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THE PLAUSIBILITY OF PERSONHOOD

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The Plausibility of Personhood

MICHAEL STOKES PAULSEN*

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I would like to acknowledge significant intellectual debts to several persons, none of whom is responsible for the specific opinions and conclusion I express here. My long-time friend and law school classmate, Walter Weber, pointed me in the direction of important prior scholarship on these issues, including a notable Supreme Court amicus brief (of which he was counsel of record and author) in *Planned Parenthood v. Casey*, addressing many of these issues and referencing important sources. Brief for Catholics United for Life et al. as Amicus Curiae Supporting Respondents and Cross-Petitioners, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902). Another long-time friend, Clarke Forsythe, directed me to numerous other sources and scholarly articles on this topic, including some of his own, which I cite throughout. In addition, both Walter and Clarke read an early version of this Article and provided generous comments. I am also indebted to the path-breaking scholarship of Stephen H. Galebach in his classic article on the interrelationship of the issues of “personhood” and the scope of Congress’s Enforcement Clause powers under Section Five of the Fourteenth Amendment. Stephen H. Galebach, *A Human Life Statute*, HUM. LIFE REV., Winter 1981, at 3.

Finally, on broader points of constitutional interpretive methodology, I owe too many intellectual debts to list individually. I am grateful in the extreme for the refining influence, and intellectual energy and impetus, of my sometime co-author Vasan Kesavan. Vasan might claim that my own prior scholarship influenced *him*, but it was our joint work in two articles that first crystallized and systematized—and in certain ways revised—my own thinking about constitutional interpretive methodology: Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291 (2002) and Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113 (2003) [hereinafter Kesavan & Paulsen, *Interpretive Force*]. *Interpretive Force* references a wealth of earlier scholarship by others that also has influenced my thinking greatly. My thanks also to Robert Delahunty, Gerard Bradley, Richard Stith, and Teresa Collett for thoughtful, detailed, insightful comments on early drafts.

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I. INTRODUCTION

Is a living human embryo or fetus a “person” within the legal meaning of the Fifth Amendment and Fourteenth Amendment to the U.S. Constitution? Put somewhat differently, is the unborn human child—despite not yet being born—nonetheless *constitutionally a “person”* whom the state may not deprive of life “without due process of law”¹ and to whom the several states owe a constitutional legal duty of “equal protection of the laws”² from the private violence or wrongs of others, or the discrimination of the state?

This, I submit, is a close, difficult, and exceedingly important constitutional question. The better answer—but by no means an incontrovertibly clear answer—is *yes*. The difficulty with such an answer lies in the unclear range of the original meaning of the word “person” as used in the Fourteenth Amendment to the Constitution.³

In this Article, I consider the constitutional question of the legal personhood status of living human fetuses *in utero*. The question was of course resolved against such status in the Supreme Court’s decision in *Roe v. Wade*, forty years ago.⁴ It is the correctness of that resolution that I wish to re-examine here.

I will do so from the perspective of the full range of classic types of constitutional argument: (1) *Text*: What was the *meaning of the word “person”*

¹ U.S. CONST. amend. V; U.S. CONST. amend. XIV.

² U.S. CONST. amend. XIV.

³ I will typically refer simply to “the Fourteenth Amendment” as the focus of my discussion on constitutional legal personhood, though the provisions of the Fifth Amendment are linguistically parallel in many respects. There are key differences, which I will discuss when relevant to the main thread of the argument. Chiefly: The Fourteenth Amendment limits state government power and authorizes Congress to enforce its provisions. The Fifth Amendment limits national government power. In addition, the Fifth Amendment has no “equal protection of the laws” guarantee, though such a requirement has (rightly or wrongly) been found implicit in the Fifth Amendment’s other textual provisions. *See, e.g.,* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Both amendments forbid government action—and possibly forbid government inaction—that deprives a “person” of “life, liberty, or property” without “due process of law.” U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

⁴ 410 U.S. 113, 158 (1973) (concluding that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn”).

in public and legal discourse in America at the time of the adoption of the Fourteenth Amendment (and, before that, of the Fifth)? (2) *Structure*: What light is shed on the meaning of the word “person” in the Fourteenth Amendment by the *logic, structure, and language of other provisions of the Constitution* (including other usage of the specific word elsewhere in the document)? What general principles governing constitutional interpretation can be derived from the structure and nature of the Constitution’s separation of powers, and do those principles suggest any default rules for dealing with cases of linguistic ambiguity or indeterminacy? (3) *History and Original “Intent”*: What evidence is there supporting a conclusion that unborn humans were *specifically intended, understood, or expected* to be constitutionally protected by the Fourteenth Amendment? (4) *Precedent*: Before *Roe*, what had *prior judicial (and non-judicial) interpretation* suggested; and, relevant to reconsideration of *Roe*, what judicial (and non-judicial) legal reasoning subsequently has supported a view of the unborn as legal persons? (5) *Policy, Pragmatics, or Evolving Meaning*: Aside from legal precedent, has there been an *evolving public or scientific conception* expanding (or contracting) what it might mean to be a “person” possessing legal rights incident to that status (and is such evolution or devolution legitimately probative of constitutional meaning)? Do *general policy considerations*, to the extent relevant to constitutional interpretation, suggest a preference for a broad rather than a narrow conception of who counts as a “person” or suggest a presumption in favor of resolving disputed cases in one direction rather than another?

Before proceeding, I offer four disclaimers: First, I make no claim that my position represents present law as understood by the Supreme Court. It obviously does not. *Roe* rejects personhood for the unborn. The question I examine is the correctness or incorrectness of this vital first premise of *Roe*. The Court in *Roe* did, however, recognize the stakes of the issue, explicitly conceding that if the unborn were legal persons, the Court would be required to reach almost exactly the *opposite* conclusion of what it in fact held.⁵ *Roe* created a right to abortion of living human embryos and fetuses—gestating, growing, developing in their mothers’ wombs—on the premise that such living human beings were not, *legally*, “persons,” and thus possessed no constitutional rights of their own that the Court’s jurisprudence need respect. But *Roe* granted that, if that premise were wrong, the right to abortion that it was creating could not legitimately exist, at least not in the full scope decreed in *Roe*.⁶ Indeed, quite the reverse, it would appear that for government to allow abortion

⁵ *Roe*, 410 U.S. at 156–57 (“If this suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment.”). As I explain below, this concession is somewhat overstated. Recognition that the unborn human fetus is a “person” would not resolve all questions concerning the scope of constitutionally allowable abortion. It would meaningfully alter the framework for consideration of such issues, of course, but there would remain many specific issues to resolve. *See infra* pp. 29–30, 70–72.

⁶ *Roe*, 410 U.S. at 156–57.

essentially as a matter of unrestricted choice—for the state to deny the equal protection of the law from the violent acts of others to a class of legal persons characterized by their extreme youth, dependency, and vulnerability—likely would be affirmatively unconstitutional.⁷

Second, I make no claim that my position is original. The issue is as old, at least, as the arguments in *Roe*. Others have asserted the position I advance here, as a critique of *Roe*. But I fear that that position has not always been carefully, or dispassionately, defended. My goal here is to present a fresh, fair, balanced, reasonable examination of this proposition in a systematic and serious way, making fair use of standard, widely accepted methods of constitutional analysis. Not all arguments that have been offered in support of legal personhood in the past can make that claim. But some of them can, at least in part, and I will draw extensively on excellent prior work by others. Mine is not a new or novel position.

Third, I make no claim that the legal personhood position is indisputably correct. My proposition is rather the obverse: that the *rejection* of the personhood position—a critical premise from which the abortion-rights argument of *Roe* proceeds—is not indisputably correct, either. The correct conclusion is that there is no correct conclusion to the question of the constitutional personhood of the human fetus. Applying standard methodologies of constitutional interpretation, the “right answer” is that the Constitution, properly interpreted, does not supply a definitive single-right-answer answer to this most extraordinarily important of constitutional questions. My argument is, therefore, one for the legal *plausibility* of the personhood position only. I do not want to overstate my case. Where an argument does not support the personhood

⁷ See generally MICHAEL STOKES PAULSEN, STEVEN G. CALABRESI, MICHAEL W. MCCONNELL & SAMUEL L. BRAY, *THE CONSTITUTION OF THE UNITED STATES* 1381–82 (2010) (“Why is not the most natural reading of the Equal Protection Clause . . . addressed to the state’s affirmative duty literally to *protect*, on an equal basis, all persons from the private violence or similar wrongful acts of other persons or groups? This understanding makes sense of the historical context, in which there had been a pervasive problem of failure to protect the newly freed blacks from discrimination and even violence.”); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1562 n.25 (2004) (“The Equal Protection Clause, as its wording implies, was probably only meant to require governments to protect all groups equally from having their rights violated by other private persons. A prominent illustration of the need for this provision was the tolerance of some governments for the activities of the Ku Klux Klan.”). Withdrawal of protection of the laws from a class of persons, essentially yielding them up to the private wrongs or violence of others, arguably could be classified as a deprivation of life and liberty by government, without due process, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments. *But cf.* *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (holding that the Due Process Clause did not apply where the police failed to enforce a restraining order resulting in the death of petitioner’s children); *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 189 (1989) (syllabus) (holding that a “State’s failure to protect an individual against private violence generally does not constitute a violation of the Due Process Clause, because the Clause imposes no duty on the State to provide members of the general public with adequate protective services”).

position, I will say so. Where an inference is only partially, or weakly, supported by the evidence, I will acknowledge as such. If my conclusion thus ends up being an uncertain-sounding one, it is because *uncertainty is the correct legal conclusion*, precisely because that is where fair consideration of the evidence leads.

That in itself may have important consequences for the legal debate over *Roe*, however: Uncertainty as to the constitutional legal status of living human fetuses may affect how reasonable judges would construct, or alter, a constitutional “balancing” scheme (assuming one believes that to be the proper judicial task); uncertainty may also affect how one views the division of practical interpretive power between courts enforcing Section One of the Fourteenth Amendment’s self-executing commands, and Congress in enacting legislation pursuant to Section Five of the Amendment to enforce, or effectuate, the commands of Section One (a point I develop at some length below);⁸ and as already noted, uncertainty may defeat the argument for constitutional abortion rights entirely, if certainty as to the legal *non*-personhood of the human fetus is an essential premise of the argument for a right to abortion—as the Court in *Roe* itself thought to be the case.⁹

Finally, if the analysis of personhood, applying rigorous constitutional analytic methodology, yields an uncertain conclusion—because of weaknesses in textual, structural, historical, or precedential arguments for such a conclusion—that in itself might be understood to function as (yet another) strong, if indirect, critique of the interpretive methodology of *Roe*: If proper constitutional analysis yields doubts about legal “personhood” for living, unborn human children, it surely yields far more serious doubts about the legitimacy of “substantive due process” ad hoc judicial balancing and policymaking of the sort embodied in the Court’s abortion jurisprudence as it stands.

A fourth and final disclaimer: I am a foe of *Roe*. Here, as in much previous writing, I come not to praise *Roe* but to bury it.¹⁰ For the fair-minded, this

⁸ See *infra* pp. 39–45.

⁹ See *supra* note 4.

¹⁰ See, e.g., Michael Stokes Paulsen, *Paulsen, J., Dissenting*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 196 (Jack M. Balkin ed., 2005) [hereinafter Paulsen, *Paulsen, J., Dissenting*]; Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 *YALE L.J.* 1535 (2000) [hereinafter Paulsen, *Abrogating Stare Decisis*]; Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused*, 7 *J.L. & RELIGION* 33 (1989) [hereinafter Paulsen, *Accusing Justice*]; Michael Stokes Paulsen, *Hell, Handbaskets, and Government Lawyers: The Duty of Loyalty and Its Limits*, 61 *LAW & CONTEMP. PROBS.* 83 (1998); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 *NOTRE DAME L. REV.* 995 (2003) [hereinafter Paulsen, *Worst Constitutional Decision*]; see also Michael Stokes Paulsen, *Casey: Enduring, Entrenched, Intentionally Evil Egregious Error*, *PUB. DISCOURSE* (June 29, 2012), <http://www.thepublicdiscourse.com/2012/06/5774/>; Michael Stokes Paulsen, *It’s a Girl*, *PUB. DISCOURSE* (Oct. 24, 2011), <http://www.thepublicdiscourse.com/2011/10/4149/>; Michael Stokes Paulsen, *Planned*

nothing-up-my-sleeve concession should not disqualify my argument any more than the pro-*Roe* policy predilections of most *Roe* defenders automatically should disqualify theirs. In either case, the logical and legal strengths of the arguments should be analyzed on their own terms. It is surely proper to acknowledge one's perspective up front—so wary readers can be aware, and beware—but it should not be essential to serious intellectual discussion of legal arguments. The existence of a particular point of view, or even a predisposition, with respect to a particular policy position merely takes away whatever enhanced credibility might be thought conferred by legal analysis that argues *against* one's preferred policy positions.¹¹ Such credibility, however, is really only a product of the *ad hominem* fallacy in reverse. Neither type of claim is really sound. An argument is neither enhanced nor diminished by the correspondence or conflict of its conclusion with its maker's politics. Analysis stands or falls—or should—on its own merits.

This Article's roadmap is straightforward and simple. I proceed through examination of constitutional arguments from text, structure, history, precedent, and policy, discussing each as they concern the constitutional question of whether the living human embryo or fetus is a "person" within the meaning of the Fourteenth Amendment.

II. TEXT

A. *The Meaning of the Word "Person"*

Begin with the text. The Fourteenth Amendment provides that "[n]o 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

Parenthood v. Casey at Twenty: *The Worst Constitutional Decision of all Time*, PUB. DISCOURSE (June 28, 2012), <http://www.thepublicdiscourse.com/2012/06/5772/>; Michael Stokes Paulsen, *The Unbearable Wrongness of Roe*, PUB. DISCOURSE (Jan. 23, 2012), <http://www.thepublicdiscourse.com/2012/01/4577/>.

¹¹ See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (arguing, against personal policy views, that *Roe* is unsound as a matter of constitutional law). I have a few such instances of these conflicts between policy preferences and legal views. See Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991 (2008) [hereinafter Paulsen, *Government of Adequate Powers*]; Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 916 n.179 (2009) [hereinafter Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*] (collecting examples); see also Michael Stokes Paulsen, *The Power to Destroy*, PUB. DISCOURSE (Aug. 8, 2012), <http://www.thepublicdiscourse.com/2012/08/6096> (defending the unfortunate correctness of the Supreme Court's "Obamacare" decision, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012)).

laws.”¹² What is the meaning of the word “person” within this authoritative written legal text?

The answer to any such question of constitutional textual meaning lies in seeking the original public meaning that a word, 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.¹³ With respect to the word *person* as used in the Fourteenth Amendment, the question to be asked is what the word would have been understood to mean, in the context of a newly enacted constitutional provision, to informed users of the English language, in the period of roughly 1866–1868. With respect to the word *person* as used in the Fifth Amendment, the question is identical, but with a different point in time as the focus of original meaning (1789–1791). Note also that the meaning of the word in the Fourteenth Amendment may be affected by its meaning in the Fifth—and even by evidence of how the term as used in the Fifth Amendment had come to be understood at the time of enactment of the Fourteenth, if that meaning is different from the Fifth Amendment’s original meaning.

Original public textual meaning is an inquiry distinct from the question of what the drafters of the provision may have *intended* or, getting somewhat warmer, what its ratifiers may have *understood*.¹⁴ That inquiry comes later—in Part III of this Article—and properly should have a subordinate status.¹⁵ The question here is not one of subjective intention or understanding but of the objective linguistic meaning of a provision. To be sure, evidence of specific subjective intention or, better yet, evidence of the understanding of a term by persons employing it at the time, may supply important *evidence* relevant to identifying the original public meaning of a term. The inquiries are related. For that reason, I will make use of such evidence from the outset in discussing textual meaning, but always with the caveat that it *is evidence* of original, objective linguistic meaning in context, not the object of inquiry itself.

The objective meaning of the word *person*, in legal understanding, in 1860s America (and, before that, in 1780s America), as it concerns the specific case of conceived and living—but not yet born—human beings is, not surprisingly,

¹² U.S. CONST. amend. XIV, § 1 (emphasis added); *see also* U.S. CONST. amend. V (similar).

¹³ For a systematic defense of this methodological proposition, see generally Kesavan & Paulsen, *Interpretive Force*, *supra* note *. For further elaboration, and an argument that the text of the Constitution itself specifies that this is the correct methodology for interpretation and application of the document, see generally Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 11. These articles, of course, draw substantially on the work of other scholars who have explicated and defended original-public-meaning textualism, in various forms, as the proper method for interpreting the Constitution.

¹⁴ Kesavan & Paulsen, *Interpretive Force*, *supra* note *, at 1131–33. *See generally* Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 11.

¹⁵ *See* Kesavan & Paulsen, *Interpretive Force*, *supra* note *, at 1132, 1134–48; Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 11, at 873–75.

somewhat ambiguous. The text is silent as to this specific instance or application of the word “person.” However, the 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.”¹⁶ One frequently sees *person* used interchangeably with “man,” in the non-gender-specific sense of the word at the time.¹⁷ The word appears to have had no *narrower*, more specific legal term-of-art understanding apart from such a common understanding—though, as we shall see, it may well have had some *broader* understandings when used in a specifically legal context to address the “rights of persons.”¹⁸ In the main, however, “person” was simply an ordinary and encompassing word denoting any and all human beings.¹⁹ It was obviously distinct from the more limited legal term “citizen.” Clearly, someone could be a “person” without being a citizen. Nor is the term “person” limited by age, political condition, or legal status: Children, aliens, members of Indian tribes, and slaves were all understood as “persons.”²⁰

It thus seems a fair conclusion that the objective linguistic meaning of the constitutional word “person,” in 1791 and also in 1868, as employed in the Fifth and Fourteenth Amendments, did not automatically *exclude* the unborn. “Person” does not, as a necessary function of its determinate linguistic meaning, exclude application to living human fetuses—human beings that are “unborn” but already exist as living beings.

At the same time, the objective, original linguistic meaning of the word does not clearly and unequivocally *include* the unborn, either. In short, the original meaning, as applied to unborn human fetuses, is ambiguous. The presumption might well be that a general term of inclusion should be understood as embracing all instances fairly falling within its range of meaning that are not by legal definition excluded: That is the approach most common to understanding general constitutional language, under most interpretive methodologies.²¹ (The only question then becomes whether legislatures or courts—or perhaps either or both of them—possess the authority to select the

¹⁶ NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 734 (Chauncey Goodrich ed., Harper & Bros. 1853) (2d ed. 1841).

¹⁷ *Id.*

¹⁸ See *infra* Part II.B.

¹⁹ Eighteenth- and nineteenth-century dictionaries embrace the same broad, common understanding of “person” as “[a]n individual human being, consisting of body and soul” or “[a] human being considered with respect to the living body or corporeal existence only,” WEBSTER, *supra* note 16, at 734, or an “[i]ndividual or particular man or woman” as “opposed to things” or simply “[h]uman being” or “[a] general loose term for a human being,” 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 686 (J.E. Worcester ed., Cottons & Barnard 1834) (3d ed. 1766) (collecting definitions drawn from Locke, Spratt, Dryden, and Clarissa).

²⁰ See *supra* note 19.

²¹ For the paradigmatic illustration, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). For a general discussion of this point, see Paulsen, *A Government of Adequate Powers*, *supra* note 11, at 994–96.

narrower or broader reading.)²² But such a presumption remains only a presumption. The presumption that human fetuses fall within—are not excluded by—the linguistic meaning of the Constitution’s term “person” would probably have to give way in the face of more specific evidence of a more specific and more limited term-of-art meaning to the word.

At this point, however, we are still looking to evidence of the objective linguistic meaning of the text at the time its words were adopted. Evidence concerning whether the unborn were specifically *contemplated* or *intended* to be included by the word “person,” or not so contemplated or intended, is largely beside the point, except insofar as such evidence sheds secondary light on what the term “person” was understood to mean in common or specialized English linguistic usage at the time. What would count, rather, is evidence that the public meaning of the term “person” carried with it a generally known specialized legal usage, when employed in legal descriptions of the rights of persons—such as the Fifth and Fourteenth Amendments to the U.S. Constitution. The relevant hunt is for such evidence of public legal meaning.

B. Did the Word “Person” Have a Specific, Legal Term-of-Art Meaning at the Time of the Adoption of the Fifth or Fourteenth Amendments?

Did the word “person” have a narrower—or a broader—specific legal meaning in eighteenth and early nineteenth century usage? If one were a lawyer or a legally minded citizen looking for specialized *legal* usage of the term in the Founding and Reconstruction generations, the place to go would have been Blackstone’s *Commentaries on the Laws of England*, first published in the late 1760s.²³ Blackstone’s four-volume work was *the* authoritative legal text, primer, and starting point for nearly all matters of legal usage of terms, legal principles and their standard operation, and legal rules and presumptions.²⁴ This was true in America as well as in England. The Framers had Blackstone readily at hand and drew on its principles, whether to follow them or sometimes to depart from them.²⁵ Blackstone’s *Commentaries* may thus be understood as, in

²²The classic case affirming broad *legislative* power to choose to act pursuant to a broad reading of textual language, taken in its fullest sweep, is *McCulloch*, 17 U.S. (4 Wheat.) at 323–24, 330. I develop this point *infra* Part III.B.

²³AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 7–8 (2012) [hereinafter AMAR, *AMERICA’S UNWRITTEN CONSTITUTION*].

²⁴*See id.*; Bernadette Meyler, *Towards a Common Law Originalism*, 59 *STAN. L. REV.* 551, 561 (2006).

²⁵*See* AMAR, *AMERICA’S UNWRITTEN CONSTITUTION*, *supra* note 23, at 7–8 (referring to Blackstone’s commentaries as “canonical” and observing that: “Both before and after Independence, American lawyers and activists of all stripes relied heavily and preeminently on the *Commentaries* for instruction on basic English legal principles, many of which applied with full force in America. Sifting through nearly a thousand American political tracts printed between 1760 and 1805, one scholar has found that no European authorities were cited more frequently than Montesquieu and Blackstone, each of whom was invoked

a sense, something of a topical concordance or glossary of the common and specialized legal meanings of certain terms—in essence performing a dictionary function better even than would a contemporaneous dictionary. Blackstone’s *Commentaries* not only defined, but also explained and applied, the legal meanings of terms, and did so in the context of these generations’ most authoritative treatise on law in general.²⁶ If one were looking for a technical, specifically *legal* gloss on the meaning of “person,” as used in the eighteenth and nineteenth centuries, one would read Blackstone.

And it turns out that Blackstone has a good bit to say about the legal meaning of the term “person.” Strikingly, what Blackstone has to say is fairly significantly probative of the meaning of “person” as it applies to the question of the status, in law, of conceived but unborn human infants. Following an extended “Introduction” to the *Commentaries* concerning the study of law, the nature of laws in general, and the extent of application of the laws of England, Blackstone takes up immediately, in “Book I, Chapter I,” the topic of “*the Rights of Persons*”—and specifically, the “*Absolute Rights of Individuals*.”²⁷ “The objects of the laws of England are so very numerous and extensive, that in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically, under proper and distinct heads”²⁸ Those heads are, for Blackstone: the “*rights of persons; . . . the rights of things; . . . private wrongs, or civil injuries; . . . public wrongs, or crimes and misdemeanors . . .*”²⁹

“Rights of persons” is first up, and it is in this context that Blackstone proceeds to discuss, front and center, the legal meaning of the term “*persons*.”³⁰ The context is significant: Blackstone’s explication of the meaning of “persons” comes in the context of discussion of what *rights* they possess *as persons*³¹—the same context in which the question of the legal understanding of personhood is presented in the Fifth and Fourteenth Amendments: Are the unborn within the range of meaning of “persons” who may not be deprived of

almost three times as often as the next man on the list, John Locke.”). The work Professor Amar cites is DONALD S. LUTZ, A PREFACE TO AMERICAN POLITICAL LEGAL THEORY 134–40 (1992). An endnote to Amar’s book collects myriad representative samples of prominent founding-era documents and Framers citing Blackstone as definitive legal authority. See AMAR, AMERICA’S UNWRITTEN CONSTITUTION, *supra* note 23, at 520 n.7.

²⁶ Cf. Kesavan & Paulsen, *Interpretive Force*, *supra* note *, at 1156–58 (making a similar point about the interpretive weight to be accorded to *The Federalist* as a source for understanding original public meaning of the Constitution’s words and phrases: Quite apart from serving as a source of evidence of the framing generation’s *understanding* or *intention*, the papers comprising *The Federalist* are a powerful, contemporaneous display of original linguistic usage of terms in the especially helpful context of a comprehensive and thoughtful discussion explaining and defending the proposed Constitution).

²⁷ 1 WILLIAM BLACKSTONE, COMMENTARIES *121 (emphasis added).

²⁸ *Id.*

²⁹ *Id.* at *122.

³⁰ *Id.* at *123.

³¹ *Id.*

life, liberty, or property without due process of law, and who are entitled to receive the equal protection of the laws? Blackstone precedes his discussion of the meaning of “persons” with a statement of the obligation of the sovereign to protect the rights of all such persons (an idiom arguably reflected in the language of the Fourteenth Amendment’s Equal Protection Clause): “Allegiance is the right of the magistrate, and *protection* the right of the people.”³²

Then comes the most apposite part of Blackstone’s discussion, as it pertains to the meaning the word “person” would have had in Anglo-American legal and political discourse in the eighteenth and early nineteenth centuries: “Persons also are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.”³³

Thus, the more specialized legal meaning of “person” was broader than the ordinary popular meaning of the word, though it obviously embraced the common meaning as well. It covered corporations—artificial legal persons—as well as “natural persons.”³⁴

³² *Id.* (emphasis added).

³³ BLACKSTONE, *supra* note 27, at *123.

³⁴ *Id.* This enlarged, Blackstonian legal meaning of “person” as including corporations has been picked up as part of the American constitutional understanding of what the term “person,” as used in the Fifth Amendment and the Fourteenth Amendment, includes. *See, e.g., Santa Clara Cnty. v. So. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886). This is noteworthy: If the word “person” as used in the Constitution fairly can be said to incorporate widely accepted Blackstonian definitions of the word, extending even to legal-fiction “persons,” it would seem, *a fortiori*, to embrace the broad Blackstonian definition of who is included within the category of “natural persons.” This is a somewhat different, and I submit more precise, argument than the one sometimes used by advocates of the legal personhood position with respect to abortion, which runs more along the lines of an argument from irony or hypocrisy: If *even corporations* can be treated by the law as legal “persons,” then *surely unborn babies* should be treated as legal persons, too. The argument, so cast, has an intuitive, rhetorical appeal. But the more precise legal argument is that *for the same interpretive methodological reason* that corporations *properly* can be understood as legal persons—that that was conventional term-of-art legal usage, and thus bears heavily on what the legal meaning of the term “person” was at the time the Fifth and Fourteenth Amendments were adopted—*natural persons, entitled to the legal rights of persons, are properly understood to include the unborn because that was standard, conventional term-of-art legal usage and as such bears heavily on what the meaning of the term “person” was at the time the Fifth and Fourteenth amendments were adopted.*

Though it is not my main point here, the Supreme Court’s interpretation of the term “person,” as including corporations as artificial legal persons, appears methodologically sound as a matter of original-public-meaning textualism, even if it may be less than intuitively obvious. And that methodological point bears on the argument concerning legal personhood for the human fetus: If the original meaning of constitutional language is to be understood in its time- and text-context, such meaning includes the specialized term-of-art meaning the word had at the time. *See Kesavan & Paulsen, Interpretive Force*, *supra* note *, at 1132 (“[W]ords, phrases, and structures might [well], in context, have a specific term-of-

Blackstone defined natural persons, charmingly but also instructively, as “*such as the God of nature formed us.*”³⁵ One of religious background or familiarity might hear in Blackstone’s formulation faint echoes of the famous Psalm 139:

“For thou didst form my inward parts, thou didst knit me together in my mother’s womb. . . . [M]y frame was not hidden from thee, when I was being made in secret, intricately wrought in the depths of the earth. Thy eyes beheld my unformed substance”³⁶

Whether or not Blackstone had Psalm 139 specifically in view as a theological matter, Blackstone’s legal position is absolutely clear: *The unborn human fetus, gestating in the womb, is in legal contemplation a “person,”* who

art meaning departing from what otherwise (that is, out of context) might have been conventional linguistic understandings. But ascribing a term-of-art meaning is consistent with, indeed required by, an approach that faithfully seeks to read the Constitution as a legal text that was set forth as a whole within a particular legal and political milieu in which particular words, phrases, or structures had a well understood even if non-literal meaning.”). A perfect, almost universally accepted illustration of the correctness of this approach is the meaning of the term “good Behaviour” in Article III of the Constitution as a description of the tenure by which federal judges hold office. U.S. CONST. art. III, § 1. “Good Behaviour” did not mean what twenty-first century Americans mean by “good behavior”—people acquitting themselves in an acceptable manner in their conduct. As applied to a description of tenure of office, it was a specific legal term of art with a specific legal meaning closer to today’s more colloquial “for life, or until retirement, at the voluntary election of the officeholder.” THE FEDERALIST NO. 78 (Alexander Hamilton). Other constitutional examples that I have used in other writing are “Establishment of Religion” and “domestic Violence.” See Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 11, at 876–77.

³⁵ BLACKSTONE, *supra* note 27, at *123 (emphasis added).

³⁶ *Psalm 139:13–16* (RSV). Blackstone, of course, would have been more familiar with the King James Version of the Bible, which renders the passage in these terms:

For thou hast possessed my reins; thou hast covered me in my mother’s womb. . . . My substance was not hid from thee, when I was made in secret, *and* curiously wrought in the lowest parts of the earth. Thy eyes did see my substance yet being unperfect, and in thy book all *my members* were written, *which* in continuance were fashioned, when *as yet there was none* of them.

Psalm 139:13–16 (King James) (emphasis added). The Today’s English Version provides an excellent modern equivalent translation:

You created every part of me; you put me together in my mother’s womb. . . . When my bones were being formed, carefully put together in my mother’s womb, when I was growing there in secret, you knew that I was there—you saw me before I was born. The days allotted to me had all been recorded in your book, before any of them ever began.

Psalm 139:13–16 (TEV).

possesses a legal right to life and to protection by the state's public and private law, just as soon as that life can be detected by human methods of discernment.

The relevant passage merits quotation at length:

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

I. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and, by a potion or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light but merely as a heinous misdemeanor.³⁷

Blackstone continues:

An infant in *ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.³⁸

Several points are striking about Blackstone's understanding, which would have been taken by the framing generation as its own baseline. First, Blackstone grounded the "right of personal security," including first and foremost "a person's legal and uninterrupted enjoyment of his life," in the gift of life from God.³⁹ It is in that sense a "natural law" right; it is a right not *conferred* by law but *recognized* by law, flowing from the act of divine creation of human life. That is a preliminary point, but perhaps a not unimportant framing consideration.⁴⁰

Second, and most importantly, the right to life exists as a right of human "persons" and includes the right to life of unborn human persons alive and

³⁷ BLACKSTONE, *supra* note 27, at *129–30 (footnotes omitted).

³⁸ *Id.* at *130 (footnotes omitted).

³⁹ *Id.* at *129.

⁴⁰ The scope and proper understanding of a legal right can certainly be affected by whether it is conceived as a right *recognized* by the state and society but a natural-law right that pre-exists and precedes the social contract of government and civil society, as opposed to one simply *conferred* by civil government and its institutions. The former should not readily be subjected to natural-rights-narrowing constructions or interpretations, while the latter might be subject to such limits. See generally Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1160, 1168–69 (2013) (making this point with respect to the natural-law right to freedom of religious exercise, as it affects interpretation of the Free Exercise Clause of the First Amendment).

gestating “in the mother’s womb.”⁴¹ Most emphatically and clearly, the legal term “person” does *not* exclude the unborn; the right to life does not begin at birth, but begins “in contemplation of law” much earlier—while the child is living in the mother’s womb.⁴² That is why killing an unborn child, by abortion or by other deliberate wrongful harm to the mother, was regarded as a crime, by “ancient” law.⁴³ Abortion was regarded as a species of homicide because it was a violation of the most fundamental right of a human “*person*”—the right to the “legal and uninterrupted enjoyment of his life, his limbs, his body, [and] his health.”⁴⁴

It is worth pausing, briefly, to reflect on the significance of this point as evidence of constitutional meaning of the term *person* in the Fifth and Fourteenth Amendments: The settled eighteenth-century legal meaning of the word “person,” according to the leading source on Anglo-American law at the time and an enormously influential legal authority in the thinking of the men who wrote the words of the original U.S. Constitution and the Bill of Rights (including the Fifth Amendment’s Due Process Clause), specifically included the unborn.⁴⁵ If the term *person*, as used in the U.S. Constitution, carried forward and embraced Blackstone’s traditional, recognized term-of-art legal understanding of the term as including living, unborn human infants—and for the reasons stated this is a reasonable and appropriate interpretive methodological move—that goes a long way to settling any issue of the supposed ambiguity of the constitutional term “person,” as applied to the question of abortion. The Due Process Clauses of the Fifth and Fourteenth Amendments are specifically about protection of the rights of *persons*—Blackstone’s discussion instantiated in written constitutional text—and about the rights of all such persons so described to “life, liberty, and property”—Blackstone’s context once again—as against deprivation without due process.⁴⁶ It would seem at least to be a very strong presumption—if indeed it is not outright conclusive—that the U.S. constitutional term “person,” if otherwise thought ambiguous with respect to the unborn, in fact protects human life in the womb in the same circumstances as Blackstone described. This seems very likely to be the objective meaning that the term “person” would have had, in social and legal context, to informed members of the general public in the generations that framed and adopted the Fifth and Fourteenth Amendments.

Third, for Blackstone, the legal right to life—personhood—was coextensive with the discernible presence of a new human life in the womb. In Blackstone’s formulation, there is no distinction—no wedge, so to speak—between *biological* human life and *legal* personhood; Blackstone treated them as one and

⁴¹ BLACKSTONE, *supra* note 27, at *130.

⁴² *Id.* at *129.

⁴³ *Id.*

⁴⁴ *Id.* at *129.

⁴⁵ *Id.*

⁴⁶ U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

the same in his description of the rights of persons.⁴⁷ Where a human life exists, it is a legal person. The distinction that some posit today—and that was an inarticulate premise of *Roe*⁴⁸—between biological human life and legal personhood is a recent, post-modern philosophical distinction alien to both the scientific and legal worldview of the eighteenth and nineteenth centuries.⁴⁹ For Blackstone, the unborn child was legally a person at the point that the existence of a new infant human life could be detected as actively alive in the womb.⁵⁰

In the eighteenth century—two hundred years before ultrasound technology—that point of detection of new human life was pegged at when fetal *movement* could be discerned, physically, by external touch or by internal feeling.⁵¹ This was conventionally referred to as the point of “quickening” or “animation.”⁵² Blackstone’s description of the trigger point for legal personhood tracks that conventional understanding.⁵³ It is not altogether clear whether Blackstone understood this to be so because of a belief that that is when human life begins as a matter of *fact*—that is, that human life *actually begins* at the point of animation or quickening (as many ancients and medieval thinkers mistakenly believed)—or because he regarded quickening as a convenient rule of *evidence*: that the unborn child’s ability to stir within the womb constituted sufficient *proof positive* of the presence of a living human child. The former view, however unscientific under today’s understanding, was one ancient biological/theological theory of when human life in fact begins: the baby was “formed” but not invested with a soul, and thus did not become a living human being, until animation.⁵⁴ It is conceivable that Blackstone’s legal description simply meant to follow that old view. However, if one attends to Blackstone’s precise words, what he says is that personhood is present where the child is “able to stir.”⁵⁵ Stirring appears to function as *evidence* of the thing, not the thing itself—an outward and visible sign of an inward, hidden but distinct physical life. Blackstone’s standard appears to be whether there *is* new

⁴⁷ See BLACKSTONE, *supra* note 27, at *130.

⁴⁸ *Roe v. Wade*, 410 U.S. 113, 157 (1973).

⁴⁹ For examples of recent philosophers who argue that not all living human beings should be treated as moral or legal persons, see PETER SINGER, *PRACTICAL ETHICS* 96–99, 186–88 (2d ed. 1993); Margaret Olivia Little, *Abortion and the Margins of Personhood*, 39 *RUTGERS L.J.* 331 (2008); as well as Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 *HASTINGS L.J.* 369, 370–72 (2007).

⁵⁰ See BLACKSTONE, *supra* note 27, at *129–30.

⁵¹ *Id.* at *129.

⁵² John Keown, *Back to the Future of Abortion Law: Roe’s Rejection of American History and Traditions*, 22 *ISSUES L. & MED.* 3, 5, 24 n.130 (2006).

⁵³ BLACKSTONE, *supra* note 27, at *129.

⁵⁴ See Keown, *supra* note 52, at 5 (“As early as the mid-thirteenth century the common law punished abortion after fetal formation as homicide. Fetal formation, the point at which the fetus assumed a recognizably human shape and was believed to be ensouled, was thought to occur some 40 days after conception.”).

⁵⁵ BLACKSTONE, *supra* note 27, at *129.

human life, as *judged by* ability to move within the womb. Thus, where human life can be shown to exist, legal personhood exists.

It is a nice question whether Blackstone, given his unequivocal endorsement of legal personhood for the unborn, would have chosen conception rather than discernible bodily movement as the correct line had eighteenth century medical and biological knowledge been so advanced. The reality is that Blackstone, medicine, and the law, simply did not know these things. Blackstone's line, describing the law at the time, was therefore bodily movement. That may not be the test preferred by most pro-life advocates today, who focus on the point of fertilization, or conception, the point at which today's science understands a new biological human life to have been created.⁵⁶ But Blackstone's analysis need not be understood as inconsistent with that modern view: Blackstone's test was *life*. His biological theory (and that of his era) of when life begins may have been mistaken as a factual matter, but it is arguable that what counts in the Blackstonian legal formulation is the general proposition that the legal rights of persons extend to living human beings in their mothers' wombs, whenever the presence of such life can be known with assurance, and not the specific limitations of medical knowledge and technology of the eighteenth century as to when that fact could be known.

Later on, I will raise the troubling methodological question whether the legal standard for "personhood" should change with advances in biological and scientific knowledge: Does the original meaning of a term, like "person," change with changed understanding of the *facts* that animated that specific original legal understanding? Or, if a prior term-of-art meaning embodied a somewhat mistaken understanding of objective facts (as opposed to social appraisals or judgments about those facts), is the original mistaken meaning nonetheless still the original meaning, so that improved scientific or medical knowledge is of no legal consequence?⁵⁷ For now, however, it is sufficient to note that the question of limited contemporaneous scientific knowledge forming original meaning is different from the question of new technological advances permitting *detection* of things that fit within a term's original meaning even if they would not have been discernable at the time the legal term was enacted. To be concrete: If a human embryo or fetus was in fact "able to stir" in the mother's womb at a given point in pregnancy, but no one in the 1760s could have *detected* it so stirring at that point, was the child "able to stir"? The answer

⁵⁶ See, e.g., KEITH L. MOORE & T.V.N. PERSAUD, *THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY* 2 (7th ed. 2003) ("A zygote is the beginning of a new human being (*i.e.*, an embryo)."); Maureen L. Condic, *Preimplantation Stages of Human Development: The Biological and Moral Status of Early Embryos*, in *IS THIS CELL A HUMAN BEING?* 25, 25–41 (A. Suarez & J. Huarte eds., 2011); Maureen L. Condic, *When Does Human Life Begin?: A Scientific Perspective* 1–12 (1 Westchester Inst. White Paper Series, 2008), available at http://www.westchesterinstitute.net/images/wi_whitepaper_life_print.pdf; see also ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, *EMBRYO: A DEFENSE OF HUMAN LIFE* 27–56 (2008) (setting forth science of human embryology).

⁵⁷ See *infra* Part VI.

clearly is yes. The child *was able* to stir, and thus fit within the legal category of personhood; the inability of eighteenth century medicine or technology to detect fetal movement until a later point in pregnancy does not alter that reality and properly forms no part of the legal meaning of the term person.⁵⁸ Blackstone's use of the phrase "quick with child" thus appears less part of the definition of the personhood of the unborn than a description of when such distinct personhood was detectable and recognizable in the eighteenth century, given that time's more limited medical understanding and technological capacities.⁵⁹

Fourth, the fact that the legal understanding of "person" includes the unborn does not, for Blackstone, seem to depend upon the precise content of the common law or criminal law with respect to abortion prohibitions.⁶⁰ Nor, conversely, does the legal personhood of the unborn determine what the specific content of the criminal and tort law with respect to abortion and other wrongful acts resulting in fetal death must be. Legal personhood status is one thing. The content and details of criminal and tort law for the protection of persons, including the unborn, is another. Of course, the fact that abortion had long been considered a serious criminal offense (the level of seriousness and the degree of punishment varying) and that death of the fetus from an injurious wrong done to the mother also was considered a crime, as well as a tort, was practice

⁵⁸This answer seems, if anything, clearer and methodologically easier than the issue of whether new *instances*, or new *phenomena*, or new *technologies* or *media*, fall within the original meaning of legal categories that were enacted at a time when such instances, phenomena, technologies or media did not yet exist. Consider a familiar modern analogy: Is television or the internet within the scope of protection of "the freedom of speech, or of the press," within the original meaning of the First Amendment? The short answer is *yes*. Digital cyberspace is a new *type* (so to speak) of "press." It is a new instance of an old category. Expression by television or radio fits within the original meaning of the word "speech." It is a new medium of speech. And so on: A term's original objective public meaning is not limited by the then-known instances or examples of items that fit within the category described by that meaning.

A fortiori, new or enhanced ability to *detect* or *discern* items or instances that always were recognized as fitting within a legal category (here, unborn, living human beings in the womb) are not excluded from a legal category simply because they could not have been detected at the time. A stirring human fetus whose stirrings could not have been detected in the eighteenth century until a later point is not a new instance of the term "person" as used by Blackstone. It is, rather, a classic example of the term. New technology simply makes its occurrence knowable more readily, and earlier, than it would have been in Blackstone's era.

⁵⁹A different interpretive question would be presented if Blackstone were properly read to say that a fetus becomes a legal person because ability to stir is what *defines* personhood—that what *makes* the unborn child a "person" is his or her ability to stir (as opposed to what constitutes sufficient *evidence* from which one can conclude that a distinct living person is in fact present in the womb). In such case, the question would be whether an eighteenth-century legal rule that stirring equals personhood should be revised in light of new factual information establishing that the existence of a new living human organism is a function of the fertilization of the egg by the sperm, not a function of stirring. *See infra* Part VI.

⁶⁰*See* BLACKSTONE, *supra* note 27, at *130.

consistent with and supporting Blackstone's overall conclusion that the unborn human fetus is, in legal contemplation, a person possessing rights to life and to legal protection by the state from harm inflicted by other individuals.⁶¹ But that general conclusion does not appear to have been dependent in any significant way on the details of what degree of homicide—whether “murder,” “manslaughter,” or some less atrocious “heinous misdemeanor”—was attached to a specific wrongful act, or on the proof requirements the criminal law imposed for conviction of a certain crime.

Blackstone is powerful evidence of the specific legal meaning of the word “person” in standard late-eighteenth-century Anglo-American usage. And, in addition to Blackstone's widespread general authoritative status, there is at least some evidence that Blackstone's specific understanding that legal personhood includes the unborn was accepted and espoused by America's leading legal scholars.⁶² If America had its own Blackstone at the end of the eighteenth century it might have been James Wilson, a leading legal scholar, one of the two or three most important draftsmen of the U.S. Constitution (with Madison and Morris), the chief architect of Article III of the Constitution (the article concerning the judicial powers), and one of the original justices of the U.S. Supreme Court.⁶³ Wilson's famous 1791 *Lectures on Law* are the nearest American equivalent to Blackstone's *Commentaries* and are strong contemporaneous evidence of the American legal understanding at the time of the meaning of “person.”⁶⁴ Echoing Blackstone, Wilson declared that “life, and whatever is necessary for the safety of life, are the natural rights of man.”⁶⁵ This seemed so obvious to Wilson as not to admit of discussion or demonstration: “Some things are so difficult; others are so plain, that they cannot be proved.”⁶⁶ Wilson then set forth his understanding of when the natural right to life of all persons begins, in terms tracking Blackstone identically:

With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb. [Wilson drops a footnote specifically citing Blackstone's *Commentaries* as authority for this point.] By the law, life is protected not only

⁶¹ See *id.* at *129.

⁶² See JAMES WILSON, *Lectures on Law*, in 2 COLLECTED WORKS OF JAMES WILSON 749, 1068 (Kermit L. Hall & Mark David Hall eds., 2007).

⁶³ AMAR, AMERICA'S UNWRITTEN CONSTITUTION, *supra* note 23, at 476; see also Nicholas Pedersen, *The Lost Founder: James Wilson in American Memory*, 22 YALE J.L. & HUMAN. 257, 266 (2010).

⁶⁴ See WILSON, *supra* note 62, at 1066.

⁶⁵ *Id.*

⁶⁶ *Id.*

from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger.⁶⁷

Wilson follows Blackstone: The unborn are persons within the contemplation of the law; such life, and the protections of the law, begin at the time of human life's "commencement," which was then discernible when the infant was "first able to stir" in his or her mother's womb.⁶⁸ Wilson's words are not direct "legislative history" concerning a specific intended meaning of the Fifth Amendment. (Wilson, an early and strong federalist advocate for ratification of the Constitution in Philadelphia, had a few years earlier voiced his opposition to the argument that a Bill of Rights was necessary.)⁶⁹ But they are good evidence that the Blackstonian understanding of the extent of the rights of persons—specifically as including the unborn—was accepted in elite American legal discourse and political theory. Blackstone's legal definition of "person" was America's legal definition of "person."

We can begin to reach a provisional conclusion as to the original public meaning of the word "person" in the Constitution, as it concerns the right to life of the unborn: *If* the meaning of the Fifth and Fourteenth Amendment's usage of the word "person" can fairly be taken as reflecting, in the absence of convincing contrary evidence, Blackstone's legal descriptions and definitions—and for reasons noted earlier this seems an eminently sound (if not absolutely ironclad) step as a matter of constitutional interpretive method—then the original public meaning of "person" in these American constitutional texts carries forward the understanding of informed users of the English language at the time that living, unborn human beings gestating in the womb are, legally, persons vested with the right to life as soon as their existence as a distinct, individual human being can be discerned. If standard eighteenth century legal usage is a good guide to the meaning of the word "person" in a new, eighteenth-century constitutional text protecting human rights—and if nineteenth-century adoption of essentially identical constitutional language does not reflect any changed meaning to the term—that tends very heavily to resolve the surface ambiguity of the word "person," as applied to the unborn, in the direction of inclusion. This does not itself dictate any particular criminal-law or tort-law regime with respect to abortion and wrongful death: Blackstone did not suggest

⁶⁷ *Id.* at 1068. Wilson goes on to note that there are various "grades of solicitude, discovered, by the law, on the subject of life" and that the law frequently distinguished "different degrees of aggression" toward life, ranging from threats to assaults to homicides. *Id.* "How those different degrees may be justified, excused, alleviated, aggravated, redressed, or punished, will appear both in the criminal and in the civil code of our municipal law." *Id.*

⁶⁸ *Id.*

⁶⁹ James Wilson, Speech at the State House Yard (Oct. 6, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA 167, 167–68 (Merrill Jensen ed., 1976).

that it did,⁷⁰ and it thus would not be at all surprising that American criminal law and common law in the several states might vary in significant respects concerning abortion, punishment, and the legal protection given the unborn. But it does go a long way toward establishing a right-to-life-for-the-unborn baseline for consideration of what legal regimes comport with due process of law before such life may be taken by state action and with the state's duty to provide "equal protection of the laws" to all such persons. And most basically of all: It goes a long way to refuting, by directly contradicting at the outset, the premise on which *Roe*'s creation of an exactly opposite constitutional right depends.

But it does not, quite, seal the deal. The plain, common meaning of "person," as used at the time of the adoption of the relevant constitutional texts, certainly does not categorically preclude inclusion of the unborn. The technical, specialized legal-definition meaning of "person," as set forth in Blackstone, the definitive, authoritative legal text of the time in America as in England, specifically includes the unborn, and America's leading legal scholars, and the Constitution's drafters, had Blackstone in view as such a defining source of legal meaning.⁷¹ Based on this 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. But the conclusion does not remain absolutely airtight. The word "person" remains at least to *some* degree ambiguous on this specific question. If proceeding on the basis of text and original textual meaning alone, without more, the conclusion would almost certainly be that *Roe* is wrong on this point. (And indeed some constitutional interpretive methodologies would therefore stop here.) But there is at least enough uncertainty to warrant inquiry into other evidence arguably relevant to constitutional meaning. If other indicia of textual meaning—embedded in the Constitution's structure and other parts of its text, or evidence of original intention or historical practice—pointed in the opposite direction with sufficient force and clarity, that might well undermine the suggestion that constitutional personhood extends to the unborn. To those other factors we now turn.

III. STRUCTURE

A. *Structure, Inference, Intratextual Usage*

Does the Constitution's structure and internal logic, or its use of the word "person" elsewhere in the Constitution, shed light on the meaning of "person" in the Fifth and Fourteenth amendments, with respect to the unborn? That is, does the text as a whole and considered in relation to its constituent parts, or a valid inference from other textual uses of a term, suggest a particular meaning of "person"?

⁷⁰ See BLACKSTONE, *supra* note 27, at *129.

⁷¹ See *supra* note 25 and accompanying text.

Arguments from the Constitution's overall structural design, and the inferences that validly can be drawn therefrom, have been a staple of constitutional argument since at least *McCulloch v. Maryland*, which in many ways exemplifies the genre.⁷² *McCulloch* is as much an argument from the logic of broad grants of general powers to the national government, and the logic of national constitutionalism and national sovereignty, as it is an interpretation specifically of particular clauses like the Necessary and Proper Clause of Article I, Section Eight, and the Supremacy Clause of Article VI.⁷³ Indeed, in the category of early, famous Supreme Court cases, *Marbury v. Madison* is a case of this type, too: *Marbury's* argument for judicial review and, by implication, for coordinate constitutional review by all branches of government, as a broader proposition, is an argument from the Constitution's foundational structural postulate of the separation, independence, and co-equal authority of the several branches of the national government, combined with the whole-text structural-textual proposition of constitutional supremacy.⁷⁴

Arguments like *McCulloch's* and *Marbury's*, from constitutional structure, logic, and the relationships entailed by that structure and logic are really nothing more than sophisticated *textual* arguments. They are arguments about the text's original meaning, in overall context, considered as a whole and evaluating the relationship of its constituent parts and provisions to one another.

So too are arguments of the sort Professor Akhil Amar has dubbed "intratextualism"—arguments that the meaning of a constitutional term in a particular article, amendment, or clause may be informed by that term's (or a related one's) meaning and usage elsewhere within the document.⁷⁵ This undoubtedly is a type of textual argument, but one with a structure-and-relationship angle. Intratextualism looks for linguistic clues to a term's meaning

⁷² A "structural" or "logic-of-the-document" or "first-premises-of-constitutionalism-yield-necessary-derived-conclusions" method was characteristic of several of the early classic constitutional opinions of Chief Justice Marshall. *See generally, e.g.,* *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). On Marshall's use of this method in *Marbury*, see Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2711 (2003) [hereinafter Paulsen, *The Irrepressible Myth*].

⁷³ *See* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 316–17, 324, 330, 396, 406, 418–22 (1819); *see also* AMAR, *AMERICA'S UNWRITTEN CONSTITUTION*, *supra* note 23, at 22–31 (discussing *McCulloch* in such a vein).

⁷⁴ *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 226–27, 241–44 (1994) [hereinafter Paulsen, *Most Dangerous Branch*] (setting forth and describing a quasi-"Euclidean" methodology of deriving valid "theorems" from structural constitutional "postulates" and premises, and attributing the proposition of judicial review to a similar methodology); *see also* Paulsen, *The Irrepressible Myth*, *supra* note 72, at 2711–12 (setting forth the structural argument for judicial review as explicated in *Marbury*). The classic work on the structural method of constitutional interpretation remains my teacher Charles Black's book. CHARLES L. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

⁷⁵ Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

at one place in the text by looking at its use in another place in the text. As Amar colorfully puts it, the technique is essentially one of “using the Constitution as its own dictionary.”⁷⁶

McCulloch is notable for this maneuver, too (as Amar details at some length).⁷⁷ An important step in Chief Justice Marshall’s reasoning supporting a broad range of congressional choice of means, under the Necessary and Proper Clause, was the rejection of a restricted, narrow sense of the word “necessary.”⁷⁸ In a key passage that has come to be regarded as stating fundamental principles of careful textual interpretation, Marshall first demonstrated that the word “necessary” had a range of meaning, depending on its usage in a particular linguistic context.⁷⁹ (I will return to this important idea of “range of meaning” later.) Then, Marshall noted that Article I, Section Ten, used the qualifying term “absolutely necessary” where the narrower sense was specifically intended.⁸⁰ The absence of words of restriction or qualification in

⁷⁶ *Id.* at 756.

⁷⁷ *See id.* at 756–58.

⁷⁸ *See id.*

⁷⁹ Marshall asked:

Is it true, that this [narrow meaning] is the sense in which the word “necessary” is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word “necessary” is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413–14 (1819).

⁸⁰ U.S. CONST. art. I, § 10, cl. 2 provides: “No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . .” *See McCulloch*, 17 U.S. (4 Wheat.) at 414–15 (“This comment on the word [‘necessary’] is well illustrated, by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying ‘imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws,’ with that which authorizes Congress ‘to make all laws which shall be necessary and proper for carrying into execution’ the powers of the general government, without feeling a conviction

the Necessary and Proper Clause, Marshall concluded, (intra-)textually implied that no such more-restrictive sense of the word was required in Article I, Section Eight, Clause Eighteen.⁸¹ This buttressed *McCulloch*'s fundamental conclusion that the Necessary and Proper Clause afforded Congress a broad range of choice to consider the means *it* judged best for carrying into execution other grants of legislative power.⁸² (I will return to this important methodological point presently as well.)

Interestingly, the majority opinion in *Roe* makes a fairly detailed argument of this intra-textualist comparative sort, *against* the personhood of the fetus, by examining how the word "person" is used elsewhere in the Constitution.⁸³ After a rapid scavenger hunt through a number of such references, including three references in the Fourteenth Amendment itself, Justice Blackmun's opinion concludes that, "in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application."⁸⁴

Blackmun's observations here are partially correct, but his reasoning is severely defective. To the extent Blackmun draws an inference against pre-natal personhood from other contexts in which the word "person" is used elsewhere in the Constitution, the inference simply is not warranted. (Indeed, in just a moment I will suggest that the better—though by no means necessary— inference is precisely the reverse of the one Blackmun draws.) Begin with this obvious point: The fact that, in several instances, the Constitution uses the word "person" in a context that could only apply to born persons—and often to a limited subset of them (e.g., those of a certain age, those who are also "citizens," or those who have been elected or appointed to a certain office)— tells us nothing about whether, *outside* that specific context, the word's meaning might not be so limited. Indeed, the fact that the word "person" is, in these other contexts, qualified and limited by additional, more specific modifying words of restriction, could be taken to suggest precisely the *opposite* inference: Where "person" was intended in a more limited sense than all living human beings (unborn as well as born) or was meant to apply specifically only to *born* human beings (as with the Citizenship Clause of Section One of the Fourteenth Amendment); or where a particular provision was intended to apply only to some subset of persons, the Constitution's framers often included words of limitation to narrow or qualify the word "person." Where no such limitation was intended, the general word "person" was used without qualification, implying

that the convention understood itself to change materially the meaning of the word 'necessary,' by prefixing the word 'absolutely.' This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.")

⁸¹ *McCulloch*, 17 U.S. (4 Wheat.) at 413–21.

⁸² *Id.* at 419–21.

⁸³ *Roe v. Wade*, 410 U.S. 113, 157 (1973).

⁸⁴ *Id.*

the propriety of according it a broader meaning.⁸⁵

Such reasoning would parallel *McCulloch*'s: It is, as John Marshall put it (perhaps a bit exuberantly), “impossible to compare”⁸⁶ the first sentence of the Fourteenth Amendment, defining citizenship as extending to certain *born or naturalized* persons, with the second, which speaks initially about the privileges or immunities of such citizens but then turns more broadly to the rights of *persons* not to be deprived of life, liberty or property without due process or denied equal protection⁸⁷ (without limitation to “born or naturalized” persons), “without feeling a conviction”⁸⁸ that prefixing the words *born or naturalized* materially changed the meaning of *persons*. Or to put it in colloquial twenty-first-century language: “[P]ersons born or naturalized in the United States” means something different from simply “persons.”⁸⁹ To suggest, on the basis of this text at least, that one must be born to be a person—that “born” somehow *defines* “person”—would be silly. By the same reasoning, one could as easily say (indeed, one would have to say) that one must be “born or naturalized in the United States and subject to the jurisdiction thereof”⁹⁰ to be a person. On such a reading, aliens are not persons and neither are members of Native American Indian tribes not subject to the jurisdiction of the United States. This is simply absurd, and highlights the absurdity of reading the words *surrounding* “person” as *defining* “person.” *Born or naturalized* are words of limitation, not definition. They describe a subset of the class of persons. They do not define the meaning of “persons” itself.

Nor do those provisions concerning how old a person must be to be president,⁹¹ a senator,⁹² or a representative.⁹³ *Age* is by convention measured from the date of birth. But that does not mean that *personhood* therefore must be measured from birth. They are simply two different things. (And, as noted above, there is ample original-meaning evidence that the convention was that legal personhood was recognized from the time that an unborn child could be discerned as a separate life in the mother’s womb.)⁹⁴

⁸⁵ See, e.g., U.S. CONST. amend. XIV, § 1.

⁸⁶ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414 (1819).

⁸⁷ U.S. CONST. amend. XIV, § 1.

⁸⁸ *McCulloch*, 17 U.S. (4 Wheat.) at 414.

⁸⁹ See U.S. CONST. amend. XIV, § 1.

⁹⁰ *Id.*

⁹¹ U.S. CONST. art. II, § 1, cl. 5.

⁹² U.S. CONST. art. I, § 3, cl. 3.

⁹³ U.S. CONST. art. I, § 2, cl. 2.

⁹⁴ See *supra* Part II.B. Interestingly, the familiar Western convention of beginning to count age from the point of birth is not universal. In certain East Asian countries, a newborn traditionally was given the age of “one,” arguably reflecting the recognition that the child’s life predated his or her birth. See, e.g., HYUNJOO PARK & YULING PAN, COGNITIVE INTERVIEWING WITH ASIAN POPULATIONS: FINDINGS FROM CHINESE AND KOREAN INTERVIEWS 20 (2007), available at www.rti.org/pubs/aapor07_park_pres.pdf (Korea); Ye Qinfa, *Chinese Culture: Birthday Customs of the Newborn and Elderly*, ABOUT.COM, <http://chineseculture.about.com/library/weekly/aa021901a.htm> (last visited Mar. 8, 2013).

The constitutional provisions that use the word “person” in reference to appointments,⁹⁵ emoluments,⁹⁶ extradition,⁹⁷ and other such uses naturally have application only to born persons. Justice Blackmun’s *Roe* opinion is correct about this.⁹⁸ But it is hard to see how this has much probative weight one way or another. To be appointed to office, to be extradited for commission of a crime, to be a fugitive, or to receive emoluments, one presumably must already be born. But again, that does not *define* the word person; it simply uses it in one common sense.

A somewhat better intra-textual argument against “persons” including the unborn is the use of “persons” in the Constitution’s clauses describing representation rules and the census.⁹⁹ The *Roe* opinion included these provisions in its laundry list of the Constitution’s uses of the word “person,” but did not give the point much separate attention.¹⁰⁰ The infamous Three-Fifths Clause of the original Constitution, later superseded by the Fourteenth Amendment, provided for apportioning representatives and direct taxes by “adding to the whole Number of free *Persons*, . . . three-fifths of all other *Persons*.”¹⁰¹ The Constitution assigned initial representation numbers and then directed that a census be taken within three years of the first meeting of Congress, and within every ten years after that.¹⁰² (Section Two of the Fourteenth Amendment did away with the three-fifths rule and provides simply: “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”)¹⁰³

Again, by convention, the unborn are not counted in a census.¹⁰⁴ In a sense, then, conceived but unborn children are literally *not counted as constitutional “persons”*—at least not so counted for purposes of apportionment of

(China); *Baby & Birth in China*, 4PANDA.COM, www.4panda.com/chinatips/culture/baby.htm (last visited Mar. 8, 2013) (same); *About the Chart*, CHINESEGENDERCHART.INFO, www.chinesegenderchart.info/pregnancy-chart-gender-selection/oneyear.html (last visited Mar. 8, 2013) (same). This fact is of course not itself probative of the meaning of the word “person” in the Constitution. It merely tends to confirm that the dating of age from birth is simply a cultural convention and does not establish the point at which a person becomes a “person.”

⁹⁵ U.S. CONST. art. II, § 1, cl. 2.

⁹⁶ U.S. CONST. art. I, § 6, cl. 2.

⁹⁷ U.S. CONST. art. IV, § 2, cl. 2.

⁹⁸ See *Roe v. Wade*, 410 U.S. 113, 157 (1973).

⁹⁹ U.S. CONST. art. I, § 2, cl. 3.

¹⁰⁰ *Roe*, 410 U.S. at 157.

¹⁰¹ U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV (emphasis added).

¹⁰² See U.S. CONST. art. I, § 2, cl. 3.

¹⁰³ U.S. CONST. amend. XIV, § 2.

¹⁰⁴ See *Explore the Form*, U.S. CENSUS BUREAU, www.census.gov/2010census/about/interactive-form.php (last visited Mar. 26, 2013) (2010 U.S. Census Form).

representatives. That tradition of not counting the unborn appears to have been carried forward in Section Two of the Fourteenth Amendment, the same amendment in which the word “person” is used in the context under examination here, in Section One. This seems the best intra-textual evidence suggesting a determinate constitutional meaning of “person” as limited to born persons—those who would be, literally, *counted* as persons in a census prescribed by the Constitution.¹⁰⁵ It is not the strongest of arguments: who is counted in the counting is a matter of convention; the Constitution prescribes that there be a counting but does not say who counts in such counting—other than in its provisions concerning “other persons” (the hideous three-fifths rule) and “Indians not taxed.”¹⁰⁶ Indeed, these examples might be taken to suggest that where the document intends that a person *not* be counted, or counted differently, it specifies so. This undermines, at least somewhat, the already uncertain strength of the intratextual inference from the representation and census clauses.

Still, the intratextual inference is there and is at least somewhat troubling. The *Roe* opinion noted the representation and census provisions in its laundry list of constitutional uses of the word person, and gave it a small amount of extra consideration in a one-sentence footnote: “We are not aware that in the taking of any census under this clause, a fetus has ever been counted.”¹⁰⁷ Perhaps not, but this bare factual observation provokes a more interesting legal question: *Could* Congress specify that conceived but unborn humans be counted in a census—that, in the official head count, a pregnant woman add *two* (or perhaps more) to the census total, rather than just one?

The proposition is far from absurd. Given Blackstone’s baseline rule that the life of a new person exists in legal contemplation when able to stir in the mother’s womb,¹⁰⁸ Congress might well have prescribed such a rule for counting persons if it had thought it a better, more accurate, and convenient one. The fact that Congress never in fact did so does not tell us much of anything about the necessary meaning of the word “person” in the Constitution—especially not if Congress *could* have chosen a count-the-unborn rule for a census. If failure to count proves anything, it is probably only that, if Congress considered the matter at all, it judged counting the unborn too inconvenient or difficult (especially in the eighteenth and nineteenth centuries), or too intrusive, to be worth the effort. A born-person implementation of the census requirement was a sufficient counting rule for census purposes.¹⁰⁹

¹⁰⁵ U.S. CONST. art. I, § 2, cl. 3.

¹⁰⁶ *Id.* Corporations are treated as legal persons for Fourteenth Amendment purposes, *see supra* note 34 and accompanying text, but they are not counted as persons in the census, *see* U.S. CENSUS BUREAU, *supra* note 104.

¹⁰⁷ *Roe v. Wade*, 410 U.S. 113, 157 n.53 (1973).

¹⁰⁸ *See* BLACKSTONE, *supra* note 27 and accompanying text.

¹⁰⁹ Today, of course, pregnancy can, and frequently does, result in the death of the fetus by abortion, in addition to miscarriage, but that is largely a function of the legal regime of *Roe*. That simply begs the question in chief: whether *Roe*’s holding on the question of

But indulge the hypothetical for a moment. Suppose Congress had at some point chosen, or chose today, a different rule. Suppose Congress prescribed, pursuant to its Necessary and Proper Clause power, that living human fetuses be counted in the census. (Or, since the apportionment-representation command as modified now appears in the Fourteenth Amendment, suppose Congress chose such a rule pursuant to its power under Section Five of the amendment to enact “appropriate” laws to enforce the amendment’s provisions.) Would such a law be *unconstitutional*, on the theory that it is beyond Congress’s power to pass laws for carrying into execution the Constitution’s provision for a census and resulting apportionment of representatives?

Writing on a clean slate—that is, in the absence of *Roe*’s influence on the question—the answer would seem to be *no*. Under *McCulloch*’s reasoning, such a choice almost certainly would be thought within the scope of Congress’s power to devise a means (of counting) calculated to achieve the end (a census).¹¹⁰ Just as “necessary” was to some degree indeterminate,¹¹¹ affording Congress a range of choice and judgment, so too “persons” to be counted is to some degree indeterminate, affording Congress a range of choice and judgment. It is hard to see why Congress could not prescribe that fetuses be counted in the census, aside from the force of *Roe* on this point (which of course is the point ultimately at issue).

This thought experiment obviously suggests a further implication. If Congress constitutionally may prescribe that the unborn be treated as “persons” for purposes of census and apportionment, may it not likewise constitutionally prescribe that the unborn be considered “persons” for purposes of not being deprived of life without due process and for purposes of entitlement to the protection of the laws? The power of Congress—the power to prescribe an appropriate rule for effectuating ends—is the same in either case: Section Five of the Fourteenth Amendment (which is really just a linguistic variation on the wording of the Necessary and Proper Clause).¹¹²

The intra-textual comparative argument thus works both ways. If the range of plausible meaning of “persons” is broad enough to encompass the unborn with respect to Congress’s power to prescribe a census method, it is broad enough to encompass the unborn with respect to Congress’s power to protect from state action the rights to life and protection. The whole question, then, is whether the constitutional term “*person*” has a range of meaning that plausibly could encompass the unborn or is entirely determinate in excluding the unborn.

personhood is correct or not. The fact that a “person” might die or be deliberately killed is not a reason to conclude that such a person was not a “person” when he or she was alive.

¹¹⁰ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413–21 (1819).

¹¹¹ *Id.* at 413–15.

¹¹² Paulsen, *Government of Adequate Powers*, *supra* note 11, at 1002 (“The Civil War Amendments’ enforcement clauses are most naturally read as new, sweeping ‘necessary and proper’ clauses. They grant Congress broad power to pass ‘appropriate’ legislation to enforce some pretty broadly-worded, generally-expressed limitations on state government power.”).

B. Structural Default Rules for Textual Ambiguity

This brings us to another—and vitally important—“structural” interpretive methodological question: *What is the correct default rule with respect to interpreting and applying a provision of the Constitution that, upon examination, to some degree has a range of meaning that is not perfectly determinate?* And a corollary structural interpretive question: *Might that default rule be different for judicial interpretation and application of a constitutional provision—that is, with respect to a decision to invalidate legislative action—than it is for political actors exercising their constitutional legislative and executive powers?*

Recall Justice Blackmun’s punch-line conclusion to his quick intra-textual canvass of the use of the words “person” and “persons” throughout the Constitution: “[I]n nearly all these instances,” he wrote, “the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.”¹¹³ The implication, unstated but clearly present, is that the absence of decisive proof of prenatal application *refutes* any such possibility of prenatal application. We have already seen the several weaknesses of the premise: the fact that some uses of the word person obviously concern born persons only is not particularly probative of whether the term might, in different settings, include unborn persons; the use of qualifying language (like “born”) in some such textual provisions might actually be taken to support the contrary inference that a broader meaning is embraced where not so qualified;¹¹⁴ and the backdrop legal understanding of personhood recognized by Blackstone suggests precisely such a broader understanding.¹¹⁵ But even granting *Roe*’s premise that other textual uses do not reliably *endorse* personhood for the unborn,¹¹⁶ the conclusion does not follow that the word person *therefore does not* include the unborn. Rather, what would follow from lack of supportive intra-textual evidence is, simply, lack of supportive intra-textual evidence. The question whether “persons” includes the unborn would remain up for grabs; to the extent the text is thought ambiguous as it concerns that question, a lack of corroborating intra-textual evidence simply retains the sense of ambiguity.

This brings us back to the question of the appropriate default rules. Justice Blackmun’s approach in *Roe*, rejecting personhood on the ground of insufficient textual proof,¹¹⁷ would seem improperly to reverse the presumption. If the text is ambiguous as to a particular point, then the judiciary is not justified in adopting one reading over another—where either or several fall within the range of meaning of the text—and then using such a reading to invalidate a choice

¹¹³ *Roe v. Wade*, 410 U.S. 113, 157 (1973).

¹¹⁴ *See supra* pp. 38–39.

¹¹⁵ *See* BLACKSTONE, *supra* note 27 and accompanying text.

¹¹⁶ *Roe*, 410 U.S. at 157.

¹¹⁷ *Id.*

adopted by representative bodies premised on a different view fully as consistent with the range of meaning admitted by the ambiguous text.

This is a structural–textual point about the power of “judicial review” in relation to the powers of representative institutions in a constitutional democracy where the text of the Constitution is ambiguous or indeterminate on a particular question. The structural argument for judicial review, as set forth in *Marbury*¹¹⁸ (and before that in *The Federalist No. 78*),¹¹⁹ rests on the premise that an action of the political branches or of the states violates some rule of law supplied with sufficient clarity by the text of the Constitution that it can be said that the political decision *violates* the Constitution’s command or prohibition.¹²⁰ Conversely, where the text does not specify a rule, or where the text’s application to a given problem is not clearly resolved by the text, the argument for a power of judicial review—the power to invalidate political decisions as being *contrary to* the text of the Constitution—no longer holds. As I have put the point in prior writing: “It is essential, then—it is part of the core justification of judicial review—that the court conclude that the legislative act violates a rule of law that is set forth by the text of the Constitution before it strikes down the act.”¹²¹ If the text supplies no such rule, or if its rule or principle is so indeterminate that it cannot fairly be said that the Constitution decides the issue, then the rationale for judicial review fails; the choice made by political institutions stands because it cannot be said to be in definite conflict with—in Hamilton’s words in *The Federalist No. 78*, in “irreconcilable variance” with—the Constitution.¹²² Thus, “the more indeterminate or under-determinate the range of a constitutional provision, the broader the duty of the courts to defer to what the legislature has enacted.”¹²³

¹¹⁸ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹¹⁹ See THE FEDERALIST NO. 78, at 465–66 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹²⁰ See Kesavan & Paulsen, *Interpretive Force*, *supra* note *, at 1129–30 n.54 (“[W]here there is a range of equally legitimate interpretations, and the political branches have chosen one of them, there is no basis for the courts to invalidate the political branches’ choice. This is because the exercise of judicial review presupposes that the political branches have made a choice that is forbidden, as a matter of law, by the Constitution. If the Constitution permits a range of choice, and the legislature and executive have chosen one choice within that range, what has been done is not unconstitutional.”); Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 11, at 858 n.4; Paulsen, *Most Dangerous Branch*, *supra* note 74, at 333 (“A court should not substitute its interpretation of a text for that of the political branches (acting within their proper spheres) when more than one interpretation is possible, there is no principled rule supplied by text, history, structure, and precedent that privileges one reading over the other, and the political branches have acted pursuant to one such reading.”).

¹²¹ Paulsen, *Government of Adequate Powers*, *supra* note 11, at 994.

¹²² THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹²³ Paulsen, *Government of Adequate Powers*, *supra* note 11, at 995 (arguing that “textual imprecision or generality often admits of a range of choices” and that the correct constitutional answer in such circumstances “is that the legislature must be permitted to choose from options within that range”).

McCulloch plainly embodies this same structural-interpretive premise about what default rules govern courts where the text admits of a range of meaning. Its first holding was, in essence, that where the text admits of a fair range of possible meaning to a word, clause, or phrase (such as the Necessary and Proper Clause), and Congress has made its policy judgments and acted within that range of meaning, there is no warrant for judicial invalidation of such a legislative choice.¹²⁴

Other scholars have articulated versions of (approximately) this same structural principle, or one resembling it, specifically with respect to the Fourteenth Amendment.¹²⁵ The most important such effort—and the leading article addressing the issue specifically with respect to abortion and the question of personhood of the unborn—is Stephen Galebach’s controversial classic, *A Human Life Statute*.¹²⁶ Galebach’s thesis, in a nutshell, was that (a) the Supreme Court in *Roe* explicitly declined to say when human life begins, on the ground that uncertainty about this fact disabled the judiciary from making such a determination as a matter of fact or law; (b) the Court in *Roe* acknowledged that *if* the human fetus could be thought a “person” within the meaning of the Fourteenth Amendment, its answer to the question of abortion rights would be different, indeed diametrically contrary to the ruling it reached; and (c) that Section Five of the Fourteenth Amendment, under then-governing Supreme Court precedent concerning that clause, therefore permitted Congress to make a judgment concerning the matter of when human life begins and, consequently,

¹²⁴ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413–23 (1819) (explaining that the Framers did not prescribe narrow limits on Congress’s enumerated powers; that Congress may legislate by any means “necessary and proper” to carry out legitimate ends within the scope of the Constitution; and that “where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake . . . to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.”).

¹²⁵ An excellent classic article is William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975). To compress greatly: Professor Cohen’s thesis is that Congress has power, at least in “marginal cases,” to adopt “arguable” interpretations of the Fourteenth Amendment “enlarg[ing]” the meaning of its provisions beyond what the Supreme Court had held those provisions to mean. *Id.* at 618–20. Congress may not adopt interpretations or applications of due process and equal protection not reasonably within the scope of the Constitution’s terms, but Congress’s power should not be less simply because the Supreme Court had spoken to the issue earlier. *Id.*; cf. Henry P. Monaghan, *The Supreme Court 1974 Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 23 (1975) (embracing the legitimacy of a congressional role in the “interpretive filling-out” of an “underlying constitutional guarantee”). An important recent article, describing a broader scope for congressional as opposed to judicial interpretive power to effectuate the provisions of the Fourteenth Amendment as a function of their different institutional roles and capacities is Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997).

¹²⁶ Galebach, *A Human Life Statute*, *supra* note *, at 5.

when constitutional legal personhood exists. All of this, Galebach argued, was consistent for the most part with the analysis in the *Roe* decision itself.¹²⁷

Galebach's doctrinal argument was masterful. Unfortunately, sixteen years later, in *City of Boerne v. Flores*, the Supreme Court rejected the argument in a different setting, retreating substantially from its earlier doctrinal formulations.¹²⁸ That case, *City of Boerne v. Flores*, has been powerfully and persuasively criticized.¹²⁹ This is not the occasion to rehearse those arguments at length.¹³⁰ Suffice it to say here that, while *City of Boerne* may stand as a *precedent* against a broad interpretation specifically of Congress's Section Five power to legislate in ways contradicting the Supreme Court's constitutional determination—and be relevant to the constitutional analysis of the personhood issue, indirectly, in that sense¹³¹—it does not directly address the question whether the unborn are constitutional “persons” or how the text's apparently conceded indeterminacy on this score should affect the question of interpretive power. Still, if *City of Boerne* does not reject personhood for the unborn, it does appear, whether rightly or wrongly, implicitly to reject the proposition that textual indeterminacy or ambiguity permits legislative choice in opposition to the judiciary's constitutional choices.¹³²

City of Boerne replicated, in a different context and in a different form, the analytic error *Roe* made with respect to the consequence of supposed textual ambiguity. Both cases assumed that textual ambiguity is to be resolved, one way or the other, solely by the judiciary. *Roe* declared that the beginning point of human life was uncertain, the meaning of “person” did not clearly include the unborn, and then resolved the ambiguity by holding that the unborn were *not* entitled to the constitutional protections of the Fourteenth Amendment. *City of Boerne* held that the Court's earlier decision in *Employment Division v.*

¹²⁷ *Id.* at 4–20.

¹²⁸ See *City of Boerne v. Flores*, 521 U.S. 507, 518–20 (1997).

¹²⁹ See generally, e.g., Amar, *supra* note 75, at 818–26; McConnell, *supra* note 125; Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115 (1999). I have criticized *Boerne*, in passing, in other work. Paulsen, *Government of Adequate Powers*, *supra* note 11, at 1003 n.50 (noting that the Court's conclusions in *Boerne* “are probably wrong” and arguing that “[t]he broader one's understanding of the language of Section 1, the less one can say that it authorizes federal judicial invalidation of state action that fits within the range of meaning admitted by such broad language; but the more one can say that the grant of federal legislative power over such a broadly-described subject matter authorizes broad congressional choice in such matters.”); see also Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 252–53 n.10 (1995) (suggesting an understanding of the Section Five Enforcement Clause power of Congress that runs counter to the Court's holding in *Boerne*).

¹³⁰ I hope to address that issue in future work. See Michael Stokes Paulsen, *The Dormant Fourteenth Amendment* (unpublished partial manuscript) (on file with the Ohio State Law Journal).

¹³¹ See *infra* Part V for a discussion of the factor of precedent.

¹³² But see *supra* note 118 and accompanying text.

Smith,¹³³ adopting the narrower of two possible textual readings of the (arguably ambiguous) Free Exercise Clause of the First Amendment, excluded the possibility of legislative choice of the broader reading. The compound error common to the two cases is the Court's belief that (a) *textual ambiguity permits the judiciary to adopt whichever reading it prefers* (i.e., human fetuses are not persons and thus possess no constitutional rights (*Roe*)); the right to the free exercise of religion does not confer a substantive immunity from facially neutral laws of general applicability (*Smith* and *City of Boerne*); and (b) that *judicial supremacy then permits the Court to exclude legislation premised on a different reading of the ambiguous text*.

The correct answer, as a matter of first principles of constitutional structure and logic, would seem to be exactly the reverse: where the legislature has acted on a view consistent with the range of meaning afforded by a broadly worded or ambiguous constitutional text, the courts cannot properly strike down such an act as being a violation of the Constitution; correlatively, the Constitution's separation of powers, and the structural–logical rationale for judicial review, require that courts accept, not reject, congressional constitutional interpretive choices that fit within the breadth of the Constitution's provisions. It follows, then, that the default rule suggested by the Constitution's structure should lead the courts to uphold an act of Congress interpreting “person” to include the unborn.¹³⁴

In the end, then, what conclusions are best drawn from generally accepted structural–textual techniques of constitutional interpretation, including intratextual linguistic comparisons of the word “person” and structural principles governing constitutional interpretation and appropriate default rules in cases of ambiguity? The evidence again appears to lean rather more heavily

¹³³ 494 U.S. 872 (1990).

¹³⁴ It likewise would seem to be the case that, absent a congressional enactment, a state legislature's laws protecting the unborn as persons should be upheld as consistent with the Fourteenth Amendment unless such laws fall outside the range of meaning permitted by the language of the Privileges or Immunities, Due Process, and Equal Protection Clauses of that amendment.

It would seem to follow from the structural logic of the Fourteenth Amendment as both a grant of rights and also of congressional power with respect to their enforcement, that, where the language of the Fourteenth Amendment admits of a range of choice, Congress's choice within that range prevails over a state legislature's choice, to the extent of any inconsistency. See *McCulloch*, 17 U.S. (4 Wheat.) at 406 (Supremacy Clause holding). Thus, to the extent the Fourteenth Amendment is thought ambiguous on the meaning of “person,” Congress can define “person” to include the unborn and its determination should prevail as against conflicting state laws and even the Supreme Court's prior interpretations. If Congress were to enact a definition of “person” that specifically *excluded* the unborn, that interpretation, too, would prevail over contrary state legislative enactments (unless, that is, the *necessary* correct reading of the word “person,” as a matter of text, structure, and history, is that it includes the unborn—a conclusion that the evidence collected in this Article suggests is entirely plausible, and certainly far more colorable than is the reverse position adopted in *Roe*).

in the direction of concluding that the word “person” does not necessarily *exclude* the unborn and certainly admits of a considered legislative choice by Congress affirmatively to *include* the unborn pursuant to its power to carry into execution the language of the Fourteenth Amendment and make interpretive choices falling within the range of the text’s meaning in the course of doing so. The word “person” as used in the Fifth and Fourteenth Amendments is not defined or limited by how “person” or “persons” is used in other contexts or specific applications elsewhere in the Constitution. Such different uses of the word person in different contexts in the document are, to some extent, constitutional apples and oranges. One could as readily conclude that limiting language narrowing or qualifying the “persons,” included in other contexts but not in the context of the Due Process and Equal Protection Clauses, suggests a broader, general meaning where the narrower, specialized meaning is not specified. And a strong structural argument can be made—albeit one at odds with the Supreme Court’s *City of Boerne* precedent—that the lack of a definitive textual answer should afford legislatures, rather than courts, the discretion to act pursuant to reasonable understandings falling within the range of meaning afforded by textual indeterminacy.

IV. HISTORY AND EVIDENCE OF “ORIGINAL INTENT”

To this point, I have been considering only the original linguistic meaning of the words of the *text* itself—searching for clues to its objective meaning as an autonomous text, in its original historical and linguistic context—and the logical inferences and deductions that objectively can be said to flow from the larger structure and interrelationships created by the text. Both inquiries seek the *objective* meaning of the words; both focus, at different levels, on *the text itself*; both inquiries are, in a sense, “internal” to the text. While extrinsic sources may prove helpful to this inquiry—sometimes providing historical or social context, sometimes serving as an external glossary, concordance, or dictionary explaining the contemporaneous and term-of-context meaning of a particular word or phrase—the object is still to ascertain the meaning of the words and not to divine the subjective intentions or expectations or purposes of the lawgiver lurking behind the text. The goal has been to ascertain what the text *means*, not what its drafters (or adopters) *meant*.

There is a difference between these two things, or very well may be in a given case. As I have put the point elsewhere: “There is a logical and important difference between the content of a legal rule and the expected consequences of the rule in the minds of (some of) its drafters and advocates.”¹³⁵ Consider some reasonably straightforward examples. First, take the case of racial segregation in education, the issue presented in *Brown v. Board of Education*.¹³⁶ The drafters of the Fourteenth Amendment may or may not have specifically *intended* to

¹³⁵ Paulsen, *Paulsen, J., Dissenting*, *supra* note 10, at 209.

¹³⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483, 487 (1954).

abolish racial segregation, but that should be less relevant than whether the necessary intrinsic meaning of the words they used—“equal protection of the laws”¹³⁷—entails a principle forbidding enforced legal separation on the basis of race.¹³⁸ What the framing generation enacted as part of the Constitution was a set of *words* with meaning, not a set of *intentions*.¹³⁹ Likewise, consider the question whether the Fourteenth Amendment has anything to say about sex-based discrimination. Again, the draftsmen of the Fourteenth Amendment may not have had the equal rights of women specifically in view, but the words they wrote forbid state denial of legal equal protection to any “person.” Whatever the precise application of that command in the context of sex-based classifications, it cannot be denied that women are persons—and so the Fourteenth Amendment clearly *applies* to sex-based classifications whether the framers of the amendment intended such application or not.¹⁴⁰

Words’ intrinsic meanings within a constitutional text thus can differ from the specific, subjective intentions of the text’s drafters. They may have a broader, more encompassing intrinsic meaning and application than anyone thought or expected they would. They might also have a narrower, more specific, or limited meaning than the hopes, dreams, expectations, desires, or intentions of (some of) its drafters may have been concerning the purpose or desired effect of the provision in question.¹⁴¹ Intention is simply not congruent with original linguistic meaning.

¹³⁷ U.S. CONST. amend. XIV, § 1.

¹³⁸ Paulsen, *Paulsen, J., Dissenting*, *supra* note 10, at 209; *see also* Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 11, at 901 & n.134; Paulsen, *Most Dangerous Branch*, *supra* note 74, at 227 n.23.

¹³⁹ Paulsen, *Most Dangerous Branch*, *supra* note 74, at 227 n.23.

¹⁴⁰ Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 11, at 901–02 (“[S]tate sex discrimination is (largely) unconstitutional, assuming women are ‘persons’ within the meaning of the Fourteenth Amendment, an assumption that seems unavoidable from the perspective of original linguistic textual meaning. *Of course* women are ‘persons’! There is no remotely plausible textualist argument that women are not embraced by the literal, ordinary meaning of the document’s language forbidding denials of due process of law or equal protection of the laws to any ‘person.’ The fact that the Amendment’s draftsmen may not have had women, but mainly race, *in mind* does not negate what the Amendment says *in words*. The word used was ‘person’ and there is no reason to believe that the men who drafted the Fourteenth Amendment did not regard women as, legally, persons or that they used the word ‘person’ in some nonstandard, specialized, technical sense so as not to mean what it ordinarily meant.”).

¹⁴¹ An example I have used in other writing is the Presidential Qualifications Clause’s rule that the President must “have attained to the Age of thirty-five years.” U.S. CONST. art. II, § 1, cl. 5. To construe the clause according to its drafters’ *intentions or purposes*—most probably, to assure a certain level of maturity and to forestall the ready possibility of lineal dynastic successions—rather than according to the rule embodied in its *text*, would produce some remarkably different results, as I have illustrated satirically in, Michael Stokes Paulsen, *Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 CONST. COMMENT. 217, 217 (1996), and also argued directly in, Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 11, at 879–82.

Nonetheless, *intention*—what the drafters of a provision had in mind, as shown by extrinsic evidence of what they said about the meaning and expected consequences of the words they used—is at least relevant evidence for constitutional interpretation. Sometimes, historical evidence of intention may display the original public meaning of the text.¹⁴² Sometimes, it may clarify ambiguities as to linguistic meaning, considered without regard to history.¹⁴³ Sometimes—more troublingly—it may impeach or undermine the apparent natural linguistic meaning of the text, leading to reconsideration of a reading otherwise presumptively warranted by the language and structure of the text.¹⁴⁴ This is troubling because, in theory, the text controls, and not any contrary intention.¹⁴⁵ Still, evidence of such contrary intention arguably doubles back on the supposedly clear linguistic meaning, shaking one’s faith in its clarity. At all events, historical evidence of original intention is at least worth *looking at*, on most constitutional questions.

What, then, was the “original intention” (if there was one) of the framers, or the original understanding of the ratifiers, of the Fifth and Fourteenth Amendments (again, if there was one) with respect to whether “persons” includes the unborn? The unsurprising answer is that the evidence is ambiguous. As I have written previously: “There is no decisive evidence of the meaning of the word ‘person,’ at the time the Fourteenth Amendment was adopted, as applied to the protection of the laws for human fetuses and embryos against the private violence of others.”¹⁴⁶ This was because “[t]he meaning of the word ‘person’ was not the focus of interpretive controversy, and abortion was not a major legal issue, with thirty-six states or territorial legislatures prohibiting it in many or most situations.”¹⁴⁷

Evidence of original intention (“what did the framers of the Fourteenth Amendment have in mind with respect to abortion?”) is sparse precisely because the framers appear not to have had abortion in mind at all when writing the amendment. That does not mean that the Amendment therefore does not apply to abortion, nor does it mean that the word “persons” therefore excludes the unborn. It simply means that evidence of *intention* will not be especially prominent in answering the question of textual meaning on this point.

What evidence there is, however, tends to lean in the direction of a broadly inclusive understanding of “persons” as essentially synonymous with all human

¹⁴² See Kesavan & Paulsen, *The Interpretive Force*, *supra* note *, at 1142–48.

¹⁴³ See, e.g., Kesavan & Paulsen, *Is West Virginia Unconstitutional?*, *supra* note *, at 361–95.

¹⁴⁴ For a debatable application of this principle see, for example, Paulsen, *Accusing Justice*, *supra* note 10, at 52–62 (arguing—perhaps unsoundly—that very strong evidence of contrary intention can in certain circumstances prevail over apparent linguistic textual meaning, at least where formulated at a high level of generality).

¹⁴⁵ See Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 11, at 872–76.

¹⁴⁶ Paulsen, *Paulsen, J., Dissenting*, *supra* note 10, at 209.

¹⁴⁷ *Id.*

beings, regardless of age, class, sex, or status. The emphasis was less on what the category of “man” or “human being” embraced—analysis that would be directly relevant to whether a fetus is a person—but on repudiating any suggestion that society could rightfully exclude from the rights of persons any class or member of the human race.¹⁴⁸ Existence as a member of the human race, not social standing, merit, or any other attribute, made someone a “person” within the intended coverage of the Constitution’s most fundamental guarantees of rights. To the extent that is relevant at all to the issue of fetal personhood, it is only indirectly relevant: it rejects, at a general level, the idea of exclusion from the rights of personhood of certain classes of individuals; but it does not say anything direct about whether an unborn child is such an individual person within the intended scope of the Fourteenth Amendment. The level of generality in the discussion is high: human status, as such, is treated as the touchstone of personhood.

The most apposite quasi-definitional such usages of “person” during the period come from the lips of some of the most important draftsmen, sponsors, and advocates of the Fourteenth Amendment—Thaddeus Stevens, John Bingham, and Lyman Trumbull. If there could be said to be a triumvirate or “holy trinity” of key figures with respect to the proposal of the Fourteenth Amendment, whose purposes or intentions should matter most, Stevens, Bingham, and Trumbull would probably qualify. Add to that the statements—the constitutional interpretations, really—of men like the influential radical Senator Charles Sumner of Massachusetts, and the statements of a few others, and a general picture begins to take shape of the probable understanding and “original intent” of the Reconstruction generation draftsmen with respect to the meaning of the word “*person*.”¹⁴⁹

What follows is a quick canvass of such statements, but with a *caveat*: These statements are not direct “legislative history” concerning the meaning of the Fourteenth Amendment, in the sense of being floor statements or speeches or official sponsors’ reports explicating the meaning of the word “persons” as used in that proposed amendment. They are thus of somewhat limited probative value. Nonetheless, they are roughly contemporaneous statements, soaked in the relevant constitutional language, that were integrally part of the constitutional debate of the time. To the extent evidence of intention is relevant to constitutional meaning, the statements of these men supply relevant but unspecific evidence of a generally liberal, inclusive intention with respect to the meaning of “persons.” To the extent they might be thought to function as a kind of working concordance displaying contemporaneous understandings of the term *person*, they are arguably relevant also as good secondary evidence of the

¹⁴⁸ See *infra* notes 149–65 and accompanying text.

¹⁴⁹ For outstanding historical treatments of Reconstruction, including discussions of the central role of these men in the processes leading to the adoption of the Fourteenth Amendment, see ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877, at 228–80 (1988) (Chapter 6: “The Making of Radical Reconstruction”); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869 (1990).

original public meaning of the word “person,” irrespective of any specific intention with respect to abortion.

Consider, first, the mid-Civil War 1862 remarks of the respected radical Republican Senator Charles Sumner of Massachusetts, whose broadly liberal racial views, once regarded as extreme, gradually came to be accepted by a broad swath of the amendment-writing Reconstruction Republican Congresses.¹⁵⁰ Speaking in support of a measure to abolish slavery in the District of Columbia, Sumner addressed the constitutional meaning of the word “persons” within the Due Process Clause of the Fifth Amendment—the very provision whose terms eventually would be borrowed as part of the Fourteenth Amendment.¹⁵¹ The word “person” was a broad, inclusive one, Sumner maintained: “[I]n the eye of the Constitution, every human being within its sphere, whether Caucasian, Indian, or African, from the President to the slave, is a *person*. Of this there can be no question.”¹⁵² For Sumner, *person* was synonymous with “every human being.”

In 1864, Senator Benjamin G. Brown of Missouri expressed a similarly broad view of the meaning of “persons,” as used in the original Constitution, in the course of the debate over a proposed thirteenth amendment to abolish slavery.¹⁵³ Brown’s discussion was in the service of an argument denying that the original Constitution’s use of the phrase “all other Persons” in the Three-Fifths Clause (concerning apportionment of representatives) implicitly embraced the propriety of slavery. This was not so, Brown argued. “It is said that the words ‘other persons’ there used included slaves,” but “does the term ‘person’ carry with it anything further than a simple allusion to the existence of the individual?” Brown asked.¹⁵⁴ “It certainly cannot be strained into any recognition of slavery, since the very recognition of personality excludes the implied sanction of enslavement, for slavery does not regard its victims as persons but as chattels.”¹⁵⁵ For Brown, the term “*persons*” was general and not contingent on legal status. “Does a reference to the mere fact of existence necessarily sanction the *status*?” he asked, rhetorically.¹⁵⁶ Constitutional *personhood* was a matter of existence and not legal status, Brown concluded, and could not properly be leveraged into a constitutional sanction of slavery.¹⁵⁷

By 1865, the anti-slavery views of men like Sumner and Brown, formerly thought radical, had come to be embodied in the Thirteenth Amendment, abolishing slavery.¹⁵⁸ In December of that year, right as that amendment was

¹⁵⁰ See CONG. GLOBE, 37TH CONG., 2D SESS. 1449 (1862).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ CONG. GLOBE, 38TH CONG., 1ST SESS. 1753 (1864).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *See id.*

¹⁵⁸ See Mark A. Graber, *Subtraction by Addition?: The Thirteenth and Fourteenth Amendments*, 112 COLUM. L. REV. 1501, 1542–43 (2012).

achieving its final state ratifications, radical leader Representative Thaddeus Stevens declaimed on the rights of persons.¹⁵⁹ They were, Stevens maintained, “innate” and not in any way contingent on legal status, condition, or capacities.¹⁶⁰ “Accidental circumstances, natural and acquired endowment and ability, will vary their fortunes,” Stevens acknowledged, “[b]ut equal rights to all the privileges of the Government” extended to “every immortal being, no matter what the shape or color of the tabernacle which it inhabits.”¹⁶¹

Illinois Senator Lyman Trumbull, the Judiciary Committee chair and a pivotal figure in the debates over the Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1866,¹⁶² similarly equated “person” with “human being,” stating that “any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the Constitution.”¹⁶³

Finally, and perhaps most importantly, consider the views and careful analysis of Representative John Bingham, the principal draftsman of Section One of the Fourteenth Amendment’s language, concerning the meaning of the word “person” as used initially in the Fifth Amendment’s Due Process Clause—constitutional language echoed in part in the Fourteenth Amendment’s guarantees of due process and equal protection, penned by Bingham the previous year.¹⁶⁴

[T]he Constitution of the United States . . . declared that “no person shall be deprived of life, liberty, or property without due process of law.” By that great law of ours it is not to be inquired whether a man is “free” by the laws of England; it is only to be inquired is he a man, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty. . . . Before that great law the only question to be asked of a creature claiming its protection

¹⁵⁹ See CONG. GLOBE, 39TH CONG., 1ST SESS. 74 (1865).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² On Trumbull’s significance and contributions, see Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship*, 36 AKRON L. REV. 717, 735 (2003).

¹⁶³ CONG. GLOBE, 39TH CONG., 1ST SESS. 77 (1865); see also *id.* at 22 (referring to the “great object of securing to every human being within the jurisdiction of the Republic equal rights before the law” during debate in the Senate Committee of the Whole on a bill to expand the Freedmen’s Bureau).

¹⁶⁴ On the importance and contributions of Bingham, see Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589, 590 (2003); see also AMAR, *AMERICA’S UNWRITTEN CONSTITUTION*, *supra* note 23, at 368–88; AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 171–74 (1998).

is this: Is he a man? Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal.¹⁶⁵

For Bingham, the meaning of “person” posed only one question: was the “creature” claiming the Constitution’s protection a “man” (in the non-gender-specific sense)? Simple biological humanity—divine creation as a “living soul”—was what counted, nothing more and nothing less.

Obviously none of this is dispositive. Further, none of these statements constitutes direct “legislative history” concerning the intended meaning of the Fourteenth Amendment’s text. None of these statements is even especially probative of the question at hand: whether the term “persons,” was specifically *intended* to embrace the unborn. That was not the point of any of these speakers, who had rather different issues on their minds. Even Bingham’s formulation, which comes closest to being directly on point, is not a specific reference to abortion. Yet, it is also 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*. Rather, the sole criterion for legal personhood was considered to be whether someone belonged to the family of “man”—that is, was a distinct living human being. If anything, the uncertain evidence of original intention seems to reflect the traditional Blackstonian understandings that the right to live is a God-given natural right¹⁶⁶—a right (in Thaddeus Stevens’s words) “innate in every immortal being”¹⁶⁷—and that this basic right of all persons is present, in contemplation of the law, in the womb. Every “living soul” (in John Bingham’s words) in human form is “endowed with the rights of life and liberty.”¹⁶⁸

It is also relevant, surely, as a matter of history and original understanding, that so many states and territorial legislatures—thirty-six of them—had laws prohibiting abortion in many or most circumstances at the time of the adoption of the Fourteenth Amendment.¹⁶⁹ This historical fact does not necessarily suggest very clearly anything about the necessary meaning of the word “persons” in the Fourteenth Amendment. The pattern of state and territorial

¹⁶⁵ CONG. GLOBE, 40TH CONG., 1ST SESS. 542 (1867). For another, earlier statement concerning the rights of persons, see CONG. GLOBE, 35TH CONG., 1ST SESS. 65–66 (1858) (statement of Rep. Joshua Giddings). Representative Giddings stated that “every human being holds from the Creator an inalienable right to live,” *id.* at 65, and that:

If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, that *all* men, without respect to complexion or condition, hold from the Creator the right to live, who shall determine what portion of the community shall be slain? And who may perpetrate the murders?

Id. at 66.

¹⁶⁶ See BLACKSTONE, *supra* note 27, at *128–30.

¹⁶⁷ CONG. GLOBE, 39TH CONG., 1ST SESS. 74 (1866).

¹⁶⁸ CONG. GLOBE, 40TH CONG., 1ST SESS. 542 (1867).

¹⁶⁹ *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting); see also Paulsen, *Paulsen, J., Dissenting*, *supra* note 10, at 209.

legislative enactment is *consistent* with a personhood reading, but does not require such a reading. It coheres with a general understanding that unborn human fetal life is entitled to substantial state protection from private violence. But even the personhood position does not automatically dictate any one specific legislative approach and, moreover, state legislatures might well have banned most abortions for general reasons of policy, without feeling *required* by the Constitution to have done so.

The stronger inference is the one noted by Justice Rehnquist's dissent in *Roe*: that it is difficult to believe that state legislatures would have understood the Fourteenth Amendment's language as invalidating abortion prohibitions so broadly in force in the states.¹⁷⁰ Even that inference is not ironclad, however. It is entirely possible for a legislature to subscribe to a rule or principle as a matter of constitutional text on one day and the next day act, wittingly or not, in violation of that text.¹⁷¹ But again, to the degree historical evidence of intention, understanding, or expectation is apposite, such evidence points far more strongly in the direction of a pro-life reading of the Fourteenth Amendment than a pro-abortion-rights reading.

V. PRECEDENT

Precedent is often a dubious source of authority.¹⁷² Yet even those who question the authority or weight of judicial precedent in constitutional interpretation—those who doubt, rightly, the logical validity of the proposition that an error at time T1 should be treated as authoritative at time T2 *because* of the fact that error was committed at time T1¹⁷³—will nonetheless at least

¹⁷⁰ See *Roe*, 410 U.S. at 177 (Rehnquist, J., dissenting).

¹⁷¹ See, e.g., Kesavan & Paulsen, *Interpretive Force*, *supra* note *, at 1169–71 (citing and discussing examples of actions of the First Congress that were unconstitutional).

¹⁷² See Andrew Jackson, Veto Message (July 10, 1832), in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: VOLUME III 1139, 1144–45 (James D. Richardson ed., 1897) (“Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled.”). I have criticized the idea of reliance on precedent, and the doctrine of “stare decisis,” in other writing. See, e.g., Paulsen, *Abrogating Stare Decisis*, *supra* note 10, at 1551–67; Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1200–09 (2008); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 292–95 (2005); Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1236–37 (2008); Michael Stokes Paulsen, *Precedent as Tactical Weaponry*, 86 TEXAS L. REV. SEE ALSO 56, 57–58 (2008), <http://www.texasrev.com/wp-content/uploads/Paulsen-86-TLRSA-56.pdf>; see also Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 678–81 (1995); Paulsen, *The Irrepressible Myth*, *supra* note 72, at 2731–34.

¹⁷³ That is the logical structure of an argument from precedent. See Paulsen, *Abrogating Stare Decisis*, *supra* note 10, at 1538 n.8 (“The essence of the doctrine . . . is adherence to

consider the reasoning of a prior judicial decision for the light it might shed on a question of constitutional interpretation. Precedent, even if not properly vested with a “disposition function” affording it decision-altering force in opposition to what the interpreter otherwise would conclude, nonetheless may serve a valid and even important “information function” of providing useful information to such present interpreters.¹⁷⁴ Precedent is informative even if it ought not be dispositive. It tells us something about the results reached, and the reasoning found persuasive, in prior cases construing a piece of constitutional language.¹⁷⁵

What, then, does prior judicial interpretation have to say specifically about the meaning of the word *person* as used in the Constitution’s Due Process and Equal Protection Clauses? What light does such prior interpretation shed on the true meaning of the language of the text?

Obviously, there is *Roe* itself, and its successors. It seems to make sense to set those decisions to one side in considering the argument from precedent, at least for a moment. For it is the correctness of *Roe*’s judgment on this point that is the question under examination here. *Roe*’s *reasoning* in support of its conclusion against the legal personhood of the human fetus—its “information function”—already has been considered at some length.¹⁷⁶ Unless one’s doctrine of precedent holds (rather implausibly and woodenly) that the fact that *Roe* decided the point itself *establishes* that this is the correct interpretation—a circular proposition—then we should (mostly) look away from *Roe* and its progeny. Otherwise, we are just proving a tautology: The personhood conclusion in *Roe* is supported by judicial precedent because of the existence of *Roe* as a precedent.¹⁷⁷

Still, if one’s theory of constitutional interpretation looks to precedent as a source of understanding, *Roe* cannot be dismissed entirely. The Supreme Court has, for forty years now, adhered to some version or another of *Roe*’s conclusion that abortion is a constitutional right and that the human fetus has no constitutional rights.¹⁷⁸ That is at least a relevant fact. To argue, however, that this forty-year course of precedent actually *determines* constitutional meaning is

earlier decisions, in subsequent cases, simply and purely because they were once decided a particular way, even though the court in the subsequent case otherwise would be prepared to say, based on other interpretive criteria, that the precedent decision’s interpretation of law is *wrong*.”); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987) (“The bare skeleton of an appeal to precedent is easily stated: The previous treatment of occurrence X in manner Y constitutes, *solely because of its historical pedigree*, a reason for treating X in manner Y if and when X again occurs.”).

¹⁷⁴ On the “information” versus “disposition” functions of precedent, see Paulsen, *Abrogating Stare Decisis*, *supra* note 10, at 1545–46.

¹⁷⁵ *See id.*

¹⁷⁶ *See supra* pp. 39–48.

¹⁷⁷ The circularity of the argument from precedent is one of many reasons I believe that precedent is not properly constitutive of constitutional meaning, a conclusion I have advanced at length in much of my other scholarship. *See supra* note 172.

¹⁷⁸ *See generally, e.g.*, *Gonzalez v. Carhart*, 550 U.S. 124 (2007); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

surely to give precedent's "disposition function" inordinate weight.¹⁷⁹ It shuts down the discussion (which is, in a sense, probably the whole point of strong notions of stare decisis, and clearly was part of the point in *Planned Parenthood v. Casey*'s discussion of stare decisis).¹⁸⁰ If one adopts such a view, that is the whole ballgame. Under such a conception of precedent, this factor points decisively in the direction of rejecting legal personhood, and overwhelms any contrary considerations of text, structure, and history, because that is what *Roe* decided and because the Court has stuck with *Roe*.¹⁸¹

Such a strict conception of *stare decisis*, however, has never been accepted in American law and especially not in American constitutional law.¹⁸² It is literally—and ironically—"unprecedented." Even *Planned Parenthood v. Casey*, the 1992 decision reaffirming *Roe*, which relied to an unprecedented degree on notions of stare decisis to reach its result that *Roe* should be adhered to, "whether or not mistaken," does not go quite this far.¹⁸³ (*Casey* concluded that whether or not to adhere to precedent depends on a multiplicity of indeterminate, incommensurable factors.¹⁸⁴ Indeed, one of the precious ironies of *Casey*'s discussion of precedent is that the doctrine of stare decisis, as formulated in *Casey*, does not require adherence to the doctrine of stare decisis as formulated in *Casey*.)¹⁸⁵

What about before *Roe*? Here again—as with text, structure, and history—the factor of precedent is simply ambiguous. There was certainly no controlling precedent at the Supreme Court level, prior to *Roe*, interpreting the word *person* as it concerns the unborn.¹⁸⁶ *Roe* was a precedent-setting case, in this regard

¹⁷⁹ If time and repetition by themselves established legal error as legal authority, then *Brown v. Board of Education*, 347 U.S. 483, 494–95 (1954) (overturning *Plessy v. Ferguson*, 163 U.S. 537, 542–43, 548 (1896)), was wrong, because *Plessy*'s regime of separate-but-equal had reigned for fifty-seven years. See, e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 344 (1938); *Gong Lum v. Rice*, 275 U.S. 78, 85 (1927); *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U.S. 151, 160 (1914). For an illustration of this point in the form of a satire, see generally Michael Stokes Paulsen & Daniel N. Rosen, *Brown, Casey-Style: The Shocking First Draft of the Segregation Opinion*, 69 N.Y.U. L. Rev. 1287 (1994) (purporting to find an early draft opinion of *Brown* in which the Court adhered to *Plessy* on the basis of stare decisis, in reasoning and wording closely tracking the Court's actual opinion in *Casey*, reaffirming *Roe*).

¹⁸⁰ See Paulsen, *Worst Constitutional Decision*, *supra* note 10, at 1029–38.

¹⁸¹ See, e.g., *Casey*, 505 U.S. at 857.

¹⁸² See, e.g., *id.* at 854 ("[I]t is common wisdom that the rule of stare decisis is not an 'inexorable command,' and certainly it is not such in every constitutional case.").

¹⁸³ *Id.* at 854, 857.

¹⁸⁴ *Cf. id.* at 854 ("[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.").

¹⁸⁵ This is the theme of Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, *supra* note 172, at 1200–09.

¹⁸⁶ See *Roe v. Wade*, 410 U.S. 113, 157 (1973).

and others. A Supreme Court case from two years earlier, *United States v. Vuitch*, had interpreted a District of Columbia criminal statute forbidding abortion except where necessary to preserve the mother's life or health as placing the burden of proof on the prosecution, not the defendant, as to whether the exception applied.¹⁸⁷ But that was scarcely an implicit rejection of fetal personhood; Justice Blackmun's *Roe* opinion cited it for such a point, but in a way that appeared to concede that *Vuitch* was the weakest of weak inferential precedents on the personhood point.¹⁸⁸

What about *Griswold v. Connecticut*, the case most often cited as the strongest precedent for *Roe* (assisted, perhaps, by other cases dealing with sexual autonomy and marital privacy)?¹⁸⁹ The short answer is that, whatever the (debatable) weight of such precedents with respect to the proposition that a pregnant woman possesses a "liberty interest" in not being pregnant (and likewise in not being sterilized or otherwise *forbidden* to conceive and bear a child), neither *Griswold* nor any other case stood for the quite different proposition that a conceived, living human embryo or fetus, gestating in his or her mother's womb, is not legally a "person."¹⁹⁰ Contraception prevents the coming together of egg and sperm to form a new embryonic human life; abortion kills a new human life. The two things are hugely different, and the difference turns hugely on the existence of personhood, which is not implicated with respect to contraception but is with respect to abortion. *Griswold* says nothing about abortion. It certainly entails no holding of any kind concerning

¹⁸⁷ 402 U.S. 62, 71 (1971).

¹⁸⁸ The Court in *Roe* cited *Vuitch* as "inferentially . . . to the same effect" as state and lower federal court cases rejecting fetal personhood. This was because, the Court in *Roe* stated, "we there [i.e., in *Vuitch*] would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection." *Roe*, 410 U.S. at 159. But this was hardly more than a feint. The Court in *Vuitch* did not in any way address ("inferentially" or otherwise) the question of whether a human fetus is a "person" within the meaning of the Constitution. The Court was simply construing the District of Columbia criminal statute forbidding abortion except where necessary to preserve the mother's life or health. 402 U.S. at 70. It held that the exception language was best understood as placing the burden of proof on the government, not the defendant, on the issue of whether an abortion was necessary to preserve the mother's life and health—that this was an element of the offense that the prosecution must establish. *Id.* at 71. Nothing in such a holding implies a legal ruling about the constitutional status of the fetus, and no such question appears to have been presented or addressed in *Vuitch*. (Fetal legal personhood does not logically dictate that there could be no exceptions to an abortion prohibition, in cases akin to traditional notions of self-defense against serious threats to life or limb, or necessary defense of third parties.) See *infra* notes 236–40 and accompanying text.

¹⁸⁹ 381 U.S. 479 (1965); cf. *Skinner v. Oklahoma*, 316 U.S. 535 (1942). See generally *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

¹⁹⁰ See, e.g., *Steinberg v. Brown*, 321 F. Supp. 741, 746–47 (N.D. Ohio 1970) (three-judge panel).

the personhood of unborn human fetal life. It is simply not precedent for any proposition concerning personhood.¹⁹¹

What about pre-*Roe* lower court decisions, by state and federal courts? The force of such precedent is obviously weaker. Moreover, the decisions themselves were divided: Some cases, cited in *Roe*, indeed had rejected legal personhood for the unborn.¹⁹² Some cases, *mis*-cited in *Roe*, did not actually

¹⁹¹ Professor Akhil Amar has observed that *Roe* is “a rather unimpressive effort” as a doctrinal argument based on precedent:

As a precedent-follower, *Roe* simply stringcites a series of privacy cases involving marriage, procreation, contraception, bedroom reading, education, and other assorted topics, and then abruptly announces with no doctrinal analysis that its privacy right “is broad enough to encompass” abortion. *Ipse dixit*. But as the Court itself admits a few pages later, the existence of the living fetus makes the case at hand “*inherently different*”—the italics here are mine—from every one of these earlier-invoked cases.

Amar, *supra* note 75, at 778 (footnote omitted).

¹⁹² *McGarvey v. Magee-Womens Hospital*, 340 F. Supp. 751, 754 (W.D. Pa. 1972), cited in *Roe v. Wade*, 410 U.S. 113, 158 (1973), rejected constitutional personhood for the unborn, as did the decision of the New York Court of Appeals in *Byrn v. New York City Health & Hospitals Corp.*, 286 N.E.2d 887, 890 (N.Y. 1972). Interestingly, in light of the quasi-legislative nature of the abortion right created in *Roe*, *McGarvey* rejected legal personhood on the ground that recognizing such a right “would be to create a new administrative jungle in the name of a civil right never heretofore conceived”—no pun intended, no doubt. This was “a problem for the legislatures of the various states. They must decide the problems in the light of the moral issues, the conflicting rights of the mother and child, the extent of medical knowledge and the interests of the state.” Any other result “would cause universal confusion and would be a striking example of judicial legislation.” *McGarvey*, 340 F. Supp. at 754 (*McGarvey*’s discussion of the impropriety of “judicial legislation,” applied to the question of the meaning of the word *person*, is interesting in light of the evidently legislative nature of the abortion right created, as a matter of *due process*, in *Roe*).

Byrn upheld New York’s statute liberalizing abortion as against a challenge brought on the ground that the statute deprived the unborn of the right to life. The Court rejected constitutional personhood, on the ground that the issue was reserved to the moral judgment of the legislature: “The Constitution does not confer or require legal personality for the unborn; the Legislature may, or it may do something less, as it does in limited abortion statutes, and provide some protection far short of conferring legal personality.” 286 N.E.2d at 890.

The clearest lower court precedent deciding against constitutional personhood was the decision of the three-judge federal district court in *Abele v. Markle*, a three-judge district court decision that the Supreme Court vacated for reconsideration in light of *Roe* and *Doe v. Bolton*. 351 F. Supp. 224, 228 (D. Conn. 1972), *vacated*, 410 U.S. 951 (1973). *Abele* struck down a Connecticut law banning abortion except where necessary to safeguard the life of the mother. *Id.* at 232. The court rejected the view that human fetuses are persons within the meaning of the Fourteenth Amendment:

Our conclusion, based on the text and history of the Constitution and on cases interpreting it, is that a fetus is not a person within the meaning of the fourteenth amendment. There is nothing in the history of that amendment nor in its interpretation

stand for such a position.¹⁹³ And at least one prominent constitutional decision by a three-judge federal district court, *not* cited in *Roe*, had explicitly embraced constitutional legal personhood status for the unborn.¹⁹⁴ The better conclusion from the pre-*Roe* lower court precedents is that the issue of legal personhood was *unsettled*. Before *Roe*, the issue had spawned markedly contrasting judicial conclusions.

The force of pre-*Roe* precedent, then—Supreme Court and lower court—on the issue of personhood for the unborn, was simply *not clear*, one way or the other. No Supreme Court decision stood for such a proposition or strongly

by the Supreme Court to give any support whatever to the contention that a fetus has constitutional rights.

Id. at 228.

¹⁹³ *Montana v. Rogers*, 278 F.2d 68, 72 (7th Cir. 1960), *aff'd sub nom. Montana v. Kennedy*, 366 U.S. 308, 312 (1961), cited by *Roe*, 410 U.S. at 158, held only that persons *not* “born” in the United States were not citizens of the United States by virtue of birth, within the meaning of the Fourteenth Amendment’s Citizens Clause—and that this conclusion was not affected by the fact that a person may have been *conceived*—(but not born) in the United States. This was not a holding concerning the meaning of “person,” but one concerning the meaning of “born.” *Keeler v. Superior Court*, 470 P.2d 617, 623 (Cal. 1970), also cited by *Roe*, 410 U.S. at 158, was an interpretation of the California murder statute, in which the California Supreme Court concluded that the legislature did not intend that the statute’s prohibition of murder of any “human being” includes an unborn but viable fetus. *Keeler* was not an interpretation of the word “person” as used in the Fourteenth Amendment, but of California’s state-law criminal murder statute.

Likewise, *State v. Dickinson*, 275 N.E.2d 599, 602 (Ohio 1971), cited by *Roe*, 410 U.S. at 158–59, involved a construction of an Ohio vehicular homicide statute concerning acts causing the death of “another [person].” The Ohio court found that the death of a fetus was not within the scope of the statute’s prohibition, as a matter of state law. The case involved no issue of interpretation of the Fourteenth Amendment.

¹⁹⁴ *See, e.g., Steinberg v. Brown*, 321 F. Supp. 741, 745 (N.D. Ohio 1970) (three-judge panel). *Steinberg* upheld the constitutionality of Ohio’s criminal abortion statute. *Id.* at 748. Rejecting the plaintiffs’ contention that the rationale of *Griswold v. Connecticut*, 381 U.S. 479 (1965), extended to a right to abortion, the court drew a line between contraception, which does not destroy a human life but merely prevents its creation, and abortion, which involves a distinct human life. *Steinberg*, 321 F. Supp. at 746–47. The court found that that newly created life was entitled to constitutional protection as a person:

Thus contraception, which is dealt with in *Griswold*, is concerned with preventing the creation of a new and independent life. The right and power of a man or a woman to determine whether or not to participate in this process of creation is clearly a private and personal one with which the law cannot and should not interfere.

It seems clear, however, that the legal conclusions in *Griswold* as to the rights of individuals to determine without governmental interference whether or not to enter into the processes of procreation cannot be extended to cover those situations wherein, voluntarily or involuntarily, the preliminaries have ended, and a new life has begun. Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it.

Id. at 746–47.

suggested it. And lower court decisions were conflicting. (The *Roe* Court's assertion that its conclusion that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn" was "in accord with the results reached in those few cases where that issue ha[d] been squarely presented,"¹⁹⁵ is simply not accurate. The pre-*Roe* lower court decisions were divided.) As an argument from precedent, *Roe* is hard—if not impossible—to defend.

Interestingly, the most relevant pre-*Roe* constitutional precedents construing the word *person* had nothing directly to do with abortion. While there may have been no Supreme Court decisions interpreting the Constitution's language with respect to living-but-not-yet-born human fetuses, there was prominent and important Supreme Court precedent interpreting the constitutional meaning of *person* in a different respect: whether the term embraced corporations as artificial legal "persons" entitled to the constitutional protections of the Fourteenth Amendment.¹⁹⁶ This of course was the other sense in which Blackstone's classic formulation identified the legal term-of-art meaning of "persons" as extending beyond born human beings.¹⁹⁷ It is perhaps instructive, as a matter of the force of precedent in identifying constitutional meaning, that a series of early Supreme Court decisions interpreting the Fourteenth Amendment adopted the Blackstonian understanding of legal "persons," *in this respect*, as encompassed by the language of the Fourteenth Amendment.¹⁹⁸ While legal personhood for corporations may remain contested in certain legal circles today,¹⁹⁹ that is not really the point. Rather, the point is that, so far as precedent is concerned, the earliest, most direct, and weightiest pre-*Roe* judicial interpretation of the Fourteenth Amendment's use of the word "person" embraced the Blackstonian position. The constitutional meaning of the word

¹⁹⁵ *Roe*, 410 U.S. at 158.

¹⁹⁶ *See, e.g.*, *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888).

¹⁹⁷ BLACKSTONE, *supra* note 27, at *119.

¹⁹⁸ *Pembina*, 125 U.S. at 189 ("Under the designation of 'person' [in the Fourteenth Amendment] there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution."). The earliest Supreme Court reference to corporations as legal "persons" within the meaning of the Fourteenth Amendment appeared two years earlier, in the reporter's notes of remarks made at argument in the case of *Santa Clara County v. Southern Pacific Railroad*:

MR. CHIEF JUSTICE WAITE said: The court 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 opinion that it does.

118 U.S. 394, 396 (1886) (syllabus).

¹⁹⁹ *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 972 (2010) (Stevens, J., dissenting) ("Corporations help structure and facilitate the activities of human beings, to be sure, and their 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established.").

person in early judicial interpretation was *not* limited to born human beings but instead embraced a highly specific term-of-art understanding tracing back to traditional notions of legal personhood. And, as noted earlier, the leading authoritative legal source for such an understanding also embraced legal personhood for living, but not yet born, human beings, as soon as their independent human life could be identified by virtue of its detectable movement in the mother's womb.²⁰⁰

Finally, when considering the force of precedent before *Roe*, one arguably should take into account *non-judicial* precedent in the form of de facto, functional interpretations of the meaning of the Fourteenth Amendment term "person," as it concerns abortion, in statutory law. After all, constitutional interpretation is not the exclusive province of courts.²⁰¹ It occurs, as a practical matter, explicitly or implicitly, every time a legislature enacts a statute (though with widely varying amounts of thoughtfulness and analytic rigor).²⁰² Constitutional interpretation of this sort may take place in state legislatures as well as in Congress. It is in this sense that the broad pattern of state abortion-prohibition statutes by the states and by territorial (federal) governments at the time of adoption of the Fourteenth Amendment is most pertinent.²⁰³ It is not that the existence of abortion-prohibition state laws disproves the possibility that the Fourteenth Amendment could have a meaning invalidating such laws. (After all, the amendment was designed to limit state power and authorize Congress to enforce such limitations.) Nor does the existence of abortion-prohibition state laws establish, at least not definitively, that the word "person" in the Fourteenth Amendment includes the unborn. But to the extent that the enactment of abortion prohibitions could be understood as (largely *sub silentio*) implicit constitutional interpretation by the states and territorial legislatures, and to the extent that Congress's and the courts' inaction in the face of such practical interpretation, for a hundred years, could be construed as a *sub silentio*

²⁰⁰ BLACKSTONE, *supra* note 27, at *125. For a more in-depth discussion of Blackstone's definition of legal personhood, see *supra* Part II.B.

²⁰¹ For an extended development of this now broadly accepted general idea (with some contestable applications), see generally Paulsen, *Most Dangerous Branch*, *supra* note 74. See also Paulsen, *The Irrepressible Myth*, *supra* note 72, at 2707–08. Professor David Currie's magnificent series of books on the history of the interpretation of the Constitution by Congress and by presidents displays this proposition in practice. See generally DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861* (2005); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829–1861* (2005); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801* (1997); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829* (2001); David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131 (2006).

²⁰² Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 224–37 (2002).

²⁰³ See *Roe v. Wade*, 410 U.S. 113, 174–75 (1973) (Rehnquist, J., dissenting) ("By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion.").

acceptance of such constructions, it surely should possess at least some slight probative value as “precedent.”

Put simply: the governing *practical* legal construction, by the states and by instrumentalities of the national government, for a century following adoption of the Fourteenth Amendment, was that unborn human life was deserving of legal protection against destruction, except for what the legislature regarded as compelling or important countervailing reasons.²⁰⁴ While the scope of such exceptions was never perfectly consistent among the states, and the mid-twentieth century saw increasingly liberalized abortion laws, “precedent” in the form of legislative practice, to the extent worthy of consideration, was consistent with a general understanding that living but unborn humans counted as persons entitled to the protection of the law.²⁰⁵

Once again, none of this is dispositive. The force, and weight, of judicial (and non-judicial) precedent on the question of constitutional legal personhood for the unborn is simply not clear. *Roe* adopted a particular conclusion and that conclusion has governed for forty years. If that itself is reason to follow *Roe*’s conclusion, then precedent points against personhood. Pre-*Roe* lower court decisions were divided, reaching differing conclusions. And early pre-*Roe* Supreme Court precedent, on a different specific question (corporate personhood) had embraced a broader, term-of-art legal meaning of *persons* under the Fourteenth Amendment, pointing uncertainly but presumptively in the direction of legal personhood for the unborn (and tending to reinforce the *textual* argument that the original public meaning of the constitutional term *persons* embraced the unborn, per the Blackstonian view).²⁰⁶ Precedent, a highly debatable source of constitutional interpretive authority in the first place, is of highly debatable relevance as applied to the specific question of whether the word “persons” may include unborn but living human beings present in their mothers’ wombs.²⁰⁷

²⁰⁴ See *id.* at 174–77 (Rehnquist, J., dissenting).

²⁰⁵ *Id.*

²⁰⁶ See *supra* note 205 and accompanying text.

²⁰⁷ What about post-*Roe* judicial precedent in state and federal courts addressing the legal status of the unborn as distinct legal persons, in non-abortion contexts (like state wrongful death and homicide statutes)? Such precedent is of secondary importance, to the extent it is not direct interpretation of the meaning of the word “person” in the Fifth and Fourteenth Amendments, but nonetheless might validly be thought relevant to the extent it tends to undermine the authoritative status or consistency of the Court’s conclusion in *Roe*: under the Supreme Court’s formulation of the doctrine of stare decisis in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the force of a precedent is weakened to the extent it has been undermined by other decisions, so that it might be thought a “remnant” or derelict of generally abandoned doctrines. See *id.* at 854–55; Paulsen, *Abrogating Stare Decisis*, *supra* note 10, at 1557–61; Paulsen, *Does the Supreme Court’s Current Doctrine of Stare Decisis Require Adherence to the Supreme Court’s Current Doctrine of Stare Decisis?*, *supra* note 172, at 1203–05.

For a sampling of such post-*Roe*, non-abortion state and federal judicial precedent (tending more in the direction of recognizing the living human fetus as a separate,

VI. POLICY, PRAGMATICS, EVOLVING MEANING, AND THE PROGRESS OF SCIENCE

The last criterion of constitutional meaning—last and, for good reason, least—is whether, independently of original textual meaning; logical inferences from constitutional structure or analogy; subjective historical intention, understanding, or expectation; or longstanding practice and clear judicial precedent, considerations of policy, science, or society’s evolving views of what is just, right, and true dictate that a constitutional provision *ought to be* interpreted (or re-interpreted) to mean a particular thing or to dictate particular conclusions. This cluster of criteria is controversial precisely because it does not involve interpretation of the constitutional text so much as explicitly normative reimagining and refashioning of that text: What should the text be taken or made by interpreters to mean, so that it is in some relevant sense a “better” text than its words, structure, and history otherwise would suggest?

This of course was the approach of *Roe v. Wade* itself: *Roe*’s result had essentially nothing to do with the text, structure, or history of the Constitution and only the most tenuous of connections to prior judicial precedent, from which the Court in *Roe* extrapolated freely and loosely.²⁰⁸ No rule or principle supplied by a fair reading of the text; no rule fairly derived from the Constitution’s internal structure, logic, or other clear propositions within the document; and no rule fairly attributable to the Framers’ or ratifiers’ intentions, expectations, or even general purposes, remotely supports *Roe*’s result. No precedent decision compelled or even very strongly supported the outcome in *Roe*.

Roe was primarily if not entirely a decision of judicially devised abortion *policy*. The justices created an abortion right not because the Constitution’s text provides one but because it seemed to the justices an appropriate thing to do as a matter of policy.

That policy decision is contestable, as all policy decisions are. That is part of what makes such pure policy arguments so dubious as a device for constitutional interpretation. In a representative democracy, policy choices typically are to be made by representative institutions; courts have authority to set aside such choices only when contrary to rules of law constraining such choices. As I have argued elsewhere, *Roe*’s policy is horrible. The decision essentially creates “a plenary right of some human beings to kill other human beings for any reason or for no reason at all.”²⁰⁹ To the extent *Roe* reached the

independent person) and for lucid summaries and analyses of such cases, see Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 616–19 (1987). See generally Paul Benjamin Linton, *The Legal Status of the Unborn Child Under State Law*, 6 ST. THOMAS J.L. & PUB. POL’Y 141 (2011).

²⁰⁸ See Paulsen, *Paulsen, J., Dissenting*, *supra* note 10, at 197–208 (canvassing these arguments with respect to the issue of whether the Constitution creates an abortion right).

²⁰⁹ *Id.* at 197.

result it did because the Court felt that it was doing *justice*, it can fairly be argued that what *Roe* did was the exact opposite of justice—indeed, that *Roe* is one of the most atrociously unjust decisions in the Supreme Court’s history.²¹⁰ My substantive-justice policy position is no more falsifiable than the *Roe* Court’s, on constitutional criteria, because there are few or no such criteria for evaluating policy arguments as being more or less correct as a matter of constitutional interpretation. Policy arguments can be merely so many collections of personal preferences.

But let us indulge the assumption that policy-based constitutional arguments are legitimate and play the game, for the sake of argument. Let us consider substantive-justice policy arguments specifically with respect to how present-day interpreters should understand the word “persons.” *Should* the term be construed to include the unborn? As with all policy-driven constitutional arguments, it is always possible to make arguments on either side and almost impossible to evaluate the merit of such arguments in terms of neutral, external criteria supplied by the Constitution. Still, there are at least some plausible, contemporary social-policy arguments that might be thought properly to inform the meaning of the term “persons” and that do so in a way less susceptible than other such policy arguments to the charge of simple personal preference.

First, a fairly compelling “evolving-meaning” policy argument for a broad understanding of *person* as including the unborn (even if such a reading would not otherwise be thought warranted by consideration of text, structure, history, and precedent) can be erected on the platform that the state of our scientific and medical knowledge is simply far more advanced than it was at the time the Fifth and Fourteenth Amendments were adopted. As a result of advances in embryology and medical knowledge generally, as well as in technological means for observation and evaluation of the embryo and fetus at far earlier stages than was possible in the eighteenth and nineteenth centuries, *we now know*—far more certainly and clearly than ever before—that a new, distinct human life comes into existence at the moment of conception.²¹¹ We know, if we did not know before, that the being gestating in the mother’s womb, is the same biological living human organism—the same human being—as he or she will be after birth. There is no ontological transformation that occurs at the point of birth, or at some mid-point in pregnancy (such as the medieval or Enlightenment theological or practical line of “quickening”), or at any other point subsequent to conception. The man or woman, or boy or girl, who is a living-breathing-walking-talking “person” today is the same ontological being—the same person—as he or she was in the womb, beginning at the point of conception. He or she may have different capacities now, have had more and different life experiences, and possess some different physical, mental, and

²¹⁰ *Id.* at 211–13; see also Paulsen, *Worst Constitutional Decision*, *supra* note 10, at 1001.

²¹¹ For a powerful, readable, concise, straightforward philosophical defense of this (medically obvious) proposition, see Mathew Lu, *Potentiality Rightly Understood*, PUB. DISCOURSE (Nov. 14, 2012), <http://www.thepublicdiscourse.com/2012/11/6236>.

emotional attributes than he or she had as a zygote, embryo, fetus, newborn, toddler, or teenager. (One expects and hopes so.) But he or she is the *same* human *being* as he or she was at each of those earlier stages in the human life cycle. He or she is the same organism, the same person, as he or she was at each of those stages of development.²¹²

We know this to be true as a matter of basic scientific fact. Biologically speaking, the human embryo or fetus is not “potential” human life. It is an actual, distinct, extant individual human life. He or she (for it is also an incontrovertible fact that the fetus has a sex from conception)²¹³ has potential for further growth, change, and development, obviously. But the life in question is the same human life throughout. To claim that the unborn human embryo is not existing human life is, as I have put it before, “from a scientific and medical standpoint, simply absurd. No serious physician or biologist would hold such a view. To so claim is either an act of ignorance or one of willful intellectual dishonesty.”²¹⁴

We did not always know this.²¹⁵ At the very least, the scientific evidence was not always so clear as to the point at which a human life begins. In addition, our technological capabilities have grown, so that we now have the ability to *see*—to detect and observe—new human life at points when such life could not have been detected, let alone observed, in earlier centuries. As noted earlier, this past deficiency explains in part Blackstone’s eighteenth-century observation that the law recognizes the existence of a new, distinct person when

²¹² *Id.* (“I began my existence as a zygote. I am just as much the *same thing* as that zygote as I am the *same thing* as my one-year-old self. This is important because the ground of my identity with my one-year-old self cannot be either material or psychological. I do not share the same matter as that child, nor do I share any memories or experiences with him. And yet surely I am the same human being, the same organism, the same substance, the same person.”).

²¹³ See, e.g., KRISTINE BARLOW-STEWART, CTR. FOR GENETICS EDUC., FACT SHEET 1, GENES AND CHROMOSOMES: THE GENOME 3 (2012), available at <http://www.genetics.edu.au/Information/Genetics-Fact-Sheets/Genes-and-Chromosomes-FS1>.

²¹⁴ Paulsen, *Worst Constitutional Decision*, *supra* note 10, at 1017; see also Paulsen, *Accusing Justice*, *supra* note 10, at 47–48.

²¹⁵ The *Roe* opinion noted that “[t]here has always been strong support for the view that life does not begin until live birth.” 410 U.S. 113, 160 (1973). The *Roe* opinion attributed this view to the ancient Stoics, and purported to find it also in Jewish and medieval Christian thought. *Id.* Even if this were an accurate description of ancient beliefs, such beliefs obviously should have no relevance unless they formed part of the enacted legal meaning of the word “persons” in the Fifth and Fourteenth Amendments. To the extent the Court in *Roe* drew upon such observations to inform its policy judgment with respect to personhood, that judgment was simply factually wrong and should be discarded in light of actual medical knowledge. If the Stoics believed that life does not begin until live birth, they were mistaken as a matter of fact.

the fetus is “able to stir” in the mother’s womb.²¹⁶ Before that point, the fetus could not in the eighteenth century be *perceived* as living.²¹⁷

In the twentieth and twenty-first centuries we have no such technological difficulties and much more certain medical knowledge. Thus, even if the unborn child were not regarded as a legal “person” at the time of the original Constitution or at the time of adoption of the Fourteenth Amendment, that view should be revised in light of our superior state of knowledge today. If the old legal view was predicated on factual assumptions we now know to be mistaken, the meaning of “person” should be updated to reflect current knowledge.²¹⁸

At all events, it seems especially absurd in light of scientific knowledge to draw the personhood line at *birth*. Live birth is certainly an important event in a human being’s life cycle. It is an important marker and convenient dividing line for many purposes. But as far as human personhood is concerned, birth is an arbitrary point. Birth changes a human being’s location, not his existence as a human being. Legally, birth triggers certain rights that before birth did not exist (like citizenship) and starts the legal clock running for others (like presidential eligibility).²¹⁹ But birth clearly does not change *being* in a sense that affects whether the being in question is a distinctive human person or not. Birth does not change a non-human organism into a human organism.²²⁰ It is equally arbitrary and nonsensical to treat birth as changing a non-person into a person.

A second reasonable evolving-meaning policy argument for interpreting “person” broadly to include the unborn is simply the liberal policy generally favoring broad, inclusive understandings of the scope of human rights and the persons to whom they extend. Simply stated: As between a narrower construction of “persons” that defines certain living human beings as non-persons, outside the protections of the law, and a broader construction that resolves uncertainties or potentially difficult line-drawing questions in favor of

²¹⁶ See BLACKSTONE, *supra* note 27, at *125.

²¹⁷ As suggested earlier, Blackstone does not say that the unborn child *is not* actually a living, separate human being before he or she is able to stir in the womb. See *supra* notes 37–55. Rather, Blackstone can be read as saying only that demonstrated ability to stir in the womb *establishes* that such an actual separate living human being *is present* in the womb, so that the law confidently can recognize the existence of another individual *person*. Ability to stir functions as something of a “safe harbor” for legal personhood: such ability demonstrates that a person exists. The absence of such an ability does not demonstrate that a person does not exist.

²¹⁸ Indeed, as noted above, it is not even necessary to cast this argument as one for changing the *meaning* of the word person from its original understanding. One can as readily view the argument as one merely for *recognizing* that the unborn human embryo or fetus *always did* fit within the category of legal “persons” but, because of limited knowledge and technology, this fact was not known at the time. See *supra* at pp. 27–29.

²¹⁹ See U.S. CONST. art. II, § 1, cl. 5 (“[N]either shall any Person be eligible to [the office of President] who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.”); U.S. CONST. amend. XIV, § 1 (“All persons born . . . in the United States . . . are citizens of the United States . . .”).

²²⁰ See Lu, *supra* note 211.

greater coverage, the latter is to be preferred. Human societies have had a good deal of experience with definitional exclusion of “the other” as unworthy of equal treatment as a fellow human being possessed of equal dignity and moral worth. Examples range from extreme tribalism to slavery, to the treatment of women at certain times and in certain cultures, to the eugenics movement, to Nazism. None of this experience has been good. Blacks, women, Asians, Jews, the mentally or physically disabled, and gays have all, at times, arbitrarily been excluded from the full rights of persons.²²¹ With good reason, then, we should be wary of any policy argument that takes a category of apparent human beings and *defines* them to be non-persons—legal non-entities. At the very least, any such categorical exclusion surely should be subjected to “strict scrutiny” (a familiar legal construct) and require extraordinary justification in order to be sustained. There should thus be, as a matter of sound constitutional policy, a strong *presumption* in favor of personhood and a commensurately heavy resistance to less-than-compelling arguments against a class of seeming persons being counted as, legally, “persons.”²²²

Roe adopted the reverse presumption. The Court, in a move notorious to its detractors and embarrassing even to its defenders, stated that it did not need to “resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”²²³ Yet just a page earlier it had rejected the proposition that the unborn counted as persons under

²²¹ For a sampling of notorious judicial examples of explicit or implicit denial of full personhood status in law, see *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding constitutionality of racial segregation); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856) (describing Africans as “beings of inferior order, and altogether unfit to associate with the white race” and “so far inferior” as to possess “no rights which the white man [is] bound to respect,” attributing such a view to the framing generation, and holding that persons of the African race cannot be citizens of the United States). *See also* *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment of Japanese-American U.S. citizens on the basis of their Japanese ethnic heritage); *Buck v. Bell*, 274 U.S. 200, 207 (1927) (finding that state law authorizing sterilization of the mentally impaired, because of their disability, does not deny equal protection of the laws, on ground that “[t]hree generations of imbeciles are enough”); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (upholding a state supreme court decision excluding a woman from the practice of law because of her sex); Robert A. Destro, *Law and the Politics of Marriage: Loving v. Virginia After 30 Years Introduction*, 47 CATH. U. L. REV. 1207, 1221 n.42 (1998) (discussing how, “[l]ike their Nazi counterparts, American eugenics advocates branded minorities and persons with developmental disabilities as genetically undesirable, ‘socially inadequate and a constant menace to the white race and society at large.’” (quoting Barbara L. Bernier, *Class, Race, and Poverty: Medical Technologies and Socio-Political Choices*, 11 HARV. BLACKLETTER L. J. 115, 130 (1994))).

²²² *Cf.* *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152–53 n.4 (1938). If ever there were a category for inclusion and protection as a discrete and insular minority class, lacking effective access to the political process for protection of rights, it is the unborn.

²²³ *Roe v. Wade*, 410 U.S. 113, 159 (1973).

the Fourteenth Amendment: “All this . . . persuades us that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”²²⁴

There are some rather obvious problems with this juxtaposition of non-conclusion and conclusion: First, if a new human life did exist from the point of conception—the point on which the Court said it was so deeply uncertain—then the preceding conclusion that “the word ‘person’ . . . does not include the unborn” becomes deeply problematic. In such event, the Court would be saying that a human *life* exists that is *not a person*. That would be incoherent—so much so, in fact, that purported agnosticism about the factual question of when human life begins cannot tolerably coexist with the conclusion that unborn are not persons. That leads to the second problem: agnosticism about life’s beginnings should lead to *uncertainty* about legal personhood for the unborn, not *rejection* of such a proposition. *Roe*’s life’s-beginning-point-is-uncertain-but-the-unborn-are-certainly-not-persons stance is not logical. Third, as discussed, as a bare matter of policy, agnosticism or uncertainty should yield a presumption of inclusion, not exclusion, from the category of human personhood. Just as uncertainty about whether a person is dead should produce caution with respect to burial, uncertainty about whether a living human being is a person should yield caution with respect to killing. The error costs of mistaken exclusion are simply enormous. And finally, as noted above, the question of when human life begins is simply not “difficult” at all. It is a matter of rudimentary scientific knowledge that human life begins at conception.²²⁵ A new human being, a biologically distinct individual, exists from that point forward. As a matter of policy, then, the factual premises, the presumptions, and the reasoning of *Roe* concerning personhood are all wrong.

The best policy argument *against* interpreting “person” to include the unborn is that doing so would have the consequence of imposing burdens on pregnant women—and, in a fairly-designed social system, men too—that they otherwise might avoid by abortion. Clearly, recognition of unborn children as persons possessing constitutional rights to life and equal protection would severely limit the circumstances in which the law could tolerate the killing of such children. And clearly, pregnancy, childbirth, and parental responsibilities can be genuine burdens on those who otherwise would not have to bear such burdens. But this policy consideration does not bear very persuasively on how we should construe “*person*”—if inconvenience to or burden on another was sufficient to make someone not a person we would all be in trouble—but goes more to how the competing interests of different persons should be balanced in the abortion policy calculus. Some asserted harms created by pregnancy, childbirth, and parenthood should perhaps prevail and justify the regrettable killing the unborn child, even if recognized as being a person. (Even the most committed pro-life champions accept this proposition, at least for certain

²²⁴ *Id.* at 158.

²²⁵ Lu, *supra* note 211.

circumstances.)²²⁶ And some such asserted harms certainly should not prevail over the unborn child's constitutional rights, as a person, to live and to receive the protection of law. (Even some defenders of the pro-abortion-freedom position concede as much.)²²⁷ But it seems mistaken, and a bit extreme, to say that a desire to strike the policy balance entirely in the direction of abortion freedom warrants reaching a negative conclusion concerning whether the unborn are "persons" in the first place.

What about the unfairness of the relative burdens that human biology (in part) and human society and law (in part) place on women and men with respect to pregnancy, childbirth, and parental responsibilities? Again, these important social policy considerations seem to be collateral to the question of legal personhood for the unborn. One could conclude that the unborn are persons and still address these questions of unequal burdens through social policy. And one could conclude that the unborn are *not* persons and yet find that the unequal biological and social-construct burdens on women and men, resulting from pregnancy, would largely remain.²²⁸ The relative burdens on women and men can, and should, be made more equal, but this social-policy goal exists whether the fetus is a person or not. A dispute about unequal treatment of A, relative to B, resulting from A's more demanding duties with respect to C, should be remedied by adjusting the unequal treatment of A relative to B, not by declaring C to be a non-person to whom neither A nor B should owe any duty whatever.

Policy considerations, then, to the extent relevant to constitutional interpretation, and notions of "living constitutionalism" under which the meaning of constitutional provisions may be understood to evolve and grow

²²⁶ Paulsen, *Worst Constitutional Decision*, *supra* note 10, at 1020 ("Even granting the status of the human fetus as human life, entitled to moral regard as such, there are doubtless 'hard cases' where one might think that the value of giving full regard to human life must yield to another value. Traditionally, private violence against the life of another sometimes may be justified, or excused, when such violence is necessary to save one's own life or the life of an innocent third party. Thus, many pro-life advocates concede that abortion is morally justifiable (or excusable) where necessary to save the life of the child's mother.").

²²⁷ Polling data consistently show that many who consider themselves "pro-choice" on abortion in fact favor restrictions of many kinds on abortion, and oppose numerous reasons for which abortion legally may be obtained under *Roe*. See Steven Ertelt, *Gallup Finds "Pro-Choice" Americans Back Most Abortion Limits*, LIFE NEWS.COM (Aug. 8, 2011, 6:08 PM), <http://www.lifenews.com/2011/08/08/gallup-finds-pro-choice-americans-back-most-abortion-limits/>.

²²⁸ See generally Richard Stith, *Her Choice, Her Problem: How Abortion Empowers Men*, FIRST THINGS, Aug.–Sept. 2009, at 7, available at <http://www.firstthings.com/article/2009/07/her-choice-her-problem>. See also Paulsen, *Paulsen, J., Dissenting*, *supra* note 10, at 216–17 n.9 ("If one is concerned about the special burdens of pregnancy and motherhood, the remedy is better social and political accommodation of pregnancy and motherhood. . . . Pregnancy, childbirth, and parenthood impose unique burdens and special obligations. The proper response of society is reasonable accommodation of those who bear these burdens and assume these obligations so that they may be fully equal citizens and participants in the life of the nation, *not* to create a legal right to eliminate pregnancy by exterminating an unborn child.").

over time, tend on balance to support reading the word “*person*” to include the unborn. Scientific knowledge has advanced to the point that it is now recognized as basic biological fact that a new human life, and a distinctive individual human identity, exists from the point of conception—information that points strongly in the direction of personhood. Modern recognition of the imperative of universal human rights, and of the dangers of definitional exclusion from the human community of persons, points strongly toward a presumption in favor of a broader, more inclusive understanding of who fits within the category of legal *persons*. And policy arguments from autonomy, freedom, avoidance of the burdens of pregnancy, childbirth and parenthood, and equality, whatever their weight and merit, are essentially collateral to issues of the *personhood* of the unborn. They are mostly relevant at the point of consideration how to balance, or adjust, the conflicting rights or interests of different persons.

VII. CONCLUSION

Where are we, then, in the end? 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 Amendments’ protections of the rights of persons extend to the unborn. But they do, on balance, suggest the *plausibility* of such legal personhood. Indeed, if forced to choose between the alternatives, the weight of the evidence and reasoning far more strongly supports the personhood position than rejects it.

The text itself may fairly be said to be indeterminate, or under-determinate, on this point. But not by very much: Evidence of original public meaning in historical and legal context—notably, the backdrop legal understanding of “*person*” in conventional legal discourse at the time, set forth in Blackstone and carried forward in the American understanding—leans strongly in the direction of resolving any surface ambiguity in the direction of legal personhood for the unborn at some point during pregnancy and most definitely by the point when the child is “able to stir” in the womb.²²⁹ Intratextual comparisons with usage of “*person*” in other constitutional provisions yield uncertain conclusions because the comparisons frequently are not precisely analogous.²³⁰ And where they are, they still suggest that the conclusion could run in either direction. At the same time, first principles of constitutional structure and democratic governance are quite strongly suggestive of an interpretive “default rule” for such cases of linguistic ambiguity and uncertainty: that democratic representative choices may not properly be invalidated by courts as contrary to a rule of law supplied by the Constitution where the choice fairly lies within the range of meaning admitted by an indeterminate or under-determinate text.²³¹ If the meaning of the

²²⁹ See *supra* Part II.

²³⁰ See *supra* Part III.A.

²³¹ See *supra* Part III.B.

word *person* fairly *may* include the unborn—if such a construction lies within the range of meaning afforded by ambiguity or uncertainty—state legislatures, and Congress, can act legislatively on such an interpretation.

Historical evidence of “original intent” is unclear on the point, largely because abortion was not at all the focus of the discussion.²³² The term *person* appears to have been used synonymously with the category of “human beings,” generally, and the framers of this constitutional language can fairly be deemed to have contemplated a broad, inclusive understanding of the term. There is no evidence to the contrary on this point. Again, this does not yield up a definite conclusion with respect to whether the unborn were subjectively *intended* to be protected as constitutional persons. But the principle is reasonably clear: all living, individual members of the human race were intended to be protected, as persons, in certain core human rights, including the right to life and to the equal protection of the laws.

Judicial precedent and doctrine is decisively against reading “person” to include the unborn, if *Roe* and its progeny are counted—but that of course is the very question under consideration: whether *Roe* and its progeny are correct on this question. Reliance on *Roe* in this sense seems somewhat circular. Judicial precedent and doctrine, considered apart from the *Roe* line, point to no certain or definite conclusion. Pre-*Roe* lower court decisions were divided. Longstanding Supreme Court precedent recognizing the legal “personhood” of corporate entities leans slightly in the direction of the traditional Blackstonian conception of legal personhood, which, as noted, recognized legal personhood for the unborn to a significant extent. If pre-*Roe* *practice*, in the form of state and federal statutes, counts in the precedent category, there is another slight push in the direction of personhood—at the very least stronger than the force of legislative precedent in the opposite direction.²³³

Policy considerations can be taken in practically any direction and are therefore rightly regarded as suspect. Nonetheless, an evolving-meaning, changed-information policy argument can fairly be made for reading “persons” broadly, in accordance with advances in scientific knowledge establishing beyond doubt that an individual human life begins at conception and continues through various stages of development, and also in accordance with a presumption favoring broad inclusion, rather than selective exclusion, of members of the human family from the definition of legal “persons.”²³⁴

In sum, the legal personhood of the unborn is an entirely plausible interpretation of the Due Process and Equal Protection Clauses of the Constitution. It is perhaps not an interpretation compelled by the document, but surely it is not (as *Roe* held, in effect) an interpretation foreclosed by the document. Personhood for the unborn, and attendant constitutional rights to life

²³² See *supra* Part IV.

²³³ See *supra* Part V.

²³⁴ See *supra* Part VI.

and protection for such persons, falls within the range of meaning admitted by the language of the Constitution.

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 living but unborn humans does not itself say anything specific about what the precise legal regime must be with respect to abortion. Blackstone, for example, observed that in legal contemplation human life, and consequently the rights of persons as persons, begins when an infant is “able to stir.”²³⁵ But Blackstone also noted the different ways the law acted upon this premise—the implication being that, while legal personhood obviously has consequences for what the legal regime ought to be, it might not itself determine that regime in all particulars.²³⁶ There is reasoning that remains to be done, even if the personhood of the unborn is accepted as the starting point for that reasoning.

Thus, the fact that the unborn might properly be considered constitutional persons within the American legal order, vested with rights to life and to protection of the state’s laws from harm committed by others, does not get one all the way to resolving questions of how to reconcile those rights with possibly conflicting rights or legal interests possessed by others. Justice Blackmun’s *Roe* opinion stated that “[i]f this suggestion of personhood is established,” the case for recognizing a plenary Fourteenth Amendment right to abortion “collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment.”²³⁷ This of course is partly right: a constitutional right to life, and to the protection of law, is surely inconsistent with a plenary legal right of others to take that life. But it is only partly right: the right to life of unborn persons does not necessarily mean that such a right must supersede any and all competing rights of other persons in every circumstance. Clearly, for example, the pregnant woman has a right to life too. What happens when two rights to life, held by two different persons, conflict with one another is something that the proposition of personhood for the unborn does not settle all on its own. Justice Blackmun was obviously wrong in thinking that the proposition of personhood, because it suggests that a claimed *general* right to abortion could not be recognized, must be incorrect because that would then mean that abortion would be impermissible even to save the mother’s life—that *any* exceptions automatically would be unconstitutional.²³⁸ Such a proposition is utterly illogical.²³⁹

²³⁵ See BLACKSTONE, *supra* note 27, at *129.

²³⁶ *Id.* at *125–26.

²³⁷ *Roe v. Wade*, 410 U.S. 113, 156–57 (1973).

²³⁸ See *id.* at 157–58 n.54.

²³⁹ Consider Professor Akhil Amar’s devastating, quick critique of Blackmun’s reasoning on this score:

In a footnote Justice Blackmun suggests that if a fetus is indeed a Fourteenth Amendment “person,” a state could probably not allow abortion even to save the life of the mother. Would not such a pro-mother rule “appear to be out of line with the

Rather, what personhood probably would mean is that certain less-weighty competing interests of other persons would have to yield to the unborn child's right to live and that the state's judgments in this regard would be subject to some range of choice but also to meaningful scrutiny. Personhood would also mean that a legal regime permitting abortion in certain exceptional circumstances could not do so in a fashion that permitted unborn persons' lives to be taken without due process of law or that denied the unborn equal protection of the laws. Such persons would be constitutionally entitled to (1) *process* appropriate to the life-and-death stakes involved; and (2) *protection* equal to that afforded other persons in comparable situations. Working out the details of what process is due, and what protection is equal, involves a further reasoning process with some room for disagreement as to specifics. It might well follow, for example, that the mandate of due process requires a hearing at which someone is permitted to represent and advocate for the interest of the unborn child in living; and that equal protection might forbid allowing the human fetus to be killed for reasons substantially less weighty than those recognized by the law as allowing other killings for reasons of self-defense or to save the gravely endangered life of another.²⁴⁰

Finally, it must be repeated and remembered that the plausibility of personhood, as an interpretation *allowed* by the fair range of meaning of the word "person" in legal usage, does not necessarily mean that such a reading is

[Fourteenth] Amendment's command?" he asks. The only thing out of line here, I suggest, is Justice Blackmun's convoluted logic. . . . Where a mother's life is at stake, what *exactly* in the Fourteenth Amendment would prevent the state from allowing her to save herself, even at the expense of the "person" she is carrying inside her?

Amar, *supra* note 75, at 777 (footnote omitted).

²⁴⁰In an essay ten years ago, as part of a book of mock alternative opinions to *Roe* edited by Jack M. Balkin, I replied to the argument of "Chief Justice Balkin" that personhood was inconsistent with permitting abortion to save the life of the mother, unless the unborn child's rights were represented by counsel or a guardian *ad litem*. See generally Paulsen, *Paulsen, J., Dissenting*, *supra* note 10, at 196–218. Balkin, much like Blackmun, seemed to regard the notion as a *reductio ad absurdum* disproving the personhood suggestion. "Justice Paulsen" retorted:

But there is nothing at all absurd about this inadvertently insightful suggestion. It is simply *unfamiliar* in the abortion context. In an appropriate case in which a state permitted aborting the child to save the mother but failed to provide procedural safeguards to ensure equal protection of the child's life, it would certainly be open to this Court to consider whether the requirement of equal protection of the laws was not satisfied (assuming it having first been decided that the unborn child was a "person" within the meaning of the Fourteenth Amendment). Similarly, the Chief Justice seems to think it a refutation of any claim that the Fourteenth Amendment protects the legal personhood of unborn human fetuses that this might mean that some state laws are *too permissive* in the circumstances in which abortion is allowed. Indeed it might, but this is not a *refutation* of the Equal Protection personhood contention, if otherwise valid, but an *implication* of it.

Id. at 218 n.14.

therefore *required*. That would be to commit an equal and opposite error to *Roe*'s, which was to treat indeterminacy and uncertainty as yielding a conclusion that personhood was therefore forbidden. Rather, the plausibility, but uncertainty, of legal personhood for the unborn probably means that the text does not yield a *judicial* rule, in opposition to democratic choices, at all. The Supreme Court would not be justified in creating a full-blown right-to-life quasi-statute, in opposition to democratic choices, any more than it would be justified in creating a full-blown right-to-abortion quasi-statute, in opposition to democratic choices (as it wrongfully did in *Roe*). If "person" is, constitutionally, indeterminate or under-determinate as it respects the unborn such that either view falls fairly within the range of meaning of the imperfectly determinate text, then the constitutionally correct default rule is that the courts may not invalidate state legislative choices in this regard and that Congress may, pursuant to its powers under Section Five of the Fourteenth Amendment, supersede such choices by *its* constitutional interpretive judgment within the sphere of *its* broad legislative power.

It is at least possible, given the weight of the interpretive evidence, to state the conclusion more strongly yet: the personhood interpretation is not merely plausible but, on balance, *persuasive*—and certainly far more so than the interpretive alternative. One might fairly conclude that the meaning of "person" in the Fourteenth Amendment, as it concerns conceived-but-unborn human life, is not really "indeterminate" at all, but *sufficiently* determinate (even if not absolutely so) to permit a determinate conclusion in favor of legal personhood. Whether one judges this to be the case or not may turn, in the end, on differences in views (or subjective perceptions) concerning the strength, or evidentiary weight, necessary to move one from a position of uncertainty or indeterminacy to a position of confidence and definite repose.

At all events, the clear plausibility of personhood suggests at the very least that *Roe*—on this point as on so many others—is indefensible. Uncertainty, indeterminacy, or unclarity of the constitutional text on the point in question cannot logically yield a conclusion that the Constitution *rejects* personhood. If legal personhood for the unborn falls within the range of meaning of the constitutional text—if the Constitution does not supply a reasonably clear answer rejecting such a position as forbidden by text, structure, history, precedent, and policy—then there is no proper basis for the courts to invalidate a legislative choice predicated on such a view. The plausibility of personhood thus establishes the proper starting point for all further constitutional analysis of the abortion issue. It establishes that the first error of *Roe* was in its first premise that the Constitution's term "persons" necessarily *excludes* the unborn. The myriad other errors that followed were only made possible by that first unwarranted step.

The plausibility of personhood tends to establish one final point. If the conclusion that the unborn are persons is, in the end, regarded as too uncertain a reading of the text—too much of an inference, too much of an extrapolation, too great an extension or penumbra, too weakly supported by the text, structure,

logic, history, and precedent—how much more so is it not the case that such interpretive methodological reservations apply to an even greater degree to the position actually adopted in *Roe*—that there exists a constitutional *right to abortion*? Surely, if constitutional interpretive premises and methods are applied consistently, one cannot fairly conclude that legal personhood for the unborn is inconceivable (so to speak) yet continue to insist that substantive due process, or some other creative argument for abortion rights, creates an affirmative constitutional right to abortion. If sauce for the goose forbids recognition of a constitutional right to life, sauce for the gander all the more clearly forbids recognition of a constitutional right to abortion. Or to put it more pointedly: If personhood is not a plausible construction of the Constitution, a right to abortion is a truly ridiculous one.