Precedent.** The Fourteenth Amendment cannot properly be understood solely by observing how some of its terms are used in other constitutional provisions. Interpreting the Fourteenth Amendment itself requires examining both its original public meaning and relevant Supreme Court precedent.

*Original Public Meaning.* Justice Clarence Thomas has explained that the “judicial task” involves “interpret[ing] and apply[ing] written law to the facts of particular cases.”<sup>56</sup> The first step is interpretation, or “determining what something...means.”<sup>57</sup> Justice Ketanji Brown Jackson explained in her March 2022 Senate Judiciary Committee confirmation hearing that interpreting the Constitution requires determining its “original public meaning.”<sup>58</sup> This is “the meaning that a knowledgeable and reasonable interpreter would have placed on the words at the time that the document was written.”<sup>59</sup>

This approach, often called *originalism*, is necessary because, as the Supreme Court has repeatedly recognized, the Constitution’s “meaning does not alter. That which it meant when adopted it means now.”<sup>60</sup> The Constitution’s meaning “is fixed according to the understandings of those who ratified it.”<sup>61</sup> Focusing constitutional interpretation on “the authority that made it”<sup>62</sup> helps “avoid an arbitrary discretion in the courts.”<sup>63</sup>

Professor Michael Stokes Paulsen has examined whether including the unborn as Fourteenth Amendment persons is consistent with its original public meaning. His analysis examines constitutional text,<sup>64</sup> history, precedent, and policy to assess the plausibility of prenatal personhood. Paulsen concludes that the “better answer...is yes.”<sup>65</sup> His analysis follows:

- **Text.** “[T]he word’s usage in legal and political discourse, as well as common understanding, indicates that person was understood as synonymous with ‘human being’ or ‘human.’ ... In the main...‘person’ was simply an ordinary and encompassing word denoting any and all human beings.”<sup>66</sup> Based on the textual evidence, “the better conclusion by far—indeed, the presumptively single-right-answer—is that the word ‘person’ as used in the Constitution includes the unborn.”<sup>67</sup>
- **Structure.** Paulsen also examines the “logic, structure, and language of other provisions of the Constitution” for “general principles governing constitutional interpretation” and “any default rules for dealing with cases of linguistic ambiguity.”<sup>68</sup> He exposes Blackmun’s “severely defective” reasoning in *Roe* in determining the meaning of “person” in the Fourteenth Amendment based only on its narrow uses in other provisions.<sup>69</sup> Paulsen concludes that “the constitutional term ‘person’ has a range of meaning that plausibly could encompass the unborn.”<sup>70</sup>
- **History and “Original Intent.”** The “original linguistic meaning of the words of the text itself,”<sup>71</sup> Paulsen writes, is different from “the expected consequences,” “subjective intentions,”<sup>72</sup> or “what the drafters had in mind.”<sup>73</sup> Still, while not dispositive, “intention...is at least relevant evidence for constitutional interpretation.” While the framers of the Fourteenth Amendment did not “have...abortion in mind at all when writing the amendment,”<sup>74</sup> it is “reasonably clear that the framers of the Fourteenth Amendment drew no distinction as a factual or legal matter between legal persons and biological human beings.”<sup>75</sup>

- **Precedent.** In *Roe*, Blackmun claimed that the Court's holding against Fourteenth Amendment fetal personhood was "in accord with the results in those few cases where that issue ha[d] been squarely presented."<sup>76</sup> Paulsen, however, cites a decision by a three-judge federal court, which Blackmun failed to cite, that addressed the issue more directly than others. The court held that "[o]nce human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safe-guarding it."<sup>77</sup> Paulsen concludes: The "constitutional meaning of the word person in early judicial interpretation,"<sup>78</sup> as well as "functional interpretations" by state legislatures<sup>79</sup> and non-judicial "instrumentalities of the national government"<sup>80</sup> was that "unborn human life was deserving of legal protection against destruction."<sup>81</sup>
- **Policy, Pragmatics, Evolving Meaning, Etc.** Paulsen notes that, while this "cluster of criteria...does not involve interpretation of the constitutional text,"<sup>82</sup> it was the basis of "*Roe v. Wade* itself.... *Roe* was primarily if not entirely a decision of judicially devised abortion policy."<sup>83</sup> Even if one follows an "evolving-meaning" approach to interpretation, Paulsen argues, the advancing state of medical and scientific knowledge provides "a fairly compelling...policy argument for a broad understanding of person as including the unborn."<sup>84</sup> Simply put, "[w]e know, if we did not know before, that the being gestating in the mother's womb is the same biological human organism—the same human being—as he or she will be after birth."<sup>85</sup> And, Paulsen writes, "it seems especially absurd in light of scientific knowledge to draw the personhood line at birth."<sup>86</sup>
- **Conclusion.** "Text, structure, history, precedent, and policy do not point to an absolutely clear, unambiguous, indisputable answer to the question of whether the Fifth and Fourteenth Amendment's protections of the rights of persons extend to the unborn.... [I]f forced to choose between the alternatives, the weight of the evidence and reasoning far more strongly supports the personhood position than rejects it."<sup>87</sup>

Professors John M. Finnis and Robert P. George also explored the original public meaning of the Fourteenth Amendment in an *amicus curiae* brief filed in *Dobbs*. They examined the legal foundations of the Fourteenth Amendment including the common law, treatises such as William

Blackstone's *Commentaries on the Laws of England*, and English and early American state court decisions. They cite, for example, *Hall v. Hancock*,<sup>88</sup> in which the Massachusetts Supreme Judicial Court unanimously held in 1834, as a "fixed principle," that "a child will be considered in being, from conception to the time of its birth, in all cases where it will be for the benefit of such child to be so considered."<sup>89</sup> Finnis and George conclude: "The original public meaning of 'persons' encompassed all human beings."<sup>90</sup>

*Supreme Court Precedent.* Two lines of Supreme Court precedent support this view of the Fourteenth Amendment's original public meaning by rejecting categorical or arbitrary distinctions. The first group of precedents, which Professor Paulsen considers "the most relevant pre-*Roe* constitutional precedents construing the word person,"<sup>91</sup> concerns the distinction between corporations and "natural" persons. These precedents support the proposition that the category of Fourteenth Amendment persons is not limited to human beings at all. The Supreme Court has long rejected such categorical distinctions under either the Fifth or Fourteenth Amendment, recognizing corporations as persons within the meaning of constitutional provisions that are suited for their inclusion.<sup>92</sup> Some examples:

- **Dartmouth College v. Woodward.**<sup>93</sup> King George III of Great Britain granted a charter to Dartmouth College in 1769. The Supreme Court rejected an attempt by college trustees to make the college a public institution by altering its charter. Chief Justice John Marshall wrote for the majority that a "corporation is an artificial being" that possesses some rights also held by "natural persons."<sup>94</sup>
- **Santa Clara County v. So. Pacific Railroad Co.**<sup>95</sup> Railroads successfully challenged a state law giving more favorable tax treatment to assets owned by corporations than those owned by individuals. Before the oral argument, Chief Justice Morrison Waite stated: "The [C]ourt does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does."<sup>96</sup>

In a second line of precedents, the Supreme Court rejected arbitrary distinctions *among* human beings. Some examples:

- **Levy v. Louisiana.**<sup>97</sup> Five illegitimate children sued under state law for the wrongful death of their mother. The Louisiana courts dismissed the suit, interpreting “child” in the relevant statute to mean “legitimate child.” The Supreme Court reversed, Justice William O. Douglas writing for the majority that “[w]e start from the premise that illegitimate children are not ‘nonpersons.’ They are humans, live, and have their being.’ They are clearly ‘persons’ within the meaning of the Equal Protection Clause of the Fourteenth Amendment.”<sup>98</sup>
- **Weber v. Aetna Casualty & Surety Co.**<sup>99</sup> A man who died from injuries received on the job had four legitimate and two unacknowledged illegitimate children, one of whom was born after his death. A state statute defined “children” to exclude unacknowledged illegitimate children, which it deemed “other dependents,” for purposes of receiving workers’ compensation benefits. The Supreme Court held that this distinction amounted to “impermissible discrimination”<sup>100</sup> that violated the Fourteenth Amendment’s Equal Protection Clause. Justice Lewis Powell, writing for the 8–1 majority, ignored any distinction between children before or after birth, focusing instead on the fact that they were all dependent children, the category that the statute was enacted to help.<sup>101</sup>
- **Linda R.S. v. Richard D.**<sup>102</sup> Decided just weeks after *Roe*, this case involved a Texas statute that made a parent’s desertion, neglect, or refusal to provide support for a minor child a misdemeanor punishable by up to two years in jail. The mother of an illegitimate child whose father refused financial support filed a class action challenging the construction of this statute to apply only to legitimate children. While the Supreme Court dismissed the suit for lack of standing, Justice Byron White, joined by Douglas, argued that excluding illegitimate children and their mothers renders them Fourteenth Amendment “nonpersons.”<sup>103</sup>

These precedents are consistent with the Fourteenth Amendment’s original public meaning, that “person” includes all human beings. Together, they counsel a broad, practical meaning for “person” as including those to whom the text can apply and, adapting the court’s words in *Hall v. Hancock*, “where it will be for [their] benefit...to be so considered.”<sup>104</sup>

## May Congress Define “Person” to Include Human Beings Before Birth?

A good case can be made, consistent with its original public meaning, that all living human beings are “persons” within the meaning of the Fourteenth Amendment. As Professor Paulsen writes, however, the “plausibility of personhood only gets you so far. That the word ‘person,’ as used in the Constitution in the Fifth and Fourteenth Amendments, is broad enough to embrace human beings before birth does not, by itself, say anything specific about what the precise legal regime must be with respect to abortion.”<sup>105</sup> Because, as noted above, there currently exists no Supreme Court precedent on whether the unborn are Fourteenth Amendment persons, the next question here is whether Congress can legislatively define them as such for purposes of enforcing the Fourteenth Amendment.

Section 5 of the Fourteenth Amendment is “a positive grant of legislative power” to Congress<sup>106</sup> but is textually limited to the power to “enforce” Section 1 of the amendment. In early cases, the Supreme Court described that authority in broad terms. In *Ex parte Virginia*,<sup>107</sup> only a dozen years after the Fourteenth Amendment’s ratification, the Supreme Court offered this description:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.<sup>108</sup>

***City of Boerne v. Flores.*** In the last few decades, however, the Supreme Court has taken a more refined view, emphasizing that enforcement legislation must be “remedial” rather than “substantive.” In *City of Boerne v. Flores*,<sup>109</sup> for example, the Court held that Congress could not use its Section 5 enforcement authority to apply the Religious Freedom Restoration Act (RFRA) to the states because RFRA sought to change the Supreme Court’s substantive interpretation of the First Amendment’s free exercise of religion clause.<sup>110</sup> Congress, Justice Anthony Kennedy wrote for the majority, “has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”<sup>111</sup>

*City of Boerne*, however, would not prevent Congress from legislatively establishing that the unborn are Fourteenth Amendment persons. Doing so addresses *to whom* the Fourteenth Amendment rights to due process and

equal protection belong but says nothing about *the meaning or application* of those rights to them. And unlike in *City of Boerne*, legislatively defining the unborn as Fourteenth Amendment persons would not conflict with any Supreme Court precedent because no precedent on that question exists. Doing so would instead be an example of, as Professor Paulsen describes it, Congress making “interpretive choices falling within the range of the text’s meaning in the course of”<sup>112</sup> enforcing the Fourteenth Amendment. This approach would be more effective than Congress’ previous attempts to define the unborn as Fourteenth Amendment persons.

**The Human Life Bill.** In January 1981, as the 97th Congress opened with a new Republican majority, Senator Jesse Helms (R-NC) introduced S. 158, the Human Life Bill (HLB). *Roe v. Wade*, of course, was then the prevailing precedent on abortion. The Senate Judiciary Subcommittee report on this bill explained that, by asserting a contrary position regarding the Fourteenth Amendment’s purpose and by deeming human life to begin at conception, the HLB was intended to “encourage the Court to reexamine the results and the reasoning of *Roe v. Wade*.<sup>113</sup>

While the HLB did not have a section formally labeled “findings,” as many bills do, these statements were phrased that way, as assertions rather than substantive legislative provisions. This is important because it is unclear whether, or how, such statements are binding. They are considered “valid law published in the Statutes at Large, which contain the law as passed by Congress and signed by the president.”<sup>114</sup> At the same time, “it is common practice for a bill to be stripped of its findings and purposes before the rest of the statute is placed in the main text of the US Code.”<sup>115</sup>

**Sanctity of Life Act.** Another bill has been introduced as the Sanctity of Life Act (SLA). One version, introduced in 10 Congresses since 1995, finds that “actual human life exists from the moment of conception,” and declares that “‘person’ shall include all human life.” It would also withdraw federal court jurisdiction over challenges to pro-life statutes, ordinances, regulations, or practices. In general, however, withdrawing such jurisdiction for future cases does not affect precedents that already exist. In any event, now that *Roe v. Wade* has been overruled, legal challenges to pro-life laws will primarily be brought in state, rather than federal, court.

These bills did not identify Congress’ specific authority to enact them. One of them, H.R. 2087, introduced in 1995, cited Congress’ authority to enforce the Fourteenth Amendment.<sup>116</sup> The others, however, referred generally to the “powers of Congress”<sup>117</sup> or to various individual provisions.<sup>118</sup> Another version of the bill declares that “the right to life guaranteed by the Constitution is vested in each human being,” but neither identifies the basis

for this right nor contains any operative provisions at all. Its content, therefore, is more suitable for a “simple resolution.”<sup>119</sup> Because resolutions “are not used to make law...[they] do not require the approval of the other house of Congress”<sup>120</sup> and need not establish Congress’ constitutional authority to enact them. Simple resolutions have many uses, including declaring the “sense of the House” or “sense of the Senate” on a particular topic.<sup>121</sup>

## How Can Congress Enforce the Fourteenth Amendment to Protect the Unborn?

There exists a sound argument that defining “person” in the Fourteenth Amendment to include human beings before birth is consistent with its original public meaning. There is also a sound argument that, in the absence of a contrary Supreme Court precedent, Congress can legislatively establish that definition for purposes of its power to enforce the Fourteenth Amendment. The final question, then, is the form and content of Fourteenth Amendment enforcement legislation by which Congress can actually protect persons before birth.

The late Professor Ronald Rotunda wrote that Congress can “enact legislation to protect individuals from state action that violates the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment,”<sup>122</sup> including providing for causes of action against states.<sup>123</sup> The Supreme Court has upheld this approach under Congress’ similar authority to enforce the Fifteenth Amendment. In *Raines v. United States*,<sup>124</sup> the Court upheld the provision in the Civil Rights Act of 1957 giving the Attorney General authority to sue for “preventive relief” whenever “any person has engaged in or...is about to engage in any act or practice which would deprive any other person of any right or privilege secured by” the Voting Rights Act. The Court held that the discriminatory conduct charged in that case was “state action”...subject to the ban of that Amendment, and that legislation designed to deal with such discrimination is ‘appropriate legislation’ under it.”<sup>125</sup>

**Due Process Clause vs. Equal Protection Clause.** If a cause of action is the desirable form of enforcement legislation, there remain two substantive issues that must be addressed in drafting actual legislation. The first is whether such legislation should enforce the Fourteenth Amendment’s Due Process Clause or Equal Protection Clause.

*Due Process Clause.* As the Supreme Court noted in *Raines*, the Fourteenth Amendment is a limitation on government action.<sup>126</sup> Constitutional rights, therefore, are *negative* rights, that is, rights to be free from certain

government actions. As Judge Richard Posner explains, the Constitution “is a charter of negative rather than positive liberties.... The Fourteenth Amendment...sought to protect Americans from oppression by state government, not to secure them basic government services.”<sup>127</sup> The goal of enforcing the Fourteenth Amendment to protect prenatal persons, however, is not to *limit* government action, but to *compel* such action in the form of laws prohibiting abortion. Focusing on the Due Process Clause for this purpose would require a *positive* right, that is, a right that imposes an obligation on government to act in a particular way. The Supreme Court has held, however, that this concept of rights is inconsistent with the Fourteenth Amendment.

In *DeShaney v. Winnebago County Dept. of Social Services*,<sup>128</sup> the mother of a boy injured by his father sued social workers, claiming that the boy’s Fourteenth Amendment right to “liberty” obligated them to remove him from his father’s custody. This case, Chief Justice William Rehnquist wrote, “is one invoking the substantive rather than the procedural component of the Due Process Clause” by claiming that government was “obligated to protect him in these circumstances.”<sup>129</sup> The Court voted 8–1 to reject this view of the Fourteenth Amendment, stating:

The [Due Process] Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without “due process of law,” but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.<sup>130</sup>

The Supreme Court has recognized the same principle when upholding laws that prevent public funds from subsidizing abortion. In *Harris v. McRae*,<sup>131</sup> for example, the Court upheld the Hyde Amendment, which prohibits using Medicaid program funds to reimburse the cost of abortions. The Court held that the Due Process Clause protects against “unwarranted government interference” with a right or liberty but “does not confer an entitlement to such [government aid] as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution.”<sup>132</sup>

In *Dobbs*, Justice Brett Kavanaugh joined the majority opinion overruling *Roe* and *Casey* and wrote a concurring opinion to explain further his views on “why *Roe* should be overruled at this time, and the future implications of today’s decision.”<sup>133</sup> Noting that some *amicus curiae* briefs filed in the case urged the Court to “hold that the Constitution *outlaws* abortion throughout

the United States,”<sup>134</sup> Kavanaugh observed that “[n]o Justice of this Court has ever advanced that position” and concluded that this position is “wrong as a constitutional matter.”<sup>135</sup> The Fourteenth Amendment’s Due Process Clause, therefore, raises difficult issues that, at least at this time, may make the Equal Protection Clause, which is discussed next, a more useful basis for Fourteenth Amendment enforcement legislation.<sup>136</sup>

*Equal Protection Clause.* Legislation enforcing the Fourteenth Amendment’s Equal Protection Clause does not involve such challenging issues but relies on more familiar concepts. The Supreme Court has held that states may not “legislate that different treatment be accorded to persons by a statute into different classes on the basis of criteria wholly unrelated to the object of that statute.... ‘[A]ll persons similarly circumstanced shall be treated alike.’”<sup>137</sup> Providing for a cause of action against states that treat differently classes of human beings with regard to protecting their lives would be consistent with this principle.

Cases alleging unequal treatment typically involve a single statute that applies differently to similarly situated parties. The same basic principle, however, would apply to states that have laws protecting the lives of some human beings but not others. Concurring in *Bell v. Maryland*,<sup>138</sup> Justice Arthur Goldberg wrote that “[d]enying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.”<sup>139</sup> In other words, “state conduct which might be described as ‘inaction’ can nevertheless constitute responsible ‘state action’ within the meaning of the Fourteenth Amendment.”<sup>140</sup>

Pro-life advocates have long argued that human beings are in the same situation, both before and after birth, with respect to their need for the government to protect their lives. Protecting the lives of some human beings but not others, therefore, may violate the Fourteenth Amendment’s requirement of equal protection.<sup>141</sup>

- In *Roe*, Texas argued that “it would be a denial of equal protection of law...for either the state or federal government to distinguish between a person who has been born and one living in the womb of its mother.”<sup>142</sup>
- Professor Charles Rice wrote in 1973 that if a state “punishes as homicide the intentional, unjustified killing of persons, and if the state authorities adopt a policy of not prosecuting for the killing of unborn persons while prosecuting for the killing of all other classes of persons, it is fair to say that such official inaction denies the child in the womb the equal protection of the laws.”<sup>143</sup>

- Professor Paulsen writes that recognizing all human beings to be Fourteenth Amendment persons would mean that unborn persons “would be constitutionally entitled to...[legal] protection equal to that afforded other persons in comparable situations.”<sup>144</sup>
- In their *amicus curiae* brief in *Dobbs*, Professors George and Finnis argue that human beings before birth are Fourteenth Amendment persons and that the amendment “codified equality in the fundamental rights of persons.”<sup>145</sup>
- Three weeks before the Supreme Court overruled *Roe*, Professor George and Josh Craddock wrote in the *Washington Post* that “[b]ecause state laws allowing elective abortion necessarily deprive a class of human beings—those at the earliest stage of development—of ‘the equal protection of the laws,’ they violate constitutional rights.”<sup>146</sup>

Ironically, Sarah Weddington, Jane Roe’s attorney, acknowledged the same point during the *Roe* re-argument. She agreed that, if human beings before and after birth were similarly Fourteenth Amendment persons, abortion would be “the equivalent after the child was born if the mother thought it bothered her health having the child around, she could have it killed.”<sup>147</sup> In other words, recognizing all human beings as Fourteenth Amendment persons would require that they be similarly protected under the law.

Examples of discriminatory or unequal treatment of prenatal persons abound. According to the National Conference of State Legislatures, 38 states prohibit fetal homicide by applying their general homicide statutes before, as well as after, birth. California law, for example, defines murder as “the unlawful killing of a human being, or a fetus, with malice aforethought.”<sup>148</sup> The statute, however, excludes “an act that results in the death of a fetus” by abortion.<sup>149</sup> Since abortion is currently legal in California, therefore, the law treats prenatal victims of abortion differently from both persons after birth and prenatal persons killed by means other than abortion.

**Fundamental Right vs. Suspect Class.** The Fourteenth Amendment’s Equal Protection Clause, therefore, provides a sound basis for enforcement legislation aimed at protecting the lives of prenatal persons. Congress could enact a statute that defines the unborn as Fourteenth Amendment persons and authorizes a cause of action by the Attorney General against states that treat persons before and after birth differently with respect to laws protecting their lives. The final substantive question is how, if enacted into law, courts would handle a cause of action brought under such a statute. Since

every law makes distinctions of some kind, courts will apply a legal standard based on the relationship between a statute's purpose and the disparate treatment it uses to achieve that purpose. "As in all equal protection cases... the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment."<sup>150</sup>

"*Mere Rationality*" v. "*Strict Scrutiny*." To prevent courts from simply replacing legislatures' policy decisions with their own, most laws challenged under the Equal Protection Clause need meet only a lenient standard. They will be upheld if there is "some rational relationship between disparity of treatment and some legitimate government purpose."<sup>151</sup> A legislative distinction that "operates to the disadvantage of some *suspect class* or impinges upon a *fundamental right*,"<sup>152</sup> however, does not have a "presumption of validity."<sup>153</sup> It will be struck down unless the unequal treatment is a "narrowly tailored"<sup>154</sup> or "necessary"<sup>155</sup> means to achieve a "compelling" government purpose.<sup>156</sup> This standard is typically called "strict" or "exact-ing"<sup>157</sup> scrutiny.

A cause of action against states that protect the lives of human beings after, but not before, birth or that prohibit feticide but not abortion, therefore, will be more likely to succeed if that unequal treatment is subject to strict scrutiny rather than "mere rationality"<sup>158</sup> review. Professor Steven Calabresi argues that "Congress has the power to interpret Section 1 of the Fourteenth Amendment when it is legislating to enforce it under Section 5... before the Supreme Court has identified [Section 1 rights], so long as at the end of the day, the Court agrees that the rights in question are encompassed in the meaning of Section 1."<sup>159</sup> The Court in *Boerne* also acknowledged that Congress should have "wide latitude" regarding the line between remedying a constitutional violation and substantively changing the law.<sup>160</sup> That latitude should be widest when Congress exercises its judgment in the absence of any Supreme Court precedent. Congress might, therefore, enact legislation that, for purposes of enforcing the Fourteenth Amendment, defines all human beings as Fourteenth Amendment persons, establishes a fundamental right to life, and provides for a cause of action against states that treat persons differently with respect to that fundamental right.<sup>161</sup>

## Conclusion

The Fourteenth Amendment protects the rights of "any person" to due process when a state deprives him or her of life, liberty, or property, and to the "equal protection of the laws." By overruling *Roe v. Wade*, the Supreme Court eliminated *Roe*'s deeply flawed holding that "the word 'person,' as

used in the Fourteenth Amendment, does not include the unborn.”<sup>162</sup> Since a sound case can be made that interpreting “person” to include all human beings is consistent with the Fourteenth Amendment’s original public meaning, Congress should do so for purposes of its power to enforce the Fourteenth Amendment.

The Fourteenth Amendment’s Equal Protection Clause is more suitable than the Due Process Clause as a basis for enforcement legislation and Congress may create a cause of action by the Attorney General against states that deny to prenatal persons the equal protection of the laws. This occurs when a state prohibits killing a person after—but not before—birth or prohibits killing prenatal persons in some circumstances but not others.

The success of this strategy will depend on the legal standard the courts will apply. In the absence of contrary Supreme Court precedent, Congress can, for purposes of its Fourteenth Amendment enforcement power, legislatively recognize a fundamental right to life for Fourteenth Amendment persons or recognize prenatal persons as a suspect class. Either approach prompts the courts to apply strict scrutiny, requiring states to show that failing to prohibit abortion is the least restrictive means of achieving a compelling government purpose.

Congress can strengthen this and other pro-life legislative goals, as well as contribute to success in litigation challenging them, by establishing a comprehensive record on key issues including:

- The original public meaning of the Fourteenth Amendment;
- America’s history and tradition of increasing legal protection for prenatal life;
- The medical and scientific consensus that, as Texas argued in its *Roe* brief, “human life is a continuum, which commences in the womb.... The child is as much a child in those several days before birth as he is in those several days after;”<sup>163</sup>
- The many ways that the law recognizes human beings before birth as legal persons with rights, undermining the rationality of leaving unborn persons without legal protection for their lives; and
- The foundation for, and implications of, recognizing a substantive constitutional right to life.

Justice Lewis Powell offered a principle that is especially poignant here: “The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to [another person]. If both are not accorded the same protection, then it is not equal.”<sup>164</sup>

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## Endnotes

1. See, e.g., DENNIS J. HORAN & THOMAS J. MARZEN, *Abortion and Midwifery: A Footnote in Legal History*, in NEW PERSPECTIVES ON HUMAN ABORTION 199 (1981) (1716 New York City law requiring an oath for midwives not to "give any counsel or administer any...thing to any woman being with child" to induce a miscarriage or abortion).
2. Editorial, Child Murder, THE REVOLUTION, Mar. 12, 1868, at 146. See also Matilda A.J. Gage, Letter to the Editors, *Is Woman Her Own? THE REVOLUTION*, Apr. 9, 1868, at 215.
3. See FREDERICK N. DYER, THE PHYSICIANS' CRUSADE AGAINST ABORTION (2005); Frederick N. Dyer, *American Medical Association Documents That Led to Law Overturned by Roe v. Wade*, 26 J. OF AM. PHYSICIANS AND SURGEONS 83 (2021).
4. See HEATHER D. BOONSTRA, RACHEL BENSON GOLD, CORY L. RICHARDS AND LAWRENCE B. FINER, *ABORTION IN WOMEN'S LIVES* 11 (Guttmacher Institute 2006).
5. See Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?* 6 GUTTMACHER POL'Y REV. 8, 12 (Mar. 2003); Harvey L. Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. CRIM. L. 3 (1969); KAREN J. LEWIS, MORTON ROSENBERG AND ALLISON I. PORTER, CONG. RSCH. SERV. IB74019, *ABORTION: JUDICIAL AND LEGISLATIVE CONTROL* 3 (1981); Human Life Federalism Amendment, Report of the S. Comm. on the Judiciary, 98th Cong. 5 (1983).
6. 410 U.S. 113 (1973).
7. *Id.* at 153. See also *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment.").
8. *Roe*, 410 U.S. at 164–65.
9. House Joint Resolution 219 introduced by Rep. Lawrence Hogan (R-MD) on January 30, 1973. Its language paralleled the Fourteenth Amendment: "Neither the United States nor any State shall deprive any human being, from the moment of conception, of life without due process of law; nor deny to any human being, from the moment of conception, within its jurisdiction, the equal protection of the laws."
10. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 926 (1973).
11. Kermit Roosevelt, *Shaky Basis for a Constitutional Right*, WASH. POST, Jan. 22, 2003.
12. MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 54 (1988).
13. Phillip Heymann and Douglas Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765, 784 (1979).
14. Wheeler & Kovar, *Roe v. Wade: The Right to Privacy Revisited*, 21 U. KAN. L. REV. 527, 527 (1973).
15. See, e.g., Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1569 (1979) ("The result in the case—the establishment of a constitutional right to abortion—was controversial enough. Beyond that, even people who approve of the result have been dissatisfied with the Court's opinion.").
16. WHAT ROE V. WADE SHOULD HAVE SAID (Jack M. Balkin, ed., N.Y. Univ. Press 2003).
17. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1200 (1992).
18. See Olivia B. Waxman, *Ruth Bader Ginsburg Wishes This Case Had Legalized Abortion Instead of Roe v. Wade*, TIME, Aug. 2, 2018, <https://time.com/5354490/ruth-baderginsburg-roe-v-wade/>.
19. 505 U.S. 833 (1992).
20. *Id.* at 846.
21. Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 420 (1983).
22. *Casey*, 505 U.S. at 869.
23. *Id.* (emphasis added).
24. *Id.* at 846. In *Roe*, the Supreme Court defined viability as the point at which "the fetus [is] potentially able to live outside the mother's womb, albeit with artificial aid." 410 U.S. at 160. Viability usually occurred at "approximately 28 weeks" when the Court decided *Roe* in 1973, 410 U.S. at 160, and "sometimes" at 23–24 weeks when the Court decided *Casey* in 1992. 505 U.S. at 860. The 24-week mark has become the generally accepted point of viability. See G. H. Breborowicz, *Limits of Fetal Viability and Its Enhancement*, EARLY PREGNANCY, Jan. 2001, at 49–50 (viability is at "approximately 24 weeks of gestational age."); *Obstetric Care Consensus: Perivable Birth*, OBSTET. & GYN., Oct. 2017, at 188 (survival rate of 23–27 percent for babies born at 23 weeks, 42–59 percent for babies born at 24 weeks). Some babies have been born even earlier. See, e.g., Pam Belluck, *Premature Babies May Survive at 22 Weeks If Treated*, STUDY FINDS, N.Y. TIMES, May 6, 2015, <https://www.nytimes.com/2015/05/07/health/premature-babies-22-weeks-viability-study.html>.
25. 142 S.Ct. 2228 (2022).
26. *Id.* at 2242.
27. *Id.* at 2248. See also *id.* at 2279 ("We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.").

28. *Id.* at 2245–46. See also *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273–74 (1993).
29. *Dobbs*, 142 S.Ct. at 2243.
30. *Id.* at 2284. See also *Heller v. Doe*, 509 U.S. 312, 320 (1993) (“a rational relationship between the disparity of treatment and some legitimate governmental purpose”).
31. *Dobbs*, 142 S.Ct. at 2243.
32. *Berman v. Parker*, 348 U.S. 26, 32 (1954).
33. See *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006).
34. *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). See also *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“We start with first principles. The Constitution creates a Federal Government of enumerated powers.”); *United States v. Morrison*, 529 U.S. 598, 607 (2000) (“Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.”).
35. THE FEDERALIST No. 45 (James Madison), [https://avalon.law.yale.edu/18th\\_century/fed45.asp](https://avalon.law.yale.edu/18th_century/fed45.asp).
36. U.S. Const., art. I, § 8, cl. 18. See Gary Lawson, *Necessary and Proper Clause*, HERITAGE GUIDE TO THE CONSTITUTION, <https://www.heritage.org/constitution/#!articles/1/essays/59/necessary-and-proper-clause>.
37. U.S. CONST., art. I, § 8, cl. 1.
38. *Id.*, art. I, § 8, cl. 3.
39. See Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, (2013) (“I make no claim that the legal personhood position is indisputably correct...My argument is...for the legal plausibility of the personhood position only.”).
40. Brief for Appellee in *Roe v. Wade* (No. 70-18), 1971 Term, at 56.
41. Brief of Americans United for Life as Amici Curiae in Support of Appellee, *Roe v. Wade* (No. 70-18), 1971, at 9.
42. *Id.* at 64.
43. Oral argument transcript, *Roe v. Wade*, No. 70-18, Oct. 11, 1972, at 39.
44. *Id.* at 20–21.
45. *Id.* at 29–30.
46. *Id.* at 30.
47. *Roe*, 410 U.S. at 156–57.
48. *Id.* at 158.
49. *Id.* at 157.
50. U.S. CONST., art. I, § 2, cl. 2.
51. *Id.*, art I, § 2, cl. 1.
52. *Id.*, art. II, § 1, cl. 5.
53. Ely, *supra* note 10, at 925–26.
54. See *infra* notes 91–96 and accompanying text.
55. John D. Gorby, *The “Right” to an Abortion, the Scope of Fourteenth Amendment Personhood, and the Supreme Court’s Birth Requirement*, 4 S. ILL. UN. L. J. 1, 13 (1979).
56. *United States v. Gamble*, 139 S.Ct. 1960, 1984 (2019) (Thomas, J., concurring).
57. BLACK’S LAW DICTIONARY 824 (7th ed. 1999).
58. See Andrew Koppelman, *Ketanji Brown Jackson’s Originalism*, THE HILL, Apr.10, 2022, <https://thehill.com/opinion/judiciary/3263173-ketanji-brown-jacksons-originalism/>.
59. John O. McGinnis and Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NORTHWESTERN UNIV. L. REV. 1371, 1376 (2019). See also *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), quoting *United States v. Sprague*, 282 U.S. 716, 783 (1931) (the Constitution “was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”).
60. *South Carolina v. United States*, 199 U.S. 437, 448 (1905).
61. *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S.Ct. 2111, 2117 (2022).
62. *VanHorne’s Lessee v. Dorrance*, 2 U.S. 304, 308 (1795).
63. THE FEDERALIST No. 78 (Alexander Hamilton), [https://avalon.law.yale.edu/18th\\_century/fed78.asp](https://avalon.law.yale.edu/18th_century/fed78.asp).

64. Paulsen, *supra* note 39, at 19 (goal is to determine the “original, objective linguistic meaning in context,” or the meaning “a term, or phrase would have had, in the linguistic and cultural-political context in which it was used, to reasonably well-informed speakers and readers of the English language at the time.”).
65. *Id.* at 14. See also *id.* at 16 (“I make no claim that the legal personhood position is indisputably correct....My argument is...one for the legal plausibility of the personhood position only.”).
66. *Id.* at 20. In addition, the “technical, specialized legal-definition meaning of ‘person,’ as set forth in Blackstone...specifically includes the unborn, and America’s leading legal scholars, and the Constitution’s drafters, had Blackstone in view.” *Id.* at 32.
67. *Id.* at 32. See also Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 ISSUES L. & MED. 185, 201 (2010) (Representative John Bingham (R-PA), author of Fourteenth Amendment’s §1, “held the term ‘person’ to be one of inclusion, not of limitation.”).
68. Paulsen, *supra* note 39, at 15.
69. *Id.* at 35–38.
70. *Id.* at 39.
71. *Id.*
72. *Id.* at 46.
73. *Id.* at 47.
74. *Id.*
75. *Id.*
76. *Roe*, 410 U.S. at 158.
77. Steinberg v. Brown, 321 F.Supp. 741,747 (N.D. Ohio 1970) (three-judge panel). *Steinberg* refused to extend the right to use contraception from *Griswold v. Connecticut*, 381 U.S. 4790 (1965) to abortion, noting that while contraception prevents “the creation of a new and independent life,” 321 F.Supp. at 746, abortion ends a “human life [that] has commenced.” *Id.*
78. Paulsen, *supra* note 39, at 58.
79. *Id.* at 59.
80. *Id.* at 60.
81. *Id.*
82. *Id.* at 61.
83. *Id.*
84. *Id.* at 62.
85. *Id.*
86. *Id.* at 64.
87. *Id.* at 68.
88. 32 Mass. 255 (1834).
89. *Id.* at 258 (emphasis added).
90. Brief of Scholars of Jurisprudence John M. Finnis and Robert P. George as Amici Curiae in Support of Petitioners, *Dobbs v. Jackson Women’s Health Organization* (No. 19-1392) 2022, at 23 (emphasis in original). For an expanded version of this brief, see John Finnis and Robert P. George, *Equal Protection and the Unborn Child: A Dobbs Brief*, 45 HARV. J. L. & PUB. POL’Y 927 (2022). See also C’Zar Bernstein, *Fetal Personhood and the Original Meaning of “Person”*, 26 TEXAS REV. L. & POL. 485, 505–11 (2002) (concluding that “the original meaning of ‘person’ in the Constitution includes the unborn”); Joshua Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?* 40 HARV. J. L. & PUB. POL’Y 539, 561 (concluding that 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.”).
91. Paulsen, *supra* note 39, at 58.
92. See also Brief of Scholars of Jurisprudence, *supra* note 90, at 3–4 (“In the 1880s, this Court reckoned corporations ‘person[s]’ under the Equal Protection and Due Process Clauses. The rationale...itself blocks any analytic path to excluding the unborn. Indeed, the originalist case for including the unborn is much stronger than for corporations.”); *id.* at 23–27.
93. 17 U.S. 518 (1819).
94. *Id.* at 636. See Carson Holloway, *Are Corporations People?* NAT’L AFFAIRS, Fall 2015, <https://www.nationalaffairs.com/publications/detail/are-corporations-people>; Carson Holloway, *Two Centuries of Legal Personhood*, HERITAGE FOUND. COMMENTARY, Feb. 15, 2019, <https://herit.ag/3B05KXf>.
95. 118 U.S. 394 (1886).

96. *Id.* at 396. See also *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888) (“there is no doubt” that corporations are persons within the meaning of the Fourteenth Amendment’s equal protection clause); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 780 n.15 (1978) (“It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment.”). The Supreme Court has held the same view when construing “person” as a statutory term. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014) (while it is a “legal fiction,” a corporation “is simply a form of organization used by human beings to achieve desired ends.”).
97. 391 U.S. 68 (1968).
98. *Id.* at 71.
99. 406 U.S. 164 (1972).
100. *Id.* at 169.
101. *Id.* at 173.
102. 410 U.S. 614 (1973).
103. *Id.* at 621.
104. See *supra* note 88 and accompanying text.
105. Paulsen, *supra* note 39, at 69–70.
106. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).
107. 100 U.S. 339 (1880).
108. *Id.* at 345–46.
109. 521 U.S. 507 (1997).
110. The Supreme Court held in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), that “liberty” in the Fourteenth Amendment includes the First Amendment right to freely exercise religion. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court held that its previous interpretation of the Free Exercise Clause would no longer apply in most challenges to government action that burdened religious practice. As long as government action that is not “specifically directed at...religious practice” would no longer violate the Free [E]xercise Clause even if burdens on religious exercise are an “incidental effect of a generally applicable” law. *Id.* at 878.
111. *Id.* at 519.
112. Paulsen, *supra* note 39, at 45.
113. The Human Life Bill, S. 158, Report of the S. Subcomm. on Separation of Powers, 97th Cong. 6 (1981).
114. See Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. Chi. L. Rev. 669, 673 (2019).
115. *Id.*
116. One bill, H.R. 2764 introduced in the 113th Congress, cites only § 1 of the Fourteenth Amendment. See H.R. 2764, 113th Cong. (2021).
117. H.R. 776, 109th Cong. (2005); H.R. 1094, 110th Cong. (2007); H.R. 2597, 110th Cong. (2007); H.R. 2533, 111th Cong. (2009).
118. See, e.g., H.R. 1096, 112th Cong. (2011); H.R. 2761, 114th Cong. (2015); H.R. 3676, 115th Cong. (2017); H.R. 6042, 116th Cong. (2020).
119. See JANE A. HEDBERG, *BILLS, RESOLUTIONS, NOMINATIONS, AND TREATIES, CHARACTERISTICS AND EXAMPLES OF USE*, CONG. RSCH. SERV., No. R46603, Nov. 16, 2020, at 4–5.
120. *Id.* at 4.
121. See CHRISTOPHER M. DAVIS, “SENSE OF” RESOLUTIONS AND PROVISIONS, CONG. RSCH. SERV. No. 98–825, Oct. 16, 2019; Jefferson’s Manual, House Document 116–177, 116th Congress, 2d Session § 395 (“fact, principles, and their own opinions and purposes, are expressed in the form of resolutions.”), <https://www.govinfo.gov/content/pkg/HMAN-117/pdf/HMAN-117.pdf>.
122. Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 Ind. L. Rev. 163, 169 (1998).
123. The 11th Amendment prohibits lawsuits “against one of the United States.” The Supreme Court has interpreted it to prevent similar suits by a state’s own citizens. See *Hans v. Louisiana*, 134 U.S. 1 (1890) and similar suits in state courts “if those suits are based on federal law.” Bradford R. Clark & Vicki C. Jackson, *The Eleventh Amendment*, INTERACTIVE CONSTITUTION, <https://bit.ly/3w4wizK>. The Supreme Court has held that Congress “can abrogate a State’s sovereign immunity when it does so pursuant to a valid exercise of power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment.” *Tennessee v. Lane*, 541 U.S. 509, 518 (2004).
124. 362 U.S. 17 (1960).
125. *Id.* at 25. Congress might also explore establishing a private cause of action against states that do not prohibit abortion. It might, for example, provide for third parties to bring an action as a “next friend” of unborn persons. This designation “has long been an accepted basis for jurisdiction in certain circumstances.” *Whitmore v. Arkansas*, 495 U.S. 149, 162 (1990). It has typically been used in the *habeas corpus* context “on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves.” *Id.* See 28 U.S.C. § 2282 (application for a writ of *habeas corpus* by “the person for whose relief it is intended or by someone acting in his behalf”) (emphasis in original). A third party acting as a “next friend” does not assert his or her own interests but acts solely on behalf of the plaintiff. *Id.* at 163. In other words, a “next friend” must

be “truly dedicated to the best interests of the person on whose behalf he seeks to litigate...and it has been further suggested that a ‘next friend’ must have some significant relationship with the real party in interest.” *Id.* at 163–64. In the abortion context, the actual litigant would have to establish the unborn person’s standing to challenge the state’s failure to prohibit abortion. Standing requires showing that the plaintiff “has suffered an ‘injury in fact’” that is “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” that is “fairly trace[able] to the challenged [state] action” and “likely to be redressed by a favorable decision.” *Id.* at 155. One argument might be that a state’s denial of equal protection by failing to prohibit abortion puts the lives of unborn persons at risk.

126. See *Shelley v. Kramer*, 334 U.S. 1, 13 (1948).
127. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir.), cert. denied, 465 U.S. 1049 (1983). See also David P. Currie, *Positive and Negative Constitutional Rights*, 53 UNIV. CHI. L. REV. 864 (1986).
128. 489 U.S. 189 (1989).
129. *Id.* 195.
130. *Id.*
131. 448 U.S. 297 (1979).
132. *Id.* at 318.
133. *Dobbs*, 142 S.Ct. at 2304 (Kavanaugh, J., concurring).
134. *Id.* (emphasis in original).
135. *Id.*
136. See also Bernstein, supra note 90, at 495–98 (concluding that using the Due Process “cannot succeed within the originalist framework because it endorses the idea of substantive due process”).
137. *Reed v. Reed*, 404 U.S. 71, 75–76 (1971), quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).
138. 378 U.S. 226 (1964).
139. *Id.* at 309 (Goldberg, J., concurring) (internal citations omitted).
140. *Id.* at 310–11.
141. See Bernstein, supra note 90, at 498–501 (concluding that whether the Constitution requires that states prohibit abortion “depends entirely on the Equal Protection Clause...the Due Process Clause...[is] inapposite.”).
142. Brief for Appellee, *supra* note 40, at 56.
143. Charles E. Rice, *Overruling Roe v. Wade: An Analysis of the Proposed Constitutional Amendments*, 15 B.C. INDUS. & COM. L. REV. 307, 336 (1973).
144. Paulsen, *supra* note 39, at 71.
145. Brief of Scholars of Jurisprudence, *supra* note 90, at 3.
146. Robert P. George and Josh Craddock, *Even If Roe Is Overturned, Congress Must Act to Protect the Unborn*, WASH. POST, June 2, 2022, <https://www.washingtonpost.com/opinions/2022/06/02/roe-abortion-congress-fourteenth-amendment/>.
147. *Oral argument transcript*, *supra* note 43, at 21.
148. Cal. Penal Code, Part 1, Title 8, § 1897(a).
149. *Id.* at § 187(b)(1).
150. *Police Dept. of City of Chicago v. Mosely*, 408 U.S. 92, 95 (1972).
151. *Central State Univ. v. American Assoc. of Univ. Professors*, 526 U.S. 124, 128 (1999).
152. San Antonio Independent School Dist. V. Rodriguez, 411 U.S. 1, 17 (1973) (emphasis added). For Fourteenth Amendment equal protection purposes, a “suspect class” is “a group that meets a series of factors that suggest the group is historically subject to discrimination or political powerlessness and warrants protection.” Selene C. Vazquez, *The Equal Protection Clause & Suspect Classifications: Children of Undocumented Entrants*, 51 U. MIAMI INTER-AM. L. REV. 63, 65 (2020). In addition, the Supreme Court has suggested that a higher legal standard might be applied when a classification reflects “prejudice against discrete or insular minorities...which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).
153. *San Antonio*, 411 U.S. at 16.
154. *Mosely*, 408 U.S. at 101.
155. *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 627 (1969).
156. See *San Antonio*, 411 U.S. at 98 (Marshall, J., dissenting); *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972).
157. *Kramer*, 395 U.S. at 626.

158. *San Antonio*, 411 U.S. at 98 (Marshall, J., dissenting).
159. Steven G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 J. CONST. L. 1431, 1433 (2009).
160. *Boerne*, 521 U.S. at 520.
161. A private right of action would have to be brought on behalf of unborn persons, but “in order to claim the interests of others, the litigants themselves still must have suffered an injury in fact, thus giving’ them ‘a sufficiently concrete interest in the outcome of the issue in dispute.’” *Thole v. U.S. Bank*, 140 S.Ct. 1615, 1620 (2020), quoting *Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013).
162. *Roe*, 410 U.S. at 158.
163. Brief for Appellee, *supra* note 40, at 53-54.
164. Regents of Univ. of California v. Bakke, 438 U.S. 265, 289-90 (1978) (opinion of Powell, J.).