

LEGAL AGNOSTICISM IN THE ABORTION DECISIONS: UNBORN PERSONS AND  
THE FOURTEENTH AMENDMENT<sup>1</sup>

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It has become a commonplace conclusion among pro-life advocates and legal scholars that a proper interpretation of the Constitution with respect to abortion would reject the concept of a privacy right to abortion, and thus return the nation to the pre-Roe status quo in which the decision of when, whether and how to regulate abortion was left to the states. In offering what I will call in this paper the "restoration interpretation," these advocates and scholars seem to have universally rejected or ignored an interpretation which would extend the protections of the Fourteenth Amendment to unborn persons, what I will call in this paper the "unborn person interpretation." They have done so despite the fact that both the majority in *Roe* and the appellants to the case conceded that if the personhood of the unborn could be established "the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."<sup>2</sup>

The several notable arguments defending the unborn person interpretation seem to have been largely ignored in the mainstream, and especially by the Court itself.<sup>3</sup> In their book *Abortion: Questions and Answers*, for example, Dr. and Mrs. John Wilke seem to assume that the only way to establish legal protection for unborn children would be through an amendment to the Constitution. They give as an example the National Right to

Life Committee's amendment proposal which would extend the word "person" to "all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every state of their biological development including fertilization."<sup>4</sup> The Constitutional necessity for such an amendment is not even questioned. Forty-five leading pro-life advocates, including Gary Bauer of the Family Research Council, James Dobson of Focus on the Family, Clarke Forsythe of Americans United for Life, Wanda Franz of the National Right to Life Committee, and Ralph Reed of the Christian Coalition, signed a much heralded joint "Statement of Pro-Life Principle and Concern" published in *First Things* in 1996 in which the primary legal complaint is made that *Roe* "wounded American democracy" by removing the issue of abortion from "democratic concern." For legal remedies, the statement suggests that the Supreme Court could reverse *Roe*, returning the issue back to the states, or the nation could pass a constitutional amendment which would extend Fifth and Fourteenth amendment Due Process protection to unborn persons. The statement does not even hint at the possibility of a Supreme Court ruling which would extend Due Process and Equal Protection protections to unborn persons.<sup>5</sup> The *First Things* statement seems to reflect the unanimous opinion of those justices on the Supreme Court who have urged reversing *Roe*, not one of whom has attempted to make or even respond to the unborn person interpretation in their opinions.

However well-intentioned, the arguments of the restoration advocates - as I shall argue below - are often grounded in a jurisprudence of epistemological skepticism that is alien to normal Constitutional interpretation and harmful to the political morality on which free government is based. While I don't object to a Constitutional amendment that would extend special protection to unborn persons, especially as such an amendment would presumably lodge protection for the unborn beyond the discretion of partisan Courts, such an amendment is Constitutionally superfluous. The issue of protecting the basic rights of persons from hostile or indifferent state governments was Constitutionally resolved almost one hundred and fifty years ago in the Fourteenth Amendment, purchased with the blood of thousands of American lives in the awful crucible of the Civil War. The Constitutional debate over abortion, then, is ultimately a rehearsal of the very same questions that shook the nation during the civil war.

## *II. The Restoration Argument*

To see why the restoration argument, while certainly more honest and legally plausible than the opinion in *Roe v. Wade*, is, standing alone, both Constitutionally flawed and politically problematic, we must first consider the arguments that have been made on its behalf. The core of the restoration argument is an attack on the contention that the right of a woman to terminate

her pregnancy is a personal privacy right protected by the Constitution. Such a right is neither "implicit in the concept of ordered liberty,"<sup>6</sup> nor is it "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>7</sup> To the contrary, there is a strong historical and legal tradition in America condemning and prohibiting abortion as a violation of the rights of the unborn. Moreover, the alleged privacy protected in *Roe* differs in kind from the other privacy precedents insofar as the right necessarily effects the interests of another human life, the fetus, and insofar as the abortion procedure has a decidedly public expression.<sup>8</sup>

So far as it goes this is an acceptable argument. But it leaves out of the equation the all important question of the status of the unborn child. The justices write as if this question can be ignored or constitutes merely a "value judgment" about which reasonable people can disagree. Justice Scalia himself explicitly asserts this latter position in his dissenting opinion to the *Casey* decision: "There is of course no way to determine that [i.e. whether the human fetus is a human life] as a legal matter; it is in fact a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so."<sup>9</sup> But if the status of the unborn child is merely a value judgment, then there is at least a plausible argument that the states have no right prohibiting it, especially when one considers the considerable burden an unexpected, unwanted or dangerous pregnancy can be on a pregnant

woman. Indeed, Justice Scalia's arguments have a frightening moral and epistemological agnosticism at their center.

The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. As the Court acknowledges, "where reasonable people can disagree the government can adopt one position or the other."<sup>10</sup>

By making the determination of human life a value question, Justice Scalia forecloses the possibility that any scientific proof or rational demonstration can establish that an unborn child is a human being. Indeed, he ultimately forecloses the possibility that there can be any rational discussion of the matter at all, insofar as values by their very nature are subjectively determined. Taken to an extreme, as Justice Scalia's legal positivism in this matter seems to do, democracy becomes the simple exercise whereby the powerful define for themselves their "own concept of existence, of meaning, of the universe, and the mystery of life," to use the famous words of Justice O'Connor in her opinion for the majority in the *Casey* decision.<sup>11</sup> In such a universe, Constitutional government is superfluous. One is strongly reminded of Lincoln's arguments with respect to slavery:

If [the Negro] is *not* a man, why in that case, he who *is* a man may, as a matter of self-government, do just as he pleases with him. But if the negro *is* a man, is it not to that extent, a total destruction of self-government, to say that he too shall not govern *himself*?<sup>12</sup>

It cannot be too strongly emphasized that whether or not an unborn child is a human being is *the* critical question in this debate, and the question has been definitively answered for decades. There can be no scientific disagreement as to the biological beginning of human life. Embryology, fetology, and medical science all attest alike to the basic facts of human growth and development, and medical textbooks for decades have declared that distinct and individual human life begins at conception.<sup>13</sup> Contrary to Justice Scalia's assertion, this is not a value question any more than whether an acorn turns into an oak tree. It is indeed both telling and disturbing that while self-proclaimed postmodernist Stanley Fish can concede that the scientific evidence is clearly on the side of the pro-life movement, Justice Scalia continues to insist this is a value judgment.<sup>14</sup>

But there is this critical difference between an acorn and an unborn child: Human beings are protected by the express provisions of the Fourteenth Amendment; oak trees are not. The value decision, then, only concerns whether we will protect all persons, or only those we have judged worthy of protection through the democratic process. As I will argue below, the super-

democratic process of Constitutional amendment has already decided this issue in favor of human life, despite the erroneous reading of the Supreme Court.

Perhaps even more disturbing is Justice Scalia's moral agnosticism, revealed in his pragmatic arguments against *Roe*. He rightly objects with scorn to the plea by the majority in *Casey* to the "contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution,"<sup>15</sup> as if the Court did not create the national controversy in the first place with its controversial ruling! And he quotes Lincoln's warning in his First Inaugural Address against deferring decisions of policy "upon vital questions affecting the whole people" to the Supreme Court, and thus resigning the power of self-government. Of course, Lincoln was referring to the ignominious *Dred Scott* decision in which the Court ruled not only that blacks were ineligible for national citizenship and thus had no legal access to federal courts, but also that slaves constituted property protected by the Fifth Amendment due process clause against Congressional prohibition of slavery in the territories. It was in order to overturn this ruling that Lincoln pressed for, Congress passed, and the nation ratified the Thirteenth and Fourteenth Amendments to the Constitution extending due process protections to all persons under United States jurisdiction. We will return to this important matter later in the paper, but for now it is important to point out that for Scalia, the restoration argument would

return the issue of abortion to the states, and thus remove it as a national issue. "As with many other issues, the division of sentiment within each State was not as closely balanced as it was among the population of the Nation as a whole, meaning not only that more people would be satisfied with the results of state by state resolution, but also that those results would be more stable."<sup>16</sup>

Stable for whom? Certainly not unborn children in states with permissive abortion laws. Couldn't Justice Scalia have added to this *dicta* some condemnation of the practice of abortion, despite his apparent constitutional responsibilities? One wonders whether restoration is Scalia's preference, and not merely his Constitutional interpretation. In any case, the irony of his position should not be lost: His argument sounds almost exactly like the "popular sovereignty" position of Stephen Douglas, Abraham Lincoln's bitter adversary, in both its professed agnosticism about the moral issue of abortion, as well as its proposed solution to the conflict. Like Douglas, Scalia professes ignorance, if not indifference, to the moral dimensions of abortion, and like Douglas he sees self-government consisting in letting the individual states decide the issue for themselves. With Lincoln, we must see this argument for what it is: a dangerous threat to self-government insofar as it undermines the very public opinion that makes self-government possible, the belief in the transcendent dignity of all human beings from the moment of conception to natural death. Any attempt to define

human worth or value with a smaller category than the general field of human beings, as Lincoln rightly saw, is necessarily arbitrary and sets forth a principle that itself undermines the principle foundation for self-government:

You say A. is white, and B. is black. It is *color*, then; the lighter, having the right to enslave the darker? Take care. By this rule, you are to be the slave to the first man you meet, with fairer skin than your own. You do not mean *color* exactly? - You mean the whites are *intellectually* the superiors of the blacks, and, therefore have the right to enslave them? Take care again. By this rule, you are to be the slave to the first man you meet, with an intellect superior to your own. But, say you, it is a question of *interest*; and, if you can make it your *interest*, you have the right to enslave another. Very well, And if he can make it his interest, he has the right to enslave you.<sup>17</sup>

The logic of this argument - so persuasive with respect to racial discrimination - has been mysteriously lost when applied to the protection of human life. We are left with a Culture of Death which shamelessly appeals to a utilitarian calculus which weighs the interests of "meaningful life" against life itself.

It is not an easy matter to pick on Justice Scalia, who as the highest ranking Catholic official in the United States has served his office with dignity and honor. But it is lamentable that he authored such an opinion, to which another Catholic,

Clarence Thomas - a supposed advocate of a "natural law" reading of the Constitution - affixed his signature. At the very least one would hope for a condemnation of the practice of abortion, even if judicial restraint required its toleration.

Not all advocates of the restoration argument, however, express Scalia's epistemological and moral skepticism so boldly. Christopher Wolfe, for example, attempts to make the Constitutional argument against the unborn person reading while at the same time affirming the moral evil of abortion. His argument runs some of the same dangers as that of Scalia however, in that while recognizing the strength of many of the arguments offered below, "given the fact that many people did and do in fact doubt (however wrongly, in fact) whether a human person exists from the time of human conception. . .The Constitution lacks the kind of clarity that would be necessary for a judge to strike down a law permitting abortion."<sup>18</sup> So Wolfe's position, like Scalia's, is based upon conceding that the status of unborn children is open to doubt.

But why allow anti-life advocates to continue this deceptive argument that the ontological status of an unborn child is open to doubt, that it is based upon religion, or values, or some other subjective standard, and that it is a point over which reasonable people can disagree? Why does Professor Wolfe leave open to doubt what is obvious to so skeptical a man as Stanley Fish? Let me be clear: If the ontological status of the unborn child is open to question, then knowledge itself is open to

question. So long as life advocates concede that this is an open question the battle over abortion, and perhaps democracy itself, is lost.

### *III. The Unborn Person Interpretation*

To be sure, there is ample reason for reticence about the unborn person interpretation. The last half-century of "living constitutionalism" and its subsequent judicial license has left a badly scarred Constitution in its wake, severely undermining the delicate balance of powers that were part of the Framers' original design. The "least dangerous branch" of Federalist 78 has arguably become the "most dangerous branch" of Brutus 15. As many liberals are beginning to discover, the surrender of self-government to the Supreme Court is a double-edged sword that can cut both ways. We must be careful, therefore, of seeking unwarranted readings of our privileged moral principles into the Constitution. For purposes of this paper I will assume without argument that the proper reading of the Constitution is a *textualist* reading as that term is used by Justice Scalia in his book *A Matter of Interpretation*.<sup>19</sup> A textualist reading assumes that the primary guidance for interpreting the Constitution come from text and context. As Justice Scalia describes it, "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."<sup>20</sup> This principle excludes both "living

Constitution" jurisprudence, as well as "natural law" jurisprudence. According to this textualist jurisprudence, it shall be argued below, the unborn person reading is the most honest and legitimate, despite Justice Scalia's claims to the contrary.

The simple syllogism for my argument can be stated as follows. The word person in the Due Process and Equal Protection Clauses of the Fourteenth Amendment includes all human beings. Unborn children are human beings. Therefore, the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect unborn children. To refute this syllogism, then, advocates of the restoration interpretation must either deny the major premise, that the legal person of the Fourteenth Amendment includes all human beings, or deny the minor premise, that an unborn child is a human being. Because virtually none of the life advocates - Justice Scalia aside - are willing to deny the minor premise, the main point of contention must be the major premise. So, do the Due Process and Equal Protection Clauses of the Fourteenth Amendment include all human beings? I will offer below four pieces of evidence for why this question must be answered in the affirmative. First, this conclusion is supported by the text of the Constitution. Second, it is supported by the repeated construction of the Fourteenth Amendment prior to *Roe*, as well as by explicit statements made by those who framed the Fourteenth Amendment. Finally, it is supported by the history of abortion law in America.

The proper point of departure is the text of the Constitution. The first section of the Fourteenth Amendment states "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The problem is that the Constitution never defines the word "person." Justice Scalia, among others, rightly looks to context for guidance on the meaning of this term, and he finds no evidence that the word was intended to include unborn persons. In a speech delivered at Notre Dame University in 1997 he pointed out that none of the references to "person" in the Constitution have prenatal application. For example, the second section of the Fourteenth Amendment states that "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." Because there is no evidence that the Framers contemplated counting unborn persons for purposes of apportioning representatives, Scalia argues, they must not have understood "person" to include "unborn person."<sup>21</sup>

But there are serious flaws with this argument, flaws that are attached to any contextual attempt to understand the meaning of the word person in the Constitution for due process purposes. The reason for this is that apart from the Fifth and Fourteenth amendments *every reference to person is context dependent.*<sup>22</sup> That is, every reference to person is intended to accomplish a particular limited purpose. Take Justice Scalia's example. The

means for determining numbers of persons in each state is regulated by the second section of the first Article of the Constitution. According to that passage, "actual Enumeration" shall be made by Congress every ten years "in such Manner as they shall by Law direct." In other words, Congress can determine by statute those who should be counted in the census for purposes of allocating representatives. Surely Congress could Constitutionally include unborn persons in the census count, and with good reason, as the count might be more accurate. On the other hand, this might be an impractical enterprise. A clearer example illustrating this contextual problem is the eligibility requirement for holding office in the House of Representatives. The Constitution states "No person shall be a Representative who shall not have attained to the Age of twenty five Years." Does this mean that no persons under the age of twenty five are protected by the Due Process Clause? Of course not.

Because abortion is primarily a private act of one or more persons against another, some attention must be given to the "state action" doctrine. Stated in its most extreme form, the state action doctrine states that the Fourteenth Amendment only protects private individuals from the State, not from other private individuals. Such a reading would appear to follow from a literal reading of the text of the Amendment, "No State shall." The temptation to this reading should be resisted. (Even Justice Scalia himself rejects it, as he chooses to focus on the question of the personhood of the unborn rather than on the capacity of

the Constitution to extend its protections against private acts. The same can be said for Justice Blackmun, writing for the majority.) While there is not sufficient room in this essay to develop such a complicated Constitutional issue as state action, I will state my position briefly.<sup>23</sup>

The restrictions on State power in the Amendment were added for two reasons: The first reason, as stated above, is that the Framers of the Amendment wanted more permanent protection for rights than Congressional legislation. That is, their purpose in adding the language was to make the amendment *stronger*, not *weaker*. Secondly, the "no state shall" phrase was added to make the provisions consistent with the Article One, Section Ten limitations on State power. In neither case did the Framers intend to limit the power of the amendment exclusively to action by the State or state actors. If this were true, then the Civil Rights Act of 1866 itself would be unconstitutional insofar as its provisions extend to private action, a thesis no credible Constitutional scholar would defend. The historical evidence is clear that at least one purpose of the Fourteenth Amendment was to make Constitutional the Civil Rights Act of 1866, the textual provisions of which seemingly extended to private action.<sup>24</sup> Moreover, the Congresses immediately subsequent to ratification, among which were many who had voted for the amendment, passed several pieces of legislation under the Amendment extending Congressional power to private action.<sup>25</sup> Although these laws were eventually struck down in *United States v. Cruikshank*<sup>26</sup> and *The*

*Civil Rights Cases*,<sup>27</sup> it was not on an argument that Congressional power cannot extend to private action, but that the statutes were overbroad. The doctrine that comes out of these Court decisions can be stated as follows: Primary responsibility for protecting rights rests with the states, but Congress retains the power to correct state failure to discharge their proper responsibilities. Therefore, Congressional power may extend to private acts, then, but only on the condition that the State has failed to act.

Reading unborn persons into the Due Process and Equal Protection Clauses of the Fourteenth Amendment would have the following legal effects. First, under the Due Process Clause States would be prevented from providing for or protecting abortion in any way. Second, although States which fail to protect unborn children might not be directly liable for that failure under the Due Process Clause,<sup>28</sup> Congress would have the power to correct this failure through remedial legislation under section five of the Fourteenth Amendment. Third, if it could be established that unborn persons are the subject of class discrimination in violation of the Equal Protection Clause in those states which fail to effectively criminalize abortion, Congress again would have the power to correct such state failure by appropriate legislation. This last argument is a bit more difficult to make, as the Courts have been reluctant to extend the strongest protections of this clause beyond race and gender. Still, permissive abortion laws would have to at least show a

"rational basis" insofar as they amount to legal discrimination based upon "age," or "geography" or even "meaning of life."<sup>29</sup> Even under this lowest level of scrutiny, the state would have a very difficult case to make. If a state fails to protect the most basic right to life of an entire class of persons, clearly it is failing in its duty under the Constitution to provide Equal Protection of the laws.

In any case, it is quite clear from the history of the Amendment that its framers did *not* intend to give Congress the power to determine personhood for Due Process and Equal Protection purposes. An early draft of the Amendment stated: "Congress shall have the power to make all laws which shall be necessary and proper to secure the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."<sup>30</sup> As Herman Belz points out, several Republicans objected to this language because it would merely "effect a general transfer of sovereignty over civil rights from the states to the federal government, while effectively failing to limit the exercise of state power that had produced the black codes."<sup>31</sup> Instead, the Framers of the Amendment chose to lodge the prohibition in the Amendment itself, while leaving to Congress *corrective* power. The Amendment clearly does not give Congress plenary power over the meaning of the first section of the Fourteenth Amendment. The strong implication of the text and history is that the courts would have a strong

hand in enforcing its provisions.<sup>32</sup> Scalia's interpretation is implausible and would effectively emasculate the Amendment.

Another prevalent and yet erroneous interpretation of the Fourteenth Amendment holds that its provisions are limited exclusively to blacks. This reading is supported by neither the text of the Amendment, the history of its framing, nor its subsequent application. The Amendment was aimed not only at the "black codes" of various states, which sought to effectively reduce freedmen to slavery while technically obeying the provisions of the Thirteenth Amendment, but at the entire Constitutional apparatus which placed the rights of persons at the mercy of oppressive state governments. (Remember, whites who supported blacks in their quest for freedom were also in danger of retaliation). In other words, they were seeking a Constitutional remedy for protecting the rights of persons when the States failed to do so. For this reason, the framers of the amendment chose to use the term "person" rather than "blacks" as the object of protection in the text of the Constitution.<sup>33</sup>

Abundant evidence from the Congressional debates over the Fourteenth Amendment indicates that the framers intended the word "person" to include all human beings. For example, the author of section one of the fourteenth amendment, John Bingham, stated that "Before that great law the only question to be asked of a creature claiming its protection 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."<sup>34</sup>

And Senator Trumball declared that the purpose of the Amendment would have the "great object of securing to every human being within the jurisdiction of the Republic equal rights before the law."<sup>35</sup>

The history of enforcement of the provisions of Due Process and Equal Protection Clauses support the argument that the provisions were not intended exclusively for freedmen. Indeed, the vast majority of Fourteenth Amendment Due Process cases which have come before the Court, even in the late nineteenth century, involved economic issues. The word "person" accordingly has been given a very liberal construction by the Supreme Court to include all human beings, be they minors, prisoners, aliens, enemies of the state, and even corporations. Indeed, apart from *Roe*, the Court has *never once* differentiated between "person" and human being," nor has it ever excluded a human being from the Due Process protections of the Fourteenth Amendment. So it is a fair legal inference to say that if it can be demonstrated that an unborn child is a human being, then that child will constitute a "person" for Fourteenth Amendment purposes. In other words, once it is determined that the unborn child is a human being, Fourteenth Amendment Due Process and Equal Protection protections are enabled.

Notice that the minor premise of the syllogism above is only marginally contingent upon historical analysis. The primary issue is ontological, not historical. Just as - to use Justice Scalia's own example - "freedom of speech" embraces many things "that were

not in fact protected, because they did not exist, in 1891 - movies, radio, television, and computers, to mention only a few," so, by a fair analogy, the Fourteenth Amendment covers persons who were not fully "discovered" when the Due Process and Equal Protection Clauses of the amendment were written.<sup>36</sup> In other words, it doesn't ultimately matter what past people thought about *when* human life begins, so long as they agreed - as they did - that at whatever point it begins, this is the point at which the protective powers of the State must be introduced. They did not have enough access to the scientific and biological facts of human reproduction and embryology to know for certain when life begins. But in a time of 4D ultrasound technology, when infants can be operated on while still in the womb, there is no room for dispute about the status of the fetus. As stated above, the biological evidence that a human fetus from the moment of conception is a uniquely individual and separate human organism with a separate genetic code, requiring only nutrition and growth to reach maturity is beyond dispute. The Court's initial and continued use of the term "potential life" to describe the fetus, then, is thus both scientifically erroneous and legally dishonest. Sperm and ova are potential life; the fetus is a human being at an early stage of human development through which all human beings must travel, with enormous potential.<sup>37</sup>

The practices of the states at the time the Fourteenth Amendment was ratified can serve as evidence of what the Framers of that Amendment thought about its meaning. Of course, there is

not sufficient room here to treat the entire legal history of abortion in America and in the West, but it is important to say something about the development of the laws with respect to abortion, and to briefly address some of the misconceptions that have attended this issue.

Abortion was condemned by the Greek physician Hippocrates, long regarded as "the Father of Medicine" and originator of the Hippocratic oath. It was also universally condemned by the Western Christian tradition as the unjust murder of a human being. Under the British common law abortion was regarded as a crime, but only after "quickening," or the first perception of fetal movement. Justice Blackmun in *Roe* made much of this fact as evidence of a longer tradition according to which abortion was only regarded as a crime after viability. But the quickening distinction had nothing to do with viability, a term which replaces an unwarranted principle of "meaningful life" for "life simply" as the standard for determining legal personhood. The proper meaning and general understanding of quickening can be found in the Oxford English Dictionary: "to give or restore life to; to make alive; to come into being." This understanding was manifested in common phrases like "the quick and the dead," which showed the proper contrast in meaning. Thus, the quickening standard simply affirmed the principle that when life is present, it is wrong to take it. There was no consideration of such an ambiguous concept as "viability." Indeed, the principle of viability would justify infanticide as well as abortion.<sup>38</sup> The

reason for the quickening specification was largely the result of a gap in scientific knowledge about human reproduction, which made certain knowledge of pregnancy almost wholly dependent upon perception of fetal movement. However, as scientific knowledge about human reproduction and embryology developed, people became increasingly aware that life began much earlier than quickening, and they began to revise their statutes accordingly. Britain was the first to do so with a law in 1803 making abortion a crime before quickening, as well as after. Within a half a century American legislatures were following suit, accommodating their laws to fit advances in scientific knowledge about human reproduction and fetal development.

As Justice Rhenquist pointed out in his dissent in *Roe*, "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."<sup>39</sup> From this he concluded that "There apparently was no question concerning the validity of this provision or of any other state statutes when the Fourteenth Amendment was adopted."<sup>40</sup> As Justice Scalia himself points out, "By the turn of the [19<sup>th</sup>] century virtually every State had a law prohibiting or restricting abortion on its books."<sup>41</sup> Significantly - and contrary to the assertions of several historians and legal scholars who were relied upon in *Roe* - abundant evidence indicates that these restrictions on abortion were passed with the primary purpose of protecting unborn children, and not merely to protect the health of the mother.<sup>42</sup>

Justice Blackmun himself quotes the report of the American Medical Association's Committee on Criminal Abortion, issued in 1859. According to this report the primary causes for the prevalence of abortion were "wide-spread popular ignorance of the true character of the crime - a belief even among mothers themselves that the foetus is not alive till after the period of quickening," combined with "grave defects in our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being." "These errors," the report continued, "which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas."<sup>43</sup> Finally, some have argued that while it is true that there was a strong consensus against abortion in America following the Civil War, various exceptions in many of the abortion statutes (e.g. life of the mother, rape, incest, etc.) suggest a deeper ambivalence in attitudes toward the unborn. While valid so far as it goes, it is important to consider this claim in context. It is an old legal and moral maxim that the extreme cases make bad law. The evidence is overwhelming that Americans believed abortion is murder, even as they sought to make what they regarded as reasonable exceptions to that principle. But this is stuff of which any criminal code is made. It involves a constant effort to work out the general principle (murder is wrong) while allowing for the justifications (insanity) and excuses (self-defense) that make the enforcement of that principle most just.

It is important to point out that there was a federal court precedent for the unborn person reading of Fourteenth Amendment before *Roe v. Wade*, though this fact was virtually ignored by Justice Blackmun. In *Stenberg v. Brown* a three judge federal district court upheld an anti-abortion statute, stating that privacy rights "must inevitably fall in conflict with express provisions of the Fifth and Fourteenth Amendments that no person shall be deprived of life without due process of law."<sup>44</sup> Relating the biological facts of fetal development, the court stated that "those decisions which strike down state abortion statutes by equating contraception and abortion pay no attention to the facts of biology."<sup>45</sup> "Once new life has commenced," the court wrote, "the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it."<sup>46</sup> Yet in commenting on the unborn person argument in *Roe*, Justice Blackmun wrote that "the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment."<sup>47</sup> He did so despite the fact that he had cited the case just five paragraphs earlier! The failure of both appellees and the court to treat this case is both unfortunate and inexplicable.

Finally, the unborn person reading brings consistency to criminal and civil laws with respect to unborn children. Thirty-five states, by court decision or statute, have criminalized the killing of an unborn child against the will of the mother, many of them merely subsuming the crime under traditional manslaughter

or murder statutes.<sup>48</sup> Most states also provide for civil actions by or on behalf persons who have been harmed or killed *en vetre sa mere*. Finally, most states recognize the vested rights of unborn children with respect to inheritances and other property rights. It simply does not make moral or legal sense to leave the effectual determination of legal personhood to the will of a single individual, the mother. This anomalous result allows for the extreme of capriciousness in what should be the most firmly secured and fixed principle in our legal system, the rights of persons.

Historical evidence, then, supports the following conclusions: When the Fourteenth Amendment was ratified a preponderance of Americans believed that unborn children were legal persons deserving protection by the criminal laws of their respective states. This belief became even stronger in the years immediately following ratification, and was well-nigh universal until the mid-20<sup>th</sup> century, when a small number of states began to liberalize their abortion laws, although most of these still retained stricter provisions than the *Roe* decision allowed. This belief that abortion involved the unjust killing of a human being was not based upon subjective values, but upon scientific knowledge about human growth and development. While this argument appears to provide stronger support to the "restoration argument" than to the "unborn person" argument, the appearance is only superficial. The Framers of the Fourteenth Amendment did not intend to supplant the criminal codes of the various states. They

merely intended to set conditions to those codes, the enforcement of which would be worked out primarily in litigation and secondarily in Congressional enforcement. By the time the Fourteenth Amendment was ratified the states were well on their way toward enforcing its provisions with respect to unborn children. Moreover, other pressing concerns dominated the attention of the time period. *Roe* was the first case in which the issue of abortion had come directly before the cognizance of the Supreme Court, and it would have been a perfectly appropriate time for the Court to affirm the proper extension of the protections of the Fourteenth Amendment to unborn persons.

#### *IV. Conclusion*

In conclusion, restoration advocates have three possible objections to the unborn person interpretation. First, they can argue that the term "person" in the Due Process and Equal Protection Clauses of the Fourteenth Amendment was not intended to include unborn children. Advocates of this position could consistently hold that abortion is the killing of a human being while at the same time denying unborn children constitutional protection. As we have seen, however, this interpretation of the Amendment is not supported by the evidence. The text, context, and history of the Fourteenth Amendment support the thesis that unborn persons are included in its Due Process and Equal Protection provisions. Second, restoration advocates can argue

that the determination of personhood is a "value question" over which reasonable people can disagree, and that the Fourteenth Amendment therefore left this determination up to state legislatures. I have argued as well why this interpretation is both implausible as a Constitutional matter, and dangerous as a political one. Finally, restoration advocates can argue that unborn persons are indeed covered by the Fourteenth Amendment, but that the state action doctrine forecloses any protection from the national government. This is undoubtedly the strongest argument against the unborn person reading. But of course, it is not really against the unborn person reading at all, but only against effective enforcement of that reading. It can affirm the ontological status of unborn children and the horror of abortion while at the same time counseling judicial and legislative restraint. Still, as I have argued above, the state action doctrine leaves plenty of room for Congressional protection of unborn children, in both the language of the amendment and its history of interpretation.

In sum, we must be cautious that our legitimate fears of an overweening Court and "living Constitutionalism" do not blind us to the proper Constitutional and political response to the problem of abortion. Metaphysical realism regarding both the identity and the dignity of the human person is the fixed point around which our political and Constitutional order revolves. Without it, there can be no resistance to the ever-encroaching influence of pragmatic and utilitarian conceptions of human

dignity. We cannot afford to feign skepticism about the personhood of unborn children any more than an earlier age could afford to feign skepticism about the personhood of Afro-Americans. Let us again, then, highly resolve that those who died for this cause shall not have died in vain, that government of the people, by the people, for the people, shall not perish from the earth.

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<sup>1</sup> An abridged version of this article was published in *First Things* No. 129 (January 2003): 28-32.

<sup>2</sup> *Roe* 93 S. Ct. 728 (1973). Members of the *Roe* court troubled the counsel for both sides in oral arguments over this question. Sarah Weddington, counsel for Jane Roe conceded upon intense questioning from Justice Potter Stewart that "if a state could show that the fetus was a person under the Fourteenth Amendment" she would have "a very difficult case." "You certainly would," Justice Stewart replied. But Jay Flowers, Assistant Attorney General for the state of Texas, was wholly unprepared to clinch the argument. He described the position of the state of Texas "that upon conception we have a human being, a person within the concept of the Constitution of the United States and that of Texas also." A good start, but Flowers then created for himself two difficulties. First, he was completely unprepared to support his claim with scientific or legal proof. When asked for evidence that an unborn child is a person he responded "I do not believe that I could give that to you without researching through the briefs that have been filed in this case, Your Honor." Second, Flowers maintained that the determination of the personhood of a child should be left up to the state legislature. Justice Stewart rightly pressed him on this point. "If you're right that an unborn fetus is a person, then you can't leave it to the legislature to play fast and loose in dealing with that person. In other words, if you're correct in your basic submission that an unborn fetus is a person, then abortion laws such as that which New York has is grossly unconstitutional, isn't it?" "You can't leave this up to the legislature," he continued. "This is a constitutional problem, isn't it?" Again, Flowers failed to respond adequately. Transcripts are from Peter Irons and Stephanie Guitton, eds., *May it Please the Court* (New York: The New Press, 1990), 344-354.

<sup>3</sup> See the *amicus* brief filed in *Webster v. Reproductive Health Services* (1988 U.S. Briefs 605) by Catholics United for Life and several other pro-life organizations; Gerard V. Bradley, "Life's Dominion: A Review Essay," 69 *Notre Dame L. Rev.* 329; and Robert A. Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," *California Law Review* 63:1250. My argument in this paper owes considerable debt to each of these writers.

<sup>4</sup> Dr. and Mrs. J.C. Wilke, *Abortion: Questions and Answers*, revised 1990 (Cincinnati, OH: Hayes Publishing Company, 1990), 28.

<sup>5</sup> "The America We Seek: A Statement of Pro-Life Principle and Concern," *First Things* 63 (May 1996): 40-44. For other scholarly statements calling for a reversal of *Roe*, see J.H. Ely, *Democracy and Distrust*, 2-3, 248 n. 52 (1980); Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 *Wash. U.L.Q.* 817, 819; Burt, *The Constitution of the Family*, 1979 *Sub. Ct. Rev.* 329, 371-73; A. Bickel, *The Morality of Consent* 27-29 (1975); Eptstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 *Sup. Ct. Rev.* 159; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication* 83 *Yale L.J.* 221, 297-311 (1973);

Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973).

<sup>6</sup> *Palko v. Connecticut*, 58 S.Ct. 149, 152 (1937).

<sup>7</sup> *Snyder v. Massachusetts* 54 S.Ct. 330 (1934).

<sup>8</sup> For a concise statement of this argument, see *Planned Parenthood v. Casey* 112 S.Ct. 2858-59 (1992). It is baffling however, that in his dissenting opinion in *Casey*, to which Justices White, Scalia and Thomas concurred, Chief Justice Rehnquist, while urging a reversal of *Roe* also states that "A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest." 112 S.Ct. 2867 (1992).

<sup>9</sup> 112 S.Ct. 2875 (1992).

<sup>10</sup> *Planned Parenthood v. Casey* 112 S.Ct. 2873-2874 (1992).

<sup>11</sup> *Planned Parenthood v. Casey* 112 S.Ct. 2807 (1992).

<sup>12</sup> Lincoln, "Speech on the Kansas-Nebraska Act," Fehrenbacher, 328.

<sup>13</sup> For evidence of this claim, see Destro, 1252-1258 (especially footnotes 24-28), and Wilke, 33-70.

<sup>14</sup> According to Richard Neuhaus of *First Things*, Fish declared the following: "Pro-life arguments are now based on scientific evidence and the pro-choice arguments are not. That is a cultural, historical fact." He recognizes the irony of the intellectual role reversal in the abortion debate: "Nowadays, it is pro-lifers who make the scientific question of when the beginning of life occurs the key one in the abortion controversy, while pro-choicers want to transform the question into a 'metaphysical' or 'religious' one by distinguishing between mere biological life and 'moral life.' . . . Until recently pro-choicers might have cast themselves as defenders of rational science against the forces of ignorance and superstition, but when scientific inquiry started pushing back the moment when significant life (in some sense) begins, they shifted tactics and went elsewhere in search of rhetorical weaponry." See *First Things*, The Public Square, (February:1999): 68-80

<sup>15</sup> *Planned Parenthood v. Casey* 112 S.Ct. 2815 (1992).

<sup>16</sup> *Planned Parenthood v. Casey* 112 S.Ct. 2882 (1992).

<sup>17</sup> Abraham Lincoln, "Fragment on Slavery," in Don E. Fehrenbacher, ed. *Lincoln: Speeches and Writings 1832-1858* (New York: The Library of America, 1989), p. 303.

<sup>18</sup> Christopher Wolfe, "Judicial Review," in *Natural Law and Contemporary Public Policy*, ed. David F. Forte (Washington, D.C.: Georgetown University Press, 1998, pg. 183. It is important to point out that Wolfe would allow Congress to pass a national law prohibiting abortion under its section five enforcement power in the Fourteenth Amendment. On the face of it, this position is implausible. The Fourteenth Amendment, as I argue below, does not give Congress plenary power, but specific power to enforce the provisions of the Amendment. Where would Congress get the power, then, to protect unborn persons if they were not already included in the amendment itself? But Wolfe seems to mean that a Congressional statute prohibiting abortion would be at least a plausible interpretation of the First Section, and that the Court would only have the power to strike down such a law if the interpretation was wholly implausible.

<sup>19</sup> Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, New Jersey: Princeton University Press, 1997).

<sup>20</sup> Scalia, *Matter*, 23.

<sup>21</sup> Notre Dame Magazine (Spring, 1997). Report of speech.

<sup>22</sup> See the listing of Constitutional references to persons in *Roe*, 93 S. Ct. 709 (1973).

<sup>23</sup> For more development of the thesis, see See Zuckert, "Congressional Power Under the Fourteenth Amendment," and Laurent B. Frantz, "Congressional Power to Enforce the Fourteenth Amendment Against Private Acts," *The Yale Law Journal* 73:1317 (1964).

<sup>24</sup> See the discussion of Michael McConnell in "Originalism and the Desegregation Decisions," *Virginia Law Review* 81:4 (May 1995): 947-1140.

<sup>25</sup> These included the Ku Klux Act of 1871 and the Civil Rights act of 1875.

<sup>26</sup> 92 U.S. 542 (1876).

<sup>27</sup> 109 U.S. 3 (1883).

<sup>28</sup> See *De Shaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), in which the Court ruled that due process only protects against state action, not private action.

<sup>29</sup> It is unlikely such classifications were in the minds of those who framed the Fourteenth Amendment, but it should be emphasized that we are not seeking an original intent reading of the Constitution, but a textualist one based upon a fair and reasonable interpretation of the words.

<sup>30</sup> CONG. GLOBE, 39<sup>th</sup> Cong. 1<sup>st</sup> Sess. 1034 (1866).

<sup>31</sup> Herman Belz, "The Civil War Amendments to the Constitution: The Relevance of Original Intent," *Constitutional Commentary*, Vol. 5 (Winter: 1988), 124.

<sup>32</sup> See Michael P. Zuckert, "Congressional Power Under the Fourteenth Amendment – The Original Understanding of Section Five," *Constitutional Commentary* 3:123 (1986). See especially pp. 134-144 in which Zuckert treats the change in language.

<sup>33</sup> For more on this, see Michael Kent Curtis, *No State Shall Abridge* (Durham, NC: Duke University Press, 1986).

<sup>34</sup> Cong. Globe, 40<sup>th</sup> Cong., 1<sup>st</sup> Sess. 542 (1867), quoted in Weber brief.

<sup>35</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 322-23 (1866), quoted in Weber brief.

<sup>36</sup> Scalia, 140.

<sup>37</sup> The attempt by some scientists to deny this evidence is an unpleasant reminder of the ways in which bias can cloud judgment. Take for example the brief filed by "167 distinguished scientists and physicians, including 11 nobel laureates" on behalf of the appellees in *Webster*. According to this brief, the question of when human life begins "cannot be answered by reference to scientific principles." Such beliefs, they assert, "are based upon values and beliefs, not science alone." Science indeed can and does demonstrate that a new human life begins at conception. This conclusion is not a belief or value, it is commanded by the scientific evidence. The only question is whether this human being is deserving of respect and dignity. This is a question of "value" that the natural sciences cannot answer.

<sup>38</sup> Destro, 1255, footnote 27.

<sup>39</sup>\*Indeed, by 1860 85% of the population in the United States lived in areas in which abortion was clearly prohibited. See Dellapenna, "The History of Abortion, Technology, and Law," *Univeristy of Pittsburgh Law Review*, 1979.

<sup>40</sup> *Roe* 93 S.Ct. 737-39 (1973).

<sup>41</sup> *Planned Parenthood v. Casey* 112 S.Ct. 1859 (1992).

<sup>42</sup> Desto, 1289-90.

<sup>43</sup> 12 Trans. Of the Am.Med.Assn. 73-78 (1859), Twelfth Annual Meeting, quoted in *Roe* 93 S.Ct. 721 (1973).

Several well-publicized authors argued that anti-abortion laws were passed by the states with the primary purpose of protecting the health of the mother. See for example James Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (New York: Oxford University Press, 1978). See also Cyril Means, "The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality," 14 N.Y.L.F. 411 (1968); and Cyril Means, "The Phoenix of American Freedom: Is a Prenumbral or Ninth Amendment Right about to Arise from the Nineteenth Century Legislative Ashes of a Fourteenth Century Common-Law Liberty?" N.Y.L.F. 335 (1971). Justice Blackmun relied heavily upon Means in writing his opinion in *Roe v. Wade*. The arguments of Mohr and Means have been persuasively challenged by a number of writers. See for example Joseph W. Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," in *Abortion and the Constitution: Reversing Roe v. Wade through the Courts*, eds. Dennis J. Horan, Edward R. Grant and Paige C. Cunningham (Georgetown: Georgetown University Press 1987) 137-158. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979). See also the piece by Robert Destro cited above.

<sup>44</sup> 321 F.Supp. 741 (D. Ohio 1970) 745-46.

<sup>45</sup> *Ibid.* 746.

<sup>46</sup> *Ibid.* 746-47.

<sup>47</sup> 93 S.Ct. 727-28 (1973).

<sup>48</sup> See 64 A.L.R. 5<sup>th</sup> 671 (1998). In fifteen of these states (AZ, ID, IL, LA, MS, MN, MO, NB, ND, OH, PA, SD, UT, WI) the law recognizes the personhood of the unborn child and applies the statute to all states of fetal development. In twelve states (AR, CA, FL, GA, MA, MS, NE, OK, RI, SC, TN, WA) the law recognizes the personhood of the unborn child only after viability. In seven states (IN, IA, KS, NH, NM, NC, VA) the law either prohibits feticide without recognizing the personhood of the unborn child, or indirectly protects the

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unborn child by protecting the mother. New York law is ambiguous, making the killing of the unborn child after twenty-four weeks "homicide" while at the same time limiting homicide protections to "a human being who has been born and is alive."