No. 19-1392

In the
Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,
Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* LEE J. STRANG IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the original meaning of "person" in the Due Process and Equal Protection Clauses of the Fourteenth Amendment includes unborn human beings.

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INTEREST OF THE AMICUS CURIAE[1]

Lee J. Strang is a leading scholar of originalism. He has written over thirty articles and essays on originalism, his recent monograph, *Originalism's Promise: A Natural Law Account of the American Constitution* (Cambridge 2019), provided the first book-length natural law justification for originalism, he is the editor of a constitutional law casebook, and he regularly speaks on and debates about originalism nationally and internationally.

SUMMARY OF ARGUMENT

The conventional wisdom across the jurisprudential spectrum since 1973 has been that the original meaning of "person" in the Due Process and Equal Protection Clauses does not include unborn human beings. This Brief employs contemporary originalist theory to explain how that conventional wisdom is mistaken.

Originalist scholars have made numerous advances over the past twenty-five years detailing the theoretical and practical aspects of ascertaining the Constitution's original meaning. In particular, originalist theory has distinguished between original meaning and expected applications, and it has also distinguished between

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[1] Petitioners and Respondents granted blanket consent for the filing of *amicus curiae* briefs in this matter. No counsel for a party to this case authored this brief in whole or in part. *Amicus curiae* gratefully acknowledges the monetary contribution from the Center for Christian Virtue intended to fund the preparation and submission of this brief.

different types of original meaning, including natural kind meaning and conventional-legal meaning.

No scholar to date has employed these refinements to evaluate the original public meaning of "person" in 1868 in the Due Process and Equal Protection Clauses. Instead, all but a handful of scholars quietly acquiesced in the conventional wisdom, largely because some states' abortion laws in 1868 permitted abortion in some instances.

Below I provide a roadmap of how, in light of originalism's refinements, the original meaning of "person" was the natural kind of human being, but because of imperfect medical knowledge, the 1868 expected application did not include all unborn human beings. Today's interpreters should apply the natural kind of human being in a factually correct manner to all unborn human beings utilizing today's accurate medical knowledge. This description of the original meaning of "person" elegantly accounts for the status quo of abortion law in 1868 and ongoing progressive change to state protection for unborn human beings. Current originalist theory, therefore, can explain how unborn human beings are constitutional persons protected by the Due Process and Equal Protection Clauses.

ARGUMENT

I. The conventional wisdom regarding the constitutional personhood of unborn human beings in jurisprudence and scholarship.

Writing for this Court, Justice Blackmun concluded that "the word 'person,' as used in the Fourteenth

Amendment, does not include the unborn." *Roe v. Wade*, 410 U.S. 113, 158 (1973). Justice Blackmun claimed that this conclusion followed from two propositions. First, "in nearly all these instances, the use of the word [person in the Constitution] is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application." *Id.* at 157. Second, Justice Blackman claimed that the history of abortion regulation, which he detailed earlier, *id.* at 129-52, showed that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today." *Id.* at 158. The *Roe* Court's claim was historical in nature, and it was that the conventional-legal meaning[2] of the word "person" in 1868 excluded unborn humans because "the unborn have never been recognized in the law as persons in the whole sense." *Id.* at 162.

The conclusion that unborn humans are not constitutionally protected persons has been implicitly followed by later Supreme Court decisions and justices. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part, and dissenting in part) (stating that "States may, if they wish, permit abortion on demand"). Lower courts likewise have followed it. *See Coe v. County of Cook*, 162 F. 3d 491, 495 (7th Cir. 1998) (Posner, C.J.) ("[T]he courts have decided that a fetus is not a person within the meaning of these clauses.").

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[2] As I describe in detail below, conventional-legal meaning is the meaning of a term derived from law and legal practice.

Surprisingly few scholars have addressed this important issue. While a handful of scholars challenged Justice Blackman's conclusion on originalist grounds,[3] most scholars appear to have accepted his claim, including scholars who do not agree with the policy that it produces. *See, e.g.*, Robert H. Bork, *Constitutional Persons: An Exchange on Abortion*, FIRST THINGS (Jan., 2003), *available at* https://www.firstthings.com/article/2003/01/constitutional-persons-an-exchange-on-abortion. Justice Blackman's conclusion that the conventional-legal meaning of "person" in the Due Process and Equal

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[3] *See, e.g.*, JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY (2006); Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13 (2013); Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 ISSUES L. & MED. 185 (2010); John Keown, *Back to the Future of Abortion Law:* Roe*'s Rejection of America's History and Traditions*, 22 ISSUES IN L. & MED. 3 (2006); James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29 (1985); Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807 (1973); *see also* John Finnis, *Abortion is Unconstitutional*, FIRST THINGS (April, 2021), *available at* https://www.firstthings.com/article/2021/04/abortion-is-unconstitutional; Joshua J. Craddock, Note, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539 (2017); Clark D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U.L. REV. 563 (1987); John D. Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement*, 4 S. ILL. U.L. J. 1 (1979); Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250 (1975).

Protection Clauses did not include unborn human beings is the conventional wisdom.

My view has long been that the strongest originalist reason that supported Justice Blackmun's conclusion that unborn human beings are not constitutional persons was the historical evidence that some states in 1868 allowed abortion in some instances,[4] because that would mean that state law authorized actions fundamentally inconsistent with the full constitutional personhood of unborn human beings *at the same time* the states adopted the Fourteenth Amendment. Indeed, this reason was cited by Justice Scalia to support his view that all abortion decisions remained with the states. "[S]ome states prohibited [abortion], some states didn't . . . . It was one of those many things . . . left to democratic choice." Interview by Piers Morgan with Antonin Scalia, *in* CNN, *Scalia:* Roe v. Wade *Theory Not Sound* (July 19, 2012), *available at* https://www.cnn.com/videos/crime/2012/07/19/piers-scalia-roe-vs-wade.cnn. It was also a key reason given by scholars. *See, e.g.*, Bork, *supra* ("It is impossible to suppose that the states ratified an Amendment they understood to outlaw all abortions but simultaneously left in place their laws permitting some abortions.").

Below I describe an alternative view of this historical evidence that provides a powerful description of the evidence within contemporary originalist theory. My description has two key virtues: (1) it ties the personhood argument to originalist theory in a way

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[4] More specifically, states allowed abortion beyond instances of danger to the life of the mother.

that has not occurred before; and (2) it provides a satisfying account of the legal development that was occurring in the nineteenth century, namely that the progressive changes in abortion law toward fully protecting unborn human beings were in response to new medical information that caused lawmakers to continually re-align state law to better fit with their (explicit and implicit) natural kind original meaning of "person." On this account, the nineteenth century legal change is itself evidence that the original meaning was the natural kind of human being and not (only) a conventional-legal conception of person that did not include (all) unborn humans. This account also explains how abortion law in 1868, which limited but did not eliminate abortion, fits the natural kind meaning of "person" because lawmakers' knowledge of the status of unborn human beings had not yet informed (all of) them that unborn humans are, in fact, human from conception.

II. The original meaning of "person" in the Due Process and Equal Protection Clauses is the natural kind of human being that includes unborn human beings.

A. Key developments in originalist theory: original meaning and natural kind meaning.

Originalism in its modern theoretical form first appeared in the early 1970s. At this stage, originalism unselfconsciously focused on the intended meaning and goals of the Constitution's framers. For instance, Raoul Berger focused on the give-and-take in the legislative process that culminated in the Fourteenth Amendment, which Berger placed within the context of

the Amendment's broader historical background, in order to uncover the Amendment's "original intention." RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 4, 6-18 (1977).

Many jurists and scholars criticized this early version of originalism. Three criticisms relevant to my argument, which many originalists took on board, include the claims that the framers intent is not the law, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16-18, 38-41 (1997), that there was not a single intended framer meaning, Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469,477 (1981), and that it was impractical for the legal system to try to uncover intended framer meaning (even if it, in theory, existed). Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214, 220 (1980).

In response, most originalist scholars re-articulated originalism as public meaning originalism. Public meaning was a real fact of the world, *e.g.*, Lawrence B. Solum, *The Fixation Thesis: The Role of Historic Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015), and the evidence for it was relatively widely available. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 93, 114-15 (2004). Originalist scholars also provided a wide

variety of arguments that following the Constitution's original meaning is normatively attractive.[5]

The Constitution's original public meaning consists of a number of analytically distinct components. *See* Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017) (providing a summary). One component is the text's conventional meaning. This meaning is the standard usage of the words or phrases by competent American English speakers at the time of ratification. A second component is the text's semantic meaning, which is identified by placing the text's conventional meaning in the context of the Constitution and applying the rules of grammar and syntax. This involves identifying how words are put together in clauses and sentences, which may modify the text's conventional meaning. Third, an interpreter takes into account contextual enrichment: the contemporary publicly available context in which the Constitution's text was drafted and ratified. Originalists utilize numerous sources to identify the original meaning including the Constitution's text and structure, legislative history, preceding legal and general history, contemporary dictionaries, corpus linguistics, and immersion in the history of the time period.

Crucially important to the meaning of "person" in the Due Process and Equal Protection Clauses, current originalist theory has articulated two key distinctions.

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[5] This brief summary does not do justice to the complex past and ongoing debates within originalism and between originalists and nonoriginalists.

First is the distinction between meaning and application. It is ubiquitous within originalist scholarship to distinguish between the meaning of constitutional text and its application. Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 483 (2013); Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS L.J. 555, 559-74 (2006). The meaning of the text is one thing, its legal consequences is a distinct phenomenon. For instance, the meaning of "human being" is one thing—member of the species Homo sapiens—and whether a particular animal is a human being is a separate issue. This distinction is ubiquitous in constitutional law. The Commerce Clause's original meaning—the commercial transportation of goods and services across state lines, BARNETT, *supra* at 312-13—is distinct from whether a particular activity—goods in their original packages being shipped across a state, *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 442 (1827)—is subject to it.

This distinction between meaning and application has many downstream effects on other aspects of originalism. The most important for our purposes is that the framers' and ratifiers' originally intended application of a text's meaning, though evidence of the original meaning, is not itself meaning. Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 B.Y.U. L. REV. 1621, 1664-66. For instance, even if the Framers and Ratifiers of the Constitution expected that application of Article I, Section 2, Clause 3 ("according to their respective Numbers"), would lead to North Carolina having fewer representatives than

Maryland (which turned out to be inaccurate), that expected application is not the Clause's meaning and is not binding on later interpreters.

Second is the distinction between different sorts of original meanings. Originalists have distinguished between conventional and non-conventional original meanings. Conventional meaning is the meaning of words or phrases derived from human convention. Originalists have identified a number of conventions that matter for purposes of constitutional interpretation; I will focus on two. One is general public meaning and another is legal meaning. General public meaning is the meaning of the Constitution's text that is widely available to and utilized by Americans at the time of ratification. It is the focal case of original public meaning originalism. For instance, "religion" in the First Amendment had a widespread public meaning, one employed and understood by Americans generally. Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181 (2002).

Legal meaning, though it is also conventional, is distinguished by its source and usage. Instead of arising from the linguistic practices of Americans generally, legal meaning arises out of legal practice. Lawyers and legal practice are a linguistic subcommunity, and words and phrases have particular meanings and nuances of meaning within legal practice. For example, the phrase "Letters of Marque and Reprisal," U.S. CONST., art. I, § 10, cl. 1, likely had no general public meaning in 1789, but it did have a legal meaning from the practice of international law.

See John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of Law*, 59 WM. & MARY L. REV. 1321, 1326 (2018) (employing this example).

Though analytically distinct, general public meaning and legal meaning are integrally connected through the linguistic division of labor. The linguistic division of labor is the idea that Americans at times of ratification look to attorneys and legal practice for the meaning of legal terms. Americans will know or suspect that a word or phrase is a legal term, even if it also has a colloquial meaning, because its placement in the Constitution suggests that its legal meaning is its constitutional meaning. For instance, a lay participant in the Pennsylvania ratification convention who wished to know the meaning of "ex post facto law," U.S. CONST., art. I, § 10, cl. 1, would have known that it was a legal term and referred to legal practice for its meaning. The participant could have reviewed a legal text, such as Blackstone's *Commentaries*, read cases employing the concept, or (as is more likely) simply asked attorneys at the convention for an explanation. *Compare* Evan C. Zoldan, *The Civil Ex Post Factor Clause*, 2015 WISC. L. REV. 727, 731 (identifying the legal meaning of the Ex Post Factor Clause from review of the phrase's use "by the professional community of American judges and lawyers in the course of their work").

By contrast with the fundamentally conventional general and legal public meanings just discussed, natural kind meaning corresponds to natural reality, independent of human convention. It is the view that linguistic meaning is attached to something factually

true. Chemical elements and compounds, such as gold and water, are paradigm examples. Gold molecules exist independent of human activity and are gold regardless if called "gold" or "aurum" or something else.

There are debates about how broadly natural kind meaning may be utilized in originalism that parallel debates over the concept of natural kind itself. Originalists appear to agree that natural kind meaning applies to natural kinds subject to the natural sciences, like gold. Solum, *The Fixation Thesis*, *supra* at 57-59. There is debate about whether natural kind meaning can apply beyond that, especially to ethical concepts. *Id*. The United States Constitution includes natural kinds of both sort. For example, the Constitution prohibits punishments that are "cruel." U.S. CONST., amend. VIII. Cruelty is not a phenomenon subject to natural science, but natural lawyers believe it is a natural kind. The original meaning of cruel was "unjustly harsh." John F. Stinneford, *The Original Meaning of "Cruel"*, 105 GEO. L.J. 441, 445 (2017). This means that an interpreter should ask him or herself whether, in fact, a punishment is unjustly harsh and follow the interpreter's conclusion even if the interpreter's application differs from the framers' and ratifiers' own. The Constitution appears to contain few material natural kinds (*i.e.*, those subject to natural science) because it is concerned with coordinating how Americans live well together, U.S. CONST., preambl., and that project deals mostly with non-material phenomena such as "Congress," "executive Power," and "Cases." Article I, Section 10, Clause 1 is one of the few examples because it references "gold" and "silver." Regardless of the

resolution of this debate over the scope of natural kind original meaning, this Brief's usage is within the area of consensus because its focus is the scientific definition of human beings.

It bears emphasizing that both conventional and natural kind meanings are the Constitution's original meaning because they were the public meaning of the text at the time of ratification. Therefore, the Constitution's original meaning, in conventional or natural kind form, is ultimately the product of convention, even if, on occasion, that convention selects natural kind meaning as the Constitution's meaning.

B. The original meaning of "person" in the Due Process and Equal Protection Clauses was the natural kind of human being.

An originalist ascertains whether the original meaning of a provision has a conventional meaning or a natural kind meaning through standard originalist research. This research looks at the conventional meaning of a word, as modified by grammar and syntax, and placed into publicly available context. An originalist will use all the standard originalist sources to support this process.

As I noted earlier, there is some originalist scholarship on the original meaning of "person" in the Due Process and Equal Protection Clauses. This Brief does not fully recount that scholarship; instead, it highlights how the natural kind meaning of "person" fits the key contributing components of the original meaning of "person" and overcomes gaps in existing scholarship. This latter point is especially important

because it shows that both the status quo of abortion law in 1868 and continual changes to that law support the natural kind interpretation. Individually, none of these components of the original meaning is dispositive; collectively, they present a strong case for the natural kind original meaning of "person."

The Constitution's text suggests that "person" was the natural kind of human being. The text of the Fourteenth Amendment describes a being who can be a citizen, who can have his or her life deprived by the government, and who can be harmed by private violence. U.S. CONST., amend. XIV, § 1. Two of these characteristics occur to human beings both pre- and postnatally; but the important point is that all of these are characteristics of human beings, and unborn human beings are the kind of beings who possess the capacities for those characteristics and will possess the actual characteristics themselves at some point in their lives (assuming normal development).[6]

The intended meaning of framers and ratifiers of constitutional text is also evidence of the Constitution's original meaning. This is especially true when the framers and ratifiers publicly state their intentions so that they become aspects of the publicly available context. As many scholars have noted, there is no direct legislative history of the Fourteenth Amendment's drafters and ratifiers discussing the Amendment's relationship with abortion. Paulsen, *supra* at 47. However, there are numerous statements

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[6] I further respond to Justice Blackmun's textual argument against unborn personhood at the end of this Brief.

that the Amendment protects all human beings, regardless of their characteristics, and this supports the natural kind original meaning of "person." For example, Senate Judiciary Committee chairman, Lyman Trumbull, spoke to the Senate about the Thirteenth Amendment and legislation for the Freedmen's Bureau that he planned to introduce, and tied the Constitution's protection to all human beings: "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." Cong. Globe, 39th Cong., 1st Sess. 77 (Dec. 19, 1865) (Lymann Trumbull). Similarly, a leading Senate sponsor of the Fourteenth Amendment, Jacob Howard, explained the broad scope of the Equal Protection Clause: "It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the [human] race the same rights and the same protection." Cong. Globe, 39th Cong., 1st Sess. 2766 (May 23, 1866) (Jacob Howard). The "Father" of the Fourteenth Amendment, Representative John Bingham of Ohio, stated in 1867 to the House regarding the word "person" in the Fifth Amendment (whose text he copied for the Fourteenth Amendment's Due Process Clause), that "[b]y that great law of ours it is not to be inquired whether a man is 'free' . . . ; 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." Cong. Globe, 40th Cong., 1st Sess. 541 (July 9, 1867) (John Bingham). Like Trumbull and Howard, Bingham equated "person" with "human being." It is worth noting before proceeding that there is no evidence from

the framing and ratification process limiting "person" to born human beings.

Dictionaries of the time period defined person as the natural kind of human being. For instance, Noah Webster's *American Dictionary of the English Language* (1864), defined person as "a living human being; a man, woman, or child; an individual of the human race." 1 NOAH WEBSTER ET AL., AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 974 (1864).

In the context of debates over the constitutional personhood of unborn human beings, the strongest argument for the conventional view of a lack of unborn personhood was the history of abortion regulation, and in particular the fact that some states permitted abortion in some contexts in 1868. Here, I describe the scholarly consensus on Anglo-American abortion law up to 1868.

Scholars today agree that abortion law changed over time from a position of less-protective to more-protective of unborn human beings. There are disagreements about nuances of this history

andimportant disagreements about its implications,[7] but the basic pattern is widely recognized.

The common law viewed unborn human beings as human beings and treated abortion upon quickening as a misdemeanor. Sir William Blackstone stated that "[l]ife is an immediate gift of God, a right inherent by nature in every individual and it begins in contemplation of the law as soon as an infant is able to stir in the mother's womb." 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *126 (1776); *see also* 1 *id*. *119 ("Natural persons are such as the God of nature formed us."). Blackstone's description of unborn humans is as fully human. Blackstone explained that "[t]o kill a child in its mother's womb, is now no murder, but a great misprison [a serious misdemeanor]: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it is murder." 4 *Id*. *198. It is widely agreed by scholars that this protection after quickening in some instances, and after birth in others, was the product of evidentiary concerns over whether a woman was indeed pregnant and the unborn victim

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[7] Perhaps most importantly, some scholars treat the common law's prohibition of abortion after quickening as evidence that the common law recognized the personhood of unborn human beings, DELLAPENNA, *supra* at xii-xiii, while others infer that this showed that the common law did not view unborn human beings as legal persons. Bernstein, *supra* at 41. The natural kind interpretation advanced here avoids taking sides in that debate because, even on the narrower view, the law's movement toward greater protection was the product of overcoming gaps in medical knowledge that revealed to later lawmakers the inadequacy of the common law's protections for unborn human beings.

was indeed alive at the time of the crime. Bernstein, *supra* at 52; Craddock, *supra* at 553; Forsythe, *supra* at 588-89. The United States accepted the English common law of abortion. DELLAPENNA, *supra* at 263.

Beginning in 1821, states began to modify their abortion law, through judicial decisions but primarily through legislation, to be more protective of unborn human beings. *See* DELLAPENNA, *supra* at 263-370 (describing this development in detail). This occurred in multiple ways, but the most important were to push back the time of protection earlier than quickening, to cover all methods of abortion, and to increase penalties for abortion. *Id*. at 315. The first statute to ban all methods of abortion was enacted in 1840. *Id*.

By 1868, American law governing abortion had moved decidedly toward robust protection of unborn human beings. At this point, almost every state had legislated on the topic to limit abortion, *see Roe*, 410 U.S. at 175-76 n.1 (Rehnquist, J., dissenting) (collecting legislation), thus displacing the common law in most states to varying degrees. Thirty of the thirty-seven states in the Union had enacted statutes that restricted abortion. Witherspoon, *supra* at 33. Of these thirty, twenty-seven state statutes restricted abortion prior to the common law line of quickening. *Id*. at 34.

Crucial to the natural kind meaning of "person," state lawmakers progressively restricted abortion because new medical knowledge enabled them with greater clarity to see that unborn human beings were indeed human beings and extended the law's protection to them. DELLAPENNA, *supra* at 313. As summarized

by the leading historian, Professor Joseph Dellapenna, this period saw "dramatic changes in scientific theories about the nature of conception and the emergence of a new consensus on when a distinct human being began that were built upon the scientific discoveries of the early nineteenth century." *Id*. at 282.

Evidence of this can be seen from many sources. State law itself reflected this understanding because twenty-eight of the thirty jurisdictions that statutorily restricted abortion placed their restrictions under the label "offenses against the person," and twenty-three states labeled unborn human beings children. Witherspoon, *supra* at 48. States imposed significant punishments for abortion reflecting the humanity of unborn human beings. *Id*. at 52-54. State judiciaries similarly modified the common law to expand protection for unborn humans, for instance, by moving earlier than the common law quickening line. Craddock, *supra* at 555.

The legal system's shift was supported by and in response to information provided to lawmakers from the medical profession. DELLAPENNA, *supra* at 298. One of the most influential books on medical ethics leading up to this period, THOMAS PERCIVAL, MEDICAL ETHICS 135-36 (1827), by a noted English physician, stated that "to extinguish the first spark of life is a crime of the same nature, both against our maker and society, as to destroy an infant, a child, or a man." Percival treated abortion as ethically indistinguishable from killing born human beings because all human beings are the same type of being. Percival's view was influential in the United States and was adopted by the

American Medical Association, which stated in 1859 that unborn human beings should be protected because of the "independent and actual existence of the child before birth, as a living being." *The Report on Criminal Abortion*, 12 TRANS. OF THE AM. MED. ASS'N 76 (1859). The Report went on to advocate state legislative reform to better protect unborn human beings. *Id*. While the states were considering ratification of the Fourteenth Amendment, New York's influential Medical Society stated that all abortions are "murder." Byrne, *supra* at 836.

Legislators changed both the common law and their own earlier statutes in response to this better information about the nature of unborn human beings. As legislators learned that quickening and other lines were irrelevant to the development of human beings, they discarded them and legislated greater protection. This is exactly what Ohio did. *See* Witherspoon, *supra* at 61-64 (describing this process). The Ohio legislature modified Ohio's 1834 abortion law in early 1867. The Ohio Senate *Report* relied on the fact that "[p]hysicians have now arrived at a unanimous opinion that the foetus in utero is alive from the very moment of conception." 1867 Ohio S.J. App. 233. Informed by the new medical information, including Dr. Percival's statements,[8] the Report condemned the "class of quacks who make child-murder a trade." *Id*. The legislature therefore changed the law and eliminated the quickening line to take better account of these newly

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[8] The Ohio legislature was remarkably well informed about the mechanics of human fetal development. Witherspoon, *supra* at 62 nn.112, 121 (quickening and embryo implantation).

known facts. "[N]o opinion could be more erroneous [than] that the life of the foetus commences only with quickening [and] to destroy the embryo before that period is not child-murder." *Id.* "[T]he legislative histories of the statutes of other states show that these statutes were often enacted pursuant to a request of state medical societies." Witherspoon, *supra* at 65. For example, New York's General Assembly, following the recommendation of its medical society that, "from the first moment of conception, there is a living creature in process of development to full maturity," modified its 1845 abortion law to prohibit abortion throughout pregnancy. DELLAPENNA, *supra* at 323-28

To be clear: this is a summary of the history governing abortion law in the United States.[9] My goal with this outline was to exemplify two propositions. First, the law of abortion changed from the earliest days of the common law up to and after 1868. Second, lawmakers changed their states' abortion laws to protect what they came ever more clearly to know were in fact human beings.

C. The natural kind original meaning of "person" in the Due Process and Equal Protection Clauses included unborn human beings.

Still, despite this uniform movement in the law toward greater protection for unborn human beings, it remained the case that, by 1868, some states had not enacted such protective legislation, and some state

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[9] Professor Dellapenna's *Dispelling the Myths of Abortion History* is the most comprehensive source on the subject, and my sketch is consistent with it.

legislation was not fully protective of unborn human beings. *Id*. at 316-17. As I noted earlier, this is the most powerful originalist argument against the constitutional personhood of unborn human beings. If that factual claim is true then, under the conventional-legal meaning approach, that would be evidence that the original meaning of "person" did not include unborn human beings, or at least not all of them.

The American legal system's lack of comprehensive protection for unborn human beings would be evidence for this proposition because, if unborn human beings were constitutional persons in 1868, then many of the states that ratified the Fourteenth Amendment *were violating the Amendment they adopted*.[10] However,

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[10] Some scholars try to avoid this conclusion by arguing that states like Ohio quickly modified their abortion laws *after* ratifying the Fourteenth Amendment. Finnis, *Abortion is Unconstitutional*, *supra*. As Professor Finnis characterized a reasonable Ohio legislator: "We are legislating now, before the Amendment comes into force, to ensure that our law here in this state is adequate to those circumstances and that condition, as science and our physicians now understand them." *Id*. This position does not fit two important facts. First, many states that adopted the Fourteenth Amendment did not comprehensively protect all unborn human life, and for some time thereafter. Second, states continued to progressively modify their abortion law to become more protective of unborn human beings. The natural kind interpretation fits both facts because it describes reasonable legislators conforming their state abortion law to the Fourteenth Amendment as best they understood it at the time, and later modifying their laws to better fit the Fourteenth Amendment once they came into possession of more accurate information about the development of unborn humans. The natural kind interpretation

with my sketch of originalist theory laid out, it is easy to see that the power of this originalist claim depends on two mistakes. The first mistake is that the Fourteenth Amendment's meaning is tied to its expected application in 1868. The second mistake is assuming that "person" was a conventional-legal meaning and not a natural kind meaning.

The natural kind original meaning of "person" was human being. Some of the Fourteenth Amendment's framers and ratifiers—including state legislators—may have believed that unborn human beings, at least at certain stages of development, were not human beings, and therefore did not apply the Fourteenth Amendment to them. This is not surprising given the state of medical knowledge and technology. It is analogous to Justice Blackmun's now-outdated trimester framework, part of which was tied to contemporary medical ability to preserve human life outside of the womb, *Roe*, 410 U.S. at 164-65. But original expected applications of the Constitution's text are not its meaning. New circumstances or new information may warrant different applications of the original meaning.

Today's more-accurate medical knowledge shows that unborn human beings are human beings from the moment of conception. The natural kind of human being was and is a natural kind commonly described as members of the species Homo sapiens, and

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also fits nicely with the contemporary actors' own self-understanding of their reasons for legislating, as described by Professor Finnis.

philosophically described by Aristotle as rational animals. *See, e.g.*, KEITH L. MOORE ET AL., THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 11 (2015) ("Human development begins at fertilization . . . ."); John Finnis, *The Priority of Persons* 35, *in* INTENTION & IDENTITY (2011) ("[T]he essence and powers of the soul seem to be given to each individual complete (as wholly undeveloped, *radical* capacities) at the outset of his or her existence as such."); *see also* OXFORD ENGLISH DICTIONARY, human 1.A. ("belonging to the species Homo sapiens") (2021); *id*. human 2 ("of, relating to or characteristic of the species Homo sapiens"). Unborn human beings are human beings: they are Homo sapiens and rational animals, though immature instances. American law likewise treats unborn human beings as human beings (with the exception of abortion, of course) including tort and criminal law. *See* Paul Benjamin Linton, *The Legal Status of the Unborn Child Under State Law*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 141 (2011) (summarizing the law). Therefore, factually accurate application of the natural kind original meaning of "person" in the Due Process and Equal Protection Clauses includes unborn human beings.

This segues to my second key point. Abortion law's status quo in 1868 needs to be set in the broader context of the legal evolution of abortion law and *why* those states had the laws they did. Once one looks at the evidence from the time period, what one sees is that state legal systems had as their goal the protection of innocent human life. State legal systems protected unborn human life to the extent they recognized unborn humans as human, and to the

extent the legal system could practically protect them. As I showed above, an important piece of evidence that the original meaning of "person" in 1868 was a natural kind is that states changed their laws governing abortion directly in response to new information about fetal development.

As importantly, the reasons these states gave for changing their laws are precisely the reasons a rational legislator would give if the meaning of "person" was a natural kind. As I showed above, legislators reasoned that their legal systems' laws failed to achieve their goal of protecting innocent human life because new information showed that fetuses were human from the moment of conception. Therefore, the legislators changed their laws regulating abortion to better achieve their goal of protecting innocent human life in light of their knew knowledge that all fetuses were, in fact, human beings.

An analogous example from the other end of the human life span is instructive. Traditionally, American law identified cessation of heart and respiratory function as death. 22A AM. JUR. 2D *Death* § 384 (2021). This legal standard fit the available evidence. As scientific knowledge advanced, it became clear that a person can be dead even when his or her heart and respiration continue. In response to this new knowledge, state legal systems adjusted their conceptions of "death" because their goal was to distinguish truly alive from truly dead citizens for the purpose of treating them differently (and appropriate to their condition). *Id.* This process of adjustment to new scientific knowledge shows that the state legal

systems' meaning of "death" was a natural kind—once a tension appeared between what was factually known and the law, states modified the law to fit what truly constituted death. A legislator would reason that the prior legal definition of death had turned out to be inaccurate; that current best medical evidence shows that cessation of brain function is the true measure of death; and that the law's definition should be updated to reflect that new, more accurate understanding.

Both recent legislators and mid-nineteenth century legislators believed they were grappling with real phenomena: death and unborn human beings. In both instances, the legislators changed the law to conform more closely to those real things in response to more accurate knowledge about those things.

The originalist argument I laid out above that showed that the original meaning of "person" in the Due Process and Equal Protection Clauses included unborn human beings is also supported by *County of Santa Clara v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886). The Court's opinion itself provides no reasoning to explain its ruling that the Fourteenth Amendment applies to corporations because, as the Chief Justice cryptically stated, "[w]e are all of the opinion that it does." *Id.* at 396. The Court instead appeared to rely on "the points made and discussed at length in the briefs of counsel for defendants in error," Southern Pacific Railroad. *Id.* The Railroad's brief, written by the eminent nineteenth century lawyer and scholar John Norton Pomeroy, argued that the Fourteenth Amendment applied to "the natural persons who compose them." *Argument for Defendants*

at 12, *San Mateo v. Southern Pa. R.R.*, 116 U.S. 138 (1885). Pomeroy did not make an argument that corporations themselves are constitutional persons in their own right; he argued that it was the human beings who comprised them that were. Indeed, Pomeroy distinguished between "a corporation as an artificial, metaphysical being" and the "separate and distinct . . . individual members." *Id.* at 10. While later cases created their own reasoning to supplement the *Santa Clara* Court's lack of explanation, *see Hale v. Henkel*, 201 U.S. 43, 76 (1906) (articulating the natural entity view of corporate personhood), the reasoning underlying *Santa Clara* itself supports the conclusion that unborn human beings are constitutional persons because Pomeroy limited his argument to natural persons even when it would have been advantageous to his argument to include artificial persons.[11]

A second piece of counter-intuitive evidence supporting the natural kind interpretation I advanced above is the broader sense of "person" that included all beings of a rational nature. The Western tradition included God and angels within the concept of person because they have the capacity for reason. *See, e.g.*, I ST. THOMAS AQUINAS, SUMMA THEOLOGICA, q. 29, a. 1 (Fathers of the English Dominican Province trans.,

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[11] The proposition that the original meaning of "person" in the Due Process and Equal Protection Clauses includes the natural kind of human being does not preclude including artificial persons within that meaning. My claim is narrow and focused only on natural persons. When the being at issue is a natural person, then "person" includes the natural kind of human beings. And when the being at issue is an artificial person, then other components of the original meaning of "person" may come into play.

Benziger Bros., Inc. 1946) ("Therefore . . . the individuals of a rational nature have a special name . . . and this name is *person*.") (emphasis in original). The Constitution, however, for a variety of sound reasons, does not deal with non-human persons. It does, however, deal with human persons, and human beings in this tradition have a rational nature, which unborn human beings possess as well.

C'Zar Bernstein claims in a sophisticated forthcoming article that there are two possible original meanings for "person" on offer: the "ordinary sense of person" and the "legal meaning of person." C'Zar Bernstein, *Fetal Personhood and the Original Meaning of "Person" in the Fourteenth Amendment*, 26 TEX. REV. OF L. & POL. __ (2022) at 3-4 (emphases and quotations omitted), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3870441. He maintains that the ordinary meaning included all natural persons, including unborn human beings, but that it "is far less clear" that the legal meaning included unborn humans. *Id*.

Mr. Bernstein's argument leaves out the path I identified: that the original public meaning of "person" in 1868 was the natural kind of human being. My argument is able to synthesize what, to Mr. Bernstein, appears to be an unbridgeable chasm between ordinary meaning and the common law of abortion at the time. My conclusion is that the public meaning of "person" meant the natural kind of human being. This is the "ordinary" meaning, as Mr. Bernstein describes it, and my natural kind interpretation also accounts for the law's treatment of abortion during the period,

including its evolution during that period, because it shows lawmakers changing the law to more closely correspond to the natural kind meaning of person as new medical knowledge became available to them.

But, putting to one side Mr. Bernstein's failure to address the natural kind public meaning of "person," there are sound bases from which to criticize his claim that the conventional-legal meaning of person in 1868 excluded unborn human beings. As I described above, scholars have shown how the law governing abortion in the United Kingdom and the United States evolved toward a progressively more-protective position. There are two relevant aspects of this legal evolution. First, the evolution suggests that there is not one-static legal meaning for person (at least as applied to unborn human beings). Second, the reason for the legal evolution tended to show that the legal meaning of person included all unborn human beings. The evolution of American abortion law was caused by lawmakers re-aligning the law to take into account more accurate information about fetal development. This re-alignment was directed toward protecting what the legislators knew—and progressively knew better—were human beings. This unidirectional development suggests that the legal meaning of person included all fetuses, who in fact are human beings.

This is most clearly seen in the contrast with words whose legal meanings were relatively static prior to and after the Fourteenth Amendment's adoption. The phrase "the protection of the laws," for instance, was the product of a long, stable, legal tradition in the United Kingdom and United States. ILAN WURMAN,

THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 6, 36-47, 83-92, (2020); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. J. 1, 34-75 (2008). The legal meaning of this phrase was static unlike the law governing abortion. This difference suggests that the word "person" in the Due Process and Equal Protection Clauses did not exclude unborn human beings.

The bulk of this Brief focused on the historical evidence of the law governing abortion. I did this because I believe it is the strongest originalist argument against constitutional personhood for unborn human beings. Here, let me say a few words about Justice Blackmun's claim that the intratextual evidence from the Constitution's use of "person" showed that it was limited to born human beings. *Roe*, 410 U.S. at 157.

First, Justice Blackmun's claim can only provide *pro tanto* evidence for the proposition. *Pro tanto* evidence is evidence supporting a claim, but it is not decisive and, more importantly, it is only as supportive as the evidence is powerful. Justice Blackman's claim is not decisive because the best-case scenario for Justice Blackman's claim is that *every* usage of "person" in the Constitution—*other than* the Due Process and Equal Protection Clauses—meant born human beings. But, even on this supposition, it does not logically follow from the multiple born uses of "person" that the uses of "person" in the Due Process and Equal Protection Clauses are similarly limited. *See also* Akhil Reed Amar, *Intratextualism*, 112 HARV.

L. REV. 747, 792 (1999) (arguing that attempts to prove a negative via intratextualism "are weaker").

Second, the intratextual evidence marshalled by Justice Blackmun is not powerful. Justice Blackmun stated that "in nearly all these instances, the use of the word [in the Constitution] is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application." *Roe*, 410 U.S. at 157. He admits that in some instances—"nearly all," "with any assurance"—person may apply to unborn human beings. Those instances clearly include the Due Process and Equal Protection Clauses because there is nothing in their text to prohibit such application, unlike, for instance, the Citizenship Clause. Those instances also likely include Article I, Section 9, Clause 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit . . . ."), Article IV, Section 2, Clause 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another . . . ."), and the Fourth Amendment ("The right of the people to be secure in their persons . . . ."). Many of the instances of solely post-natal application are so only because their context and function limit them. For instance, the presidency is limited to "No Person except a natural born Citizen." U.S. CONST., art. II, § 1, cl. 5. The Due Process and Equal Protection Clauses lack such limiting text or function; the Clauses are not limited to born persons or even natural persons. Moreover, the fact that "person" in the Due Process and Equal Protection Clauses is not limited to some classes of humans, such as "born" or "natural persons" or "such

persons," suggests that it includes all persons. *See* Gorby, *supra* (providing a variety of critiques of Justice Blackmun's intratextualism).

CONCLUSION

This Brief showed the path of an originalist argument for the constitutional personhood of unborn human beings pursuant to which the Due Process and Equal Protection Clauses protect unborn human beings. It did so by applying to the historical record two aspects of originalist theory, the distinction between meaning and application, and the distinction between types of meaning. That path reveals that the original meaning of "person" in the Due Process and Equal Protection Clauses was the natural kind of human being. This natural kind interpretation of "person" was able to account for the status quo of American abortion law in 1868 as well as the fact that abortion law was progressively becoming more protective of all human life.

This Brief makes no claim about the original meaning of the Equal Protection Clause or how the constitutional personhood of unborn human beings interacts with it.

Respectfully submitted,

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