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FETAL PERSONHOOD: THE DOOR LEFT OPEN

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I. REBIRTH

In the wake of *Dobbs v. Jackson Women's Health Organization*, states may now regulate the long-protected constitutional right to abortion.[1] The obvious implication of this decision is the ability of states to enact laws that strictly regulate or even prohibit abortion.[2] However, by overturning precedent,[3] the *Dobbs* decision also opens the door to questions about the underlying debate over fetal[4] personhood.[5] Specifically, are fetuses people? And if so, at what point at or following conception[6] do fetuses have constitutional protections, including the right to life?[7] Previously, the United States

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1. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022) ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."); *see also* Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. 215; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by Dobbs*, 597 U.S. 215.
2. *Dobbs*, 597 U.S. at 302.
3. *Id.* at 302 (overruling the precedent set in *Roe* and affirmed in *Casey* that guaranteed a constitutional right to abortion); *see also Roe*, 410 U.S. 113; *Casey*, 505 U.S. 833.
4. *Fetus*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/fetus [https://perma.cc/E9HJ-Y289] (defining "fetus" as "an unborn or unhatched vertebrate especially after attaining the basic structural plan of its kind *specifically*: a developing human from usually two months after conception to birth"). This comment will use the term "fetus" to refer to a developing human in any period prior to birth.
5. *See* discussion *infra* Section II; *see also Dobbs*, 597 U.S. at 265.
6. *Conception*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/conception [https://perma.cc/5U2S-VFYU] (defining "conception" as "the process of becoming pregnant involving fertilization or implantation or both"). This comment will use the term "conception" to refer to both fertilization and implantation.
7. U.S. CONST. amend. XIV, § 1 (providing that "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 constitutional "right to life" is separate and distinct from general idea of "life" itself. This comment is focused on the definition of "person" under the Fourteenth Amendment, which determines when the "right to life" and legally cognizable interests are granted, not when "life" begins.

Supreme Court answered the first question in the negative,[8] and the Court has never addressed the second question.[9] But in the changing abortion law landscape, these important constitutional questions now remain unanswered.[10]

If precedent is not an issue,[11] the Court must use originalism and textualism to address the issue of "fetal personhood."[12] This comment presents a solution to the "fetal personhood" debate framed in light of the originalist and textualist approaches recently used by the Supreme Court to address constitutional issues.[13] Section II provides an overview of the current state of fetal personhood jurisprudence.[14] Section III briefly discusses the congressional push to establish fetuses as people under the Constitution.[15] Section IV outlines originalism and textualism, explaining how the Court incorporates both approaches into its constitutional analysis.[16] Finally, Section V uses the Court's originalist and textualist approach to provide an end to the fetal personhood debate, concluding that the framers did not intend the Fourteenth Amendment's use of the word "person" to include fetuses.[17]

II. CONCEPTION

The overarching question in the fetal personhood debate turns on whether fetuses should qualify as persons under the Constitution.[18] If they do, fetuses are entitled to constitutional protections, including

8. *Roe*, 410 U.S. at 158 ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").
9. *See id.* The Court's previous denial of personhood to fetuses made a judicial determination on the time constitutional rights were granted after conception unnecessary. *Id.*
10. *See* discussion *infra* Section II.
11. *See* discussion *infra* Section II.
12. *See* discussion *infra* Section IV.
13. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n. v. Bruen, 597 U.S. 1, 3–4, 17 (2022) (holding that the Second Amendment's plain text protects the right to "bear" arms publicly for self-defense and that "[o]nly if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside of the Second Amendment's 'unqualified command'"). The Court applied both originalist and textualist analyses of the Constitution to reach their conclusion, and this comment will use a similar approach.
14. *See* discussion *infra* Section II.
15. *See* discussion *infra* Section III.
16. *See* discussion *infra* Section IV.
17. *See* discussion *infra* Section V.
18. Brendan (Bo) F. Pons, *The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go From Here?*, 58 S.D. L. REV. 119, 121 (2013).

life, liberty, property, and equal protection under the law.[19] The Court has briefly addressed this debate over the years, but often incident to decisions challenging the right to abortion.[20]

The Supreme Court's fetal personhood jurisprudence originates with *Roe v. Wade*.[21] In *Roe*, the appellant challenged the constitutionality of Texas statutes that criminalized the attempted or actual procurement of an abortion and provided an exception only for an abortion performed to save the mother's life.[22] At the time, a majority of the states had similar statutes in effect.[23] In determining the constitutionality of the Texas statutes and, indirectly, the other state statutes, the Court addressed the appellee's argument that a fetus qualifies as a person within the language of the Fourteenth Amendment.[24] The Court conceded that if fetal personhood was established, the appellant's case would "collapse" as the fetus's right to life would be constitutionally guaranteed.[25] The Court turned to the plain text of the Constitution and determined that despite the Constitution's repeated use of the word "person," at no point is the word defined.[26] The Court found that, absent a clear definition of "person" in the Constitution, in nearly all instances used, the word

19. *Id.*
20. *See infra* Section II.
21. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
22. *See id.* at 117–20; TEX. CRIM. STAT. §§ 1191–96, *invalidated by Roe*, 410 U.S. at 113 (defining and criminalizing "abortion," "furnishing," "attempt at abortion," "murder in producing abortion," abortion "by medical advice," and "destroying unborn child" and specifying the punishments for each crime).
23. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3603 (originally enacted as § 13-211 (1956)); 1972 Conn. Pub. Acts 1 (Spec. Sess.); CONN. GEN. STAT. §§ 53-29, 53-30 (repealed 1990); IDAHO CODE § 18-602 (originally enacted as § 18-601 (1948)), *invalidated by* Planned Parenthood of Idaho v. Wasden, 376 F.3d 908 (9th Cir. 2004); IND. CODE § 35-1-58-1 (repealed 1977); IOWA CODE § 701.1 (1971); KY. REV. STAT. ANN. § 436.020 (repealed 1974); LA. STAT. ANN. § 37:1285(8) (1964); ME. REV. STAT. ANN. tit. 17, § 51 (repealed 1979); MASS. GEN. LAWS ANN. ch. 272, § 19 (repealed 2018); MICH. COMP. LAWS § 750.14 (1948) (repealed 2023); N.H. REV. STAT. ANN. § 585:13 (1955) (repealed 1997); N.J. STAT. ANN. § 2A:87-1 (repealed 1979); N.D. CENT. CODE §§ 12-25-01, 12-25-02 (1960); OHIO REV. CODE ANN. § 2901.16 (repealed 1974); OKLA. STAT. ANN. tit. 21, § 861, *invalidated by* Henrie v. Derryberry, 358 F. Supp. 719 (N.D. Okla. 1973); 18 PA. STAT. AND CONS. STAT. §§ 4718, 4719 (repealed 1974); 11 R.I. GEN. LAWS ANN. § 11-3-1 (repealed 2019); S.D. CODIFIED LAWS § 22-17-1 (repealed 1977); TENN. CODE ANN. §§ 39-301, 39-302 (1956); VT. STAT. ANN. tit. 13, § 101 (repealed 2013); W. VA. CODE § 61-2-8 (1966); WIS. STAT. § 940.04 (1969); *see also Roe*, 410 U.S. at 117–18 & n.2.
24. *Roe*, 410 U.S. at 156.
25. *Id.* at 156–57.
26. *Id.* at 157.

has postnatal application.[27] Ultimately, the Court concluded that, "[a]ll this, together with our observation . . . that throughout the major portion of the [nineteenth] century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[28] While declining to address the question of "when life begins," the Court determined that a fetus does not constitute a "person" under Fourteenth Amendment and therefore the Amendment's protections did not apply to fetuses.[29]

Following *Roe*, the Court again addressed the right to abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[30] Unlike *Roe*, the *Casey* opinion lacked any analysis regarding personhood.[31] The Court reaffirmed the holding in *Roe*[32] but rejected the trimester framework,[33] which the Court did not consider part of *Roe*'s essential holding.[34] However, the Court could not have reached this conclusion and reaffirmed *Roe* if the Court had changed its understanding of the constitutional status of a fetus.[35]

The fetal personhood status set by *Roe* remained in place until the Court rendered the *Dobbs* decision in 2022.[36] The *Dobbs* Court

27. *Id.*
28. *Id.* at 158.
29. *Id.* at 158–59.
30. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
31. *See generally id.*
32. *Id.* at 846.
33. *See Roe*, 410 U.S. 164–65. *Roe* divided pregnancy into three trimesters. *Id.* Under the trimester framework, during the first trimester, the "abortion decision and its effectuation" was left to the "medical judgment of the pregnant woman's attending physician." *Id.* at 164. During the second trimester, the state was able to "regulate the abortion procedure in ways that are reasonably related to maternal health." *Id.* During the third trimester, the state was able to "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 165. The *Casey* Court found this standard to be too rigid, and instead replaced the framework with the "undue burden standard." *Casey*, 505 U.S. at 837.
34. *Casey*, 505 U.S. at 873 ("We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. . . . A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life.").
35. *See id.* at 833; *see also* Vincent J. Samar, *Personhood Under the Fourteenth Amendment*, 101 MARQ. L. REV. 287, 295 (2017).
36. *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

overturned the constitutional right to abortion granted in *Roe*, finding *Roe* "egregiously wrong from the start."[37] The Court found that instead of bringing about a "national settlement of the abortion issue, *Roe* and *Casey* have enflamed the debate and deepened division."[38] Despite overruling the previous opinion, the Court in *Dobbs* expressly declined to address if and when fetuses are entitled to life or any other constitutional protections.[39] However, by concluding that the Fourteenth Amendment does not provide a substantive right to abortion,[40] the Court implicitly gave states the power to decide when life begins and whether a fetus has rights or legally cognizable interests.[41]

In 2022, the United States Supreme Court received an opportunity to clarify the Fourteenth Amendment's meaning of the word "person," but it declined to grant certiorari to hear the case.[42] In that case, *Benson v. McKee*, the Supreme Court of Rhode Island determined that the "unborn" plaintiffs lacked standing to assert a deprivation of legally cognizable and protected interests because they were not "persons."[43] The Supreme Court of Rhode Island relied on the *Roe* Court's finding that the Fourteenth Amendment's use of the word "person" does not include fetuses.[44] But when *Dobbs* overturned *Roe*, the plaintiffs submitted a petition for writ of certiorari, requesting that the United States Supreme Court "finally determine whether prenatal life, at any gestational age, enjoys constitutional protection."[45] Despite this opportunity, the Supreme Court declined the petitioners writ without comment, leaving the issue of fetal personhood unaddressed.[46]

The 2024 term presents the United States Supreme Court with yet another opportunity to address the issue of fetal personhood.[47] On Wednesday, December 13, 2023, the Court granted the Food & Drug

37. *Id.* at 231; *see also Roe*, 410 U.S. 113.
38. *Dobbs*, 597 U.S. at 231–32; *see also Roe*, 410 U.S. 113; *Casey*, 505 U.S. 833.
39. *Dobbs*, 597 U.S. at 263 ("Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth.").
40. *Id.* at 260.
41. *Id.* at 231. By returning the power to regulate abortion to the states, the Court also gave states the power to regulate when life begins. *Id.* at 232.
42. Benson v. McKee, 273 A.3d 121 (R.I. 2022), *cert. denied sub nom.*, Doe *ex rel.*Doe v. McKee, 143 S. Ct. 309 (2022) (mem.).
43. *Id.* at 131.
44. *Id.*
45. Petition for Writ of Certiorari at 22, McKee, 143 S. Ct. 309 (No. 22-201).
46. *McKee*, 143 S. Ct. 309; *see generally Benson*, 273 A.3d 121; *see also supra* notes 42–45 and accompanying text.
47. *See infra* notes 48–56 and accompanying text.

Administration's (FDA) petition for a writ certiorari to hear *United States Food & Drug Administration v. Alliance for Hippocratic Medicine*.[48] The case, initially brought by Alliance, a group of "doctors and national medical associations,"[49] challenged the FDA's approval of mifepristone, a drug used to end a pregnancy through ten weeks gestation.[50] Despite the seemingly absent argument from either side about fetal rights and fetuses not being parties to the action,[51] the district court opinion is riddled with personhood-focused language.[52] While personhood was a nonissue in the case, the court parenthetically considered whether judicial review of certain claims was proper as it relates to fetuses.[53] On appeal, the Fifth Circuit shied away from the district court's strong use of "personhood" language, only using "unborn" when quoting the declarations of plaintiff

48. FDA v. All. for Hippocratic Med., *cert. granted*, No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023); *see also* All. for Hippocratic Med. v. FDA, 78 F.4th 210 (5th Cir. 2023).

49. All. for Hippocratic Med. v. FDA., No. 2:22-CV-223-Z, 2023 WL 2825871, at *1 (N.D. Tex. 2023).

50. *See id.*; *see also Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, FDA, https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation [https://perma.cc/CU6B-F2R8] (Sept. 1, 2023) ("Mifepristone is a drug that blocks a hormone called progesterone that is needed for a pregnancy to continue. Mifepristone, when used together with another medicine called misoprostol, is used to end a pregnancy through ten weeks gestation . . . .").

51. *All. for Hippocratic Med.*, 2023 WL 2825871, at *1 ("Plaintiffs are doctors and national medical associations that provide healthcare for pregnant and post-abortive women and girls.").

52. Judge Kacsmaryk's first footnote in the opinion reads:

> Jurists often use the word "fetus" to inaccurately identify unborn humans in unscientific ways. The word "fetus" refers to a specific gestational stage of development, as opposed to the zygote, blastocyst, or embryo stages. Because other jurists use the terms "unborn human" or "unborn child" interchangeably, and because both terms are inclusive of the multiple gestational stages relevant to the FDA Approval, 2016 Changes, and 2021 Changes, this Court uses "unborn human" or "unborn child" terminology throughout this Order, as appropriate.

Id. at *1 n.1 (citation omitted).

53. *Id.* at *14 ("Parenthetically, said 'individual justice' and 'irreparable injury' analysis also arguably applies to the unborn humans extinguished by mifepristone — especially in the post-*Dobbs* era."). This "parenthetical" assertion was merely dictum, indicating a bias favoring the establishment of fetal personhood by the failure to apply any other analysis in the claims to "unborn humans." *See generally id.*

physicians.[54] Despite the Fifth Circuit's limited use of personhood-focused language and the case's focus on FDA approval,[55] the underlying issue of fetal personhood once again arises, giving the Supreme Court the opportunity to address it.[56]

III. CONGRESSIONAL PUSH

At the federal level, some legislators have sought to establish fetal personhood since *Roe* was decided.[57] In various iterations, this push to grant Fourteenth Amendment protections to fetuses has continued since 1973, with legislators proposing or introducing several hundred personhood bills in Congress since then.[58] Recently, elected officials have introduced two bills seeking to extend the Fourteenth Amendment right of equal protection to fetuses in both the United States Senate and House of Representatives.[59] Both bills purport to

54. All. for Hippocratic Med. v. FDA, 78 F.4th 210, 231 (5th Cir. 2023) (quoting Wozniak Declaration ¶ 24); *see also id.* at 239 (quoting Barrows Declaration ¶¶ 16–17; Skop Declaration ¶ 28). While the majority's use of "unborn" is very limited, the partial concurrence discusses the "unborn" independent of quotations from declarations. *Id.* at 260 (Ho, J., concurring).

55. *See* Petition for Writ of Certiorari at *4, FDA v. All. for Hippocratic Med., No. 23-235, 2023 WL 5979790 (U.S. Sept. 8, 2023); *id.* at I ("This case concerns mifepristone . . . . The questions presented are: 1. Whether [Alliance has] Article III standing to challenge FDA's 2016 and 2021 actions. 2. Whether FDA's 2016 and 2021 actions were arbitrary and capricious. 3. Whether the district court properly granted preliminary relief.").

56. *See supra* notes 48–55 and accompanying text.

57. H.R.J. Res. 261, 93d Cong. (1973). Eight days after *Roe* was decided, legislators proposed the first federal fetal personhood bill, stating in relevant part that "neither the United States nor any State shall deprive any human being, from the moment of conception, of life without due process of law; nor deny to any human being, from the moment of conception, within its jurisdiction, the equal protection of the laws." *Id.*; *see generally* Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

58. *The Personhood Movement*: *Where It Came from and Where It Stands Today*, PROPUBLICA, https://www.propublica.org/article/the-personhood-movement-timeline [https://perma.cc/U6BP-Q29F]. Between 1973–2014, legislators introduced more than 300 federal bills. *Id.* This number has trended upward since then. Becca Demante & Kierra B. Jones, *A Year After the Supreme Court Overturned Roe v. Wade, Trends in State Abortion Laws Have Emerged,* CTR. FOR AM. PROGRESS (June 15, 2023), https://www.americanprogress.org/article/a-year-after-the-supreme-court-overturned-roe-v-wade-trends-in-state-abortion-laws-have-emerged/ [https://perma.cc/R7BK-47PY].

59. *See* Life at Conception Act of 2021, S.99, 117th Cong. (2021); Life at Conception Act, H.R. 1011, 117th Cong. (2021). The bills are substantially the same in substance, nature, and purpose with slight textual differences. The House proposed a bill two weeks after the Senate proposed its bill, and likely used the Senate bill as a model, as the House bill is slightly more concise in Section 2 and more inclusive in Section 3.

use Congress's power under Article I, Section Eight of the Constitution and Congress's power under Section Five of the Fourteenth Amendment to declare that "the right to life guaranteed by the Constitution is vested in each human being."[60] The bills further seek to redefine "human being" and "human person" to include "each and every member of the species homo sapiens at all stages of life, including the moment of fertilization, cloning, or other moment at which an individual member of the human species comes into being."[61] The enactment of either bill would grant Constitutional rights to fetuses contrary to the Supreme Court's previous findings in *Roe*.[62] Because the Court opened the door to the questions of fetal personhood,[63] for the sake of consistency,[64] the Court must also settle this issue with originalism.[65]

IV. LABOR: FRAMEWORK FOR CONSTITUTIONAL ANALYSIS

A. Originalism and Textualism: Two Methods of Constitutional Interpretation

Originalism refers to a family of related theories that subscribe to the "fixation thesis," which states: "the linguistic meaning of the Constitution was fixed when each provision was framed and ratified."[66] This concept originally focused on the framers' intent of

60. S.99 § 2; H.R. 1011 § 2 (2021); *see* U.S. CONST. art. I, § 8; U.S. CONST. amend. XIV, § 5.

61. H.R. 1011 § 3(1); *see also* S.99, § 3(1) ("The terms 'human person' and 'human being' include each member of the species homo sapiens at all stages of life, including the moment of fertilization or cloning, or other moment at which an individual member of the human species comes into being.").

62. *See Roe*, 410 U.S. at 158 ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

63. *See supra* Part II.

64. *See infra* note 71 and accompanying text; *see also infra* Section IV.B.

65. *See infra* Section IV.A.

66. ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 4 (2011). Bennett and Solum discuss three other ideas that originalism yields: (1) that "sound interpretation of the Constitution requires recovery of its *original public meaning*"; (2) that the "original public meaning has the *force of law*"; and (3) that "*constitutional interpretation*, which discerns the linguistic meaning of the text" is distinguished from "*constitutional construction*, which determines the legal effect of the text." *Id.* at 2–4. Because the fixation thesis is "accepted by almost every originalist thinker," it will be the focus of this comment's originalist analysis. *Id.* at 4.

for a given constitutional provision.[67] However, over time, the prevailing version of originalism has become public meaning originalism.[68] Public meaning originalism is premised on the tenet that:

> [T]he original and unchanging meaning of a constitutional provision is either (1) what a reasonable person who knew the publicly available facts about the context of its drafting would have taken it to mean or (2) what literate and informed members of the public actually understood it to be, at the time of its promulgation.[69]

Due to the inability to discover an individual's understanding of a given constitutional provision at the time of its ratification, an originalist analysis generally relies on what informed persons of that time would reasonably have understood the provision to communicate.[70]

In light of the Supreme Court's recent decisions, one jurist has referred to the Court as "the most originalist Court in American History."[71] This characterization stems from the Supreme Court's reliance on history to determine the original understanding of a constitutional provision at the time it was adopted.[72] While the Court does rely on historical evidence in their constitutional analyses, the

67. Erwin Chemerinsky, *Chemerinsky: Originalism Has Taken Over the Supreme Court*, ABA J. (Sept. 6, 2022, 8:00 AM), https://www.abajournal.com/columns/article/chemerinsky-originalism-has-taken-over-the-supreme-court [https://perma.cc/9WBQ-4PU5].

68. Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1424 (2021).

69. *Id.* at 1425–26; *see also* ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012) ("In their full context, words mean what they conveyed to reasonable people at the time they were written."); Lawrence B. Solum, *Cooley's Constitutional Limitations and Constitutional Originalism*, 18 GEO. J.L. & PUB. POL'Y 49, 57 (2020) ("The original meaning of the constitutional text is best understood as the meaning communicated to the public at the time each provision was framed and ratified.").

70. Fallon, Jr., *supra* note 68, at 1426.

71. Chemerinsky, *supra* note 67. Chemerinsky specifically refers to the U.S. Supreme Court term that ended on June 30, 2022. *Id*. However, the U.S. Supreme Court whose term ended on June 30, 2022, is the same Court that issued the recent opinions relevant to this comment, specifically *Dobbs* and *Bruen*. *Id.*; *see generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (applying originalism analysis to the issue of abortion); *see generally* N.Y. State Rifle & Pistol Ass'n. v. Bruen, 597 U.S. 1 (2022) (applying originalism analysis to gun rights).

72. *See* Chemerinsky, *supra* note 67; *see generally Dobbs*, 597 U.S. 215; *see generally Bruen*, 597 U.S. 1.

inquiry always begins with a textual approach,[73] which is not the same as originalism.[74] Where originalism takes a historical approach,[75] textualism requires strict adherence to the text.[76] While textualism and originalism may be used in tandem and may, in some instances, lead to the same result, the two are distinct approaches.[77]

The Supreme Court derives the original public meaning of a term by applying a formulaic approach that begins with a reading of the plain text of the challenged provision.[78] To conduct a textual analysis of the term in question, the Court considers the plain meaning of the text,[79] dictionary definitions at the time of the nation's founding, and dictionary definitions at the time the relevant constitutional amendment was ratified.[80] Once the Court has an understanding of the given constitutional provision's definition, the Court considers the pre-enactment and post-enactment history surrounding the constitutional provision at issue.[81] In conducting an analysis of the term "person"[82] within the Fourteenth Amendment, this comment follows the same formula, applying both textualism and originalism to reach a conclusion.[83]

B. The Court's Analytical Framework

In *Dobbs*, the Court conducted a constitutional analysis of the Fourteenth Amendment to determine whether its reference to "liberty" protected the right to abortion.[84] In conducting this analysis, the Court first looked at the explicit meaning of the constitutional

73. *See Dobbs*, 597 U.S. at 235 (beginning the constitutional analysis with "language of the instrument" to determine whether the Constitution explicitly grants a right to abortion); *see Bruen*, 597 U.S. at 31–32 (beginning with the "plain text of the Second Amendment" to determine whether petitioners have a right to "bear" arms in public for self-defense).
74. *See infra* text accompanying notes 75–77.
75. Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115, 115 (2021).
76. *Id.*
77. *Id.*
78. *Bruen*, 597 U.S. at 32; *see also* District of Columbia v. Heller, 554 U.S. 570, 592 (2008).
79. *See* discussion *infra* Section IV.B.
80. *Heller*, 554 U.S. at 584 (using dictionaries to find the meaning of the term "bear" at the time of founding and at the time the Second Amendment was ratified).
81. *See Bruen*, 597 U.S. at 34–35.
82. This comment applies both textualism and originalism to analyze the term "person" within the Fourteenth Amendment. *See infra* Part V.
83. *See infra* Part V.
84. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 234 (2022).

text,[85] and then conducted a historical inquiry to determine the constitutional text's implicit meaning.[86] In *Dobbs*, the Court, in reviewing the plain text, found that "[t]he Constitution makes no express reference to a right to obtain an abortion" and accordingly, for the Constitution to protect such a right, the Court must find that the "right [to abortion] is somehow implicit in the constitutional text."[87] The Court then began a historical analysis to determine whether the right to abortion is "deeply rooted in [our] history and tradition" and essential to our nation's "scheme of ordered liberty."[88] This analysis began with the English common law[89] and early colonial United States treatment of abortion,[90] before moving into the most relevant time period for Fourteenth Amendment analysis, the nineteenth century.[91] The Court outlined the states' statutory criminalization of abortion leading up to and following the Fourteenth Amendment's ratification in 1868, concluding that "right

85. *Id.* at 234–35.

86. *Id.* at 235–54.

87. *Id.* at 235.

88. *Id.* at 237–38 (quoting Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019)). The Court notes that a similar inquiry was performed in *McDonald v. City of Chicago*, in its finding that the Fourteenth Amendment protects the right to keep and bear arms. *Id.* at 238 (citing McDonald v. City of Chicago, 561 U.S. 742, 767–77 (2010)).

89. *Id.* at 242 (finding that "abortion was a crime at least after 'quickening'—*i.e.*, the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy"). While the common law history provided background for treatment of abortion in the United States, it is not necessary for an analysis of our own Constitution as "English common-law practices and understand[ings] at any given time in history cannot be indiscriminately attributed to the Framers of our own Constitution." N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 34–35 (2022).

90. *Dobbs*, 597 U.S. at 245. The Court relied on Blackstone's commentaries, 18th century manuals for justice of the peace, and a few colonial cases that corroborated the criminalization of abortion in some capacity. *Id.* (citing 2 ST. GEORGE TUCKER & WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES 129–30 (1803); 5 ST. GEORGE TUCKER & WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES 200–01 (1803); JAMES PARKER, CONDUCTOR GENERALIS 220 (1788); 2 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 221–22 (7th ed. 1762)). *See generally* JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 215–28 (2006) (cataloging cases from the colonial period). However, this is not the guiding history for the Court's analysis as constitutional rights are "enshrined with the scope they were understood to have *when the people adopted them*." *Bruen*, 597 U.S. at 34.

91. *Dobbs*, 597 U.S. at 247–48. Because the states ratified the Fourteenth Amendment in 1868, the nineteenth century is the most relevant period for determining what the people understood the Fourteenth Amendment to mean. *See* U.S. CONST. amend. XIV; *Bruen*, 597 U.S. at 34.

to abortion is not deeply rooted in the Nation's history and traditions."[92]

The Court followed this same formula in *New York State Rifle & Pistol Association, Inc. v. Bruen*, to determine the meaning of "bear" in the Second Amendment.[93] The Court first looked at the plain text of the Second Amendment, finding that the text "presumptively guarantees . . . a right to 'bear' arms in public for self-defense."[94] The Court then examined historical sources, giving the most weight to the time of the Second and Fourteenth Amendment's adoption in 1791 and 1868, respectively, because the most relevant historical period for constitutional interpretation occurred when the people adopted the relevant provision.[95] While the Court considered historical evidence that predated both enactment dates, it did so with caution to avoid going "too far back into antiquity for the best securities of our liberties."[96] Similarly, while the Court reviewed "a variety of legal and other sources to determine *the public understanding* of [the Second Amendment] after its . . . ratification," the Court avoided giving post-enactment history too much weight because the text controls in the event of later history contradicting the text.[97]

Accordingly, the Court must use the same formulaic approach and give the most weight to the text and historical evidence from 1868 in determining whether the framers intended the Fourteenth Amendment's use of the word "person" to extend to fetuses.

V. DELIVERY: AN ANALYSIS OF THE FOURTEENTH AMENDMENT

A. The Fetal Personhood Debate

Suppose public meaning originalism[98] provides the basis for the Court's constitutional analysis of the meaning of "person" within the Fourteenth Amendment. In that case, the Court would find that that the Fourteenth Amendment does not include fetuses.[99] The most "fundamental semantic rule of interpretation" is the ordinary meaning

92. *Dobbs*, 597 U.S. at 248–50.
93. *Bruen*, 597 U.S. at 31–70.
94. *Id.* at 32–33.
95. *Id.* at 34–35.
96. *Id.* at 35 (quoting Funk v. United States, 290 U.S. 371, 382 (1933)).
97. *Bruen*, 597 U.S. at 35 (quoting District of Columbia v. Heller, 554 U.S. 570, 605 (2008)); *see also id.* at 36.
98. *See supra* Section IV.A.
99. *See supra* Section IV.A.

rule.[100] Absent good reason to suppose the relevant word or concept bears a technical meaning within a more restricted community in a given context, "[w]ords are to be understood in their ordinary, everyday meanings."[101] This rule of interpretation applies to constitutions as well as to various legal instruments; Justice Joseph Story best explained this concept in 1833, stating:

> [E]very word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings.[102]

Because the Court lacks evidence that the context of the Fourteenth Amendment furnishes some ground to control, quantify, or enlarge the meaning of "person," the word must be expounded in its plain, obvious, and common sense meaning.[103]

The originalist argument that the Fourteenth Amendment applies to fetuses is straightforward—the Fourteenth Amendment provides the constitutional guarantees of due process and equal protection to all members of the human species.[104] At the moment of fertilization, a fetus becomes a member of the human species, and therefore, the Fourteenth Amendment protects fetuses.[105] The originalist argument against the Fourteenth Amendment's applicability to fetuses is the opposite—the Fourteenth Amendment provides the constitutional

100. SCALIA & GARNER, *supra* note 69, at 69.

101. *Id.* ("The ordinary meaning rule is the most fundamental semantic rule of interpretation." It says that "[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense."). *See also* C'Zar Bernstein, *Fetal Personhood and the Original Meanings of "Person,"* 26 TEX. REV. L. & POL. 485, 505 (2022).

102. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 345 (Melvin M. Bigelow, ed., William S. Hein & Co., 5th ed. 1994) (1891).

103. *See* SCALIA & GARNER, *supra* note 69, at 69; STORY, *supra* note 102, at 345.

104. Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539, 546–47 (2017).

105. *Id.* at 547–48.

guarantees of due process and equal protection to all "persons."[106] The word "person" was not understood to include fetuses, and therefore, the Fourteenth Amendment does not extend to fetuses.[107]

B. The Plain Text of the Constitution Does Not Explicitly Provide Protection to Fetuses

Following the Court's approach, a constitutional analysis must begin with the "language of the instrument,"[108] which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[109]

The Constitution never expressly defines the word "person,"[110] and the Constitution never expressly mentions "fetus," "fetal personhood," or the rights of fetuses.[111] Thus, the lack of an express constitutional mention of "fetal personhood" the Court must find that

106. *See infra* Sections V.B, V.C. *See generally* U.S. CONST. amend. XIV, § 1.

107. *See infra* Sections V.B, V.C, V.D.

108. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 235 (2022) (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 186–89 (1824)).

109. U.S. CONST. amend. XIV, § 1.

110. Roe v. Wade, 410 U.S. 113, 157 (1973) ("The Constitution does not define 'person' in so many words. Section 1 of the Fourteenth Amendment contains three references to 'person.' The first, in defining 'citizens,' speaks of 'persons born or naturalized in the United States.' The word also appears both in the Due Process Clause and in the Equal Protection Clause."), *overruled by Dobbs*, 597 U.S. 215. Person is also used in the listing of the qualifications for Representatives and Senators; the Apportionment Clause; the Migration and Importation provision; the Emolument Clause; the Electors provision; the listing of qualifications for the office of the President; the Extradition provisions; the superseded Fugitive Slave Clause; and in the Fifth, Twelfth, Fourteenth, and Twenty-second Amendments. *Id.* None of these usages indicate a clear prenatal application. *Id.*

111. *See generally* U.S. CONST. (reading the entirety of the Constitution or performing a computer-aided word search of the document affirms that neither word nor phrase is within the text of the Constitution); *see also Dobbs*, 597 U.S. at 235 (beginning the constitutional analysis with the plain text of the Constitution to find that there is no explicit mention of abortion or the right to abortion).

the Constitution implicitly intended to grant "personhood" to fetuses; otherwise, the "fetal personhood" argument fails.[112]

C. Historical Definitions of "Person": Viewing the Text Through an Originalist Lens

Dictionaries at the time of the nation's founding defined a "person" as an "[i]ndividual or particular man or woman; human being; a general looſe[113] term for a human being; one's ſelf, not a repreſentative . . ."[114] This definition does not provide much guidance on the Founders' limitations, if any, on what qualities determined personhood.[115] However, given the decades between the nation's founding and the ratification of the Fourteenth Amendment,[116] the understanding of "person" likely shifted.

According to dictionaries at the time of the Fourteenth Amendment's ratification, a "person" is: "[a]n individual; a human being; one:–body; shape; exterior appearance";[117] "[a] living soul; a self-conscious being; a moral agent; especially, a living human being;

112. *See Dobbs*, 597 U.S. at 235 (noting that a failure to show explicit constitutional granting of a right means proponents must show the right is someone implicit in the Constitution).

113. The "long s" (ſ) was a letter developed in the eighth century that remained present in English language documents until the mid- to late-eighteenth century. Writers used it where we now use a lowercase "s" and meant it to have the same effect as a lowercase "s." Special Collections & Archives, Cal. State Univ., Northridge Univ. Libr., *The Long S*, CAL. ST. UNIV., NORTHRIDGE UNIV. LIBR.: PEEK IN THE STACKS (Jan. 22, 2019), https://library.csun.edu/SCA/Peek-in-the-Stacks/esses#:~:text=The%20long%20s%20was%20only,case%20of%20a%20double%20s [https://perma.cc/2UV9-LG7Y].

114. *Person*, THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789).

115. *See id.*

116. Ninety-two years passed between the signing of the Declaration of Independence on July 4, 1776, and ratification of the Fourteenth Amendment on July 9, 1868. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776) (declaring the independence of the 13 colonies on July 4, 1776); *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, *Milestone Documents*, NAT'L ARCHIVES https://www.archives.gov/milestone-documents/14th-amendment#:~:text=Passed%20by%20Congress%20June%2013,Rights%20to%20formerly%20enslaved%20people [https://perma.cc/CCP5-45GH] (Jan. 12, 2024) (providing an overview of the passage of the Fourteenth Amendment by Congress in 1866 through the Amendment's ratification in 1868).

117. *Person*, JOSEPH E. WORCESTER, A PRIMARY DICTIONARY OF THE ENGLISH LANGUAGE 190 (1868).

a man, woman, or child; an individual of the human race."[118] Scholars argue that the absence of "birth" or the "status of being born" in the definition of "person" provides enough evidence to conclude the term included all human beings, which necessarily includes "prenatal human beings."[119] While some dictionaries at the time of the Fourteenth Amendment's ratification provides little information on what "person" means outside of "human,"[120] others give more insight on the qualities necessary to be a "person."[121] The assertion that the absence of "birth" means the Amendment includes all human beings[122] ignores the "self-conscious being"[123] descriptor, which was at the time defined as, "[c]onscious of one's acts or states as belonging to, or originating in, one's self" or "[c]onscious of one's self as an object of the observation of others."[124] Both definitions lead to the conclusion that the original meaning of "person" at the time of the Fourteenth Amendment's ratification only included beings that are conscious of one's self or acts, which necessarily excludes fetuses.[125]

D. The Originalist View of "Person"

Originalism holds that a term's constitutional meaning is fixed according to "the understandings of those who ratified it."[126] But, when appropriate, "the Constitution can and must, apply to circumstances beyond those the Founders specifically anticipated."[127] However, the Founders likely did not anticipate inclusion of fetuses

118. *Person*, NOAH WEBSTER, NEW ILLUSTRATED EDITION OF DR. WEBSTER'S UNABRIDGED DICTIONARY OF ALL THE WORDS IN THE ENGLISH LANGUAGE 974 (Chauncey A. Goodrich & Noah Porter eds., 1864).
119. Craddock, *supra* note 104, at 549.
120. WORCESTER, *supra* note 117, at 132 (defining "Human" as: "having the qualities of man"); *id.* at 161 (defining "Man" as "a human being").
121. WEBSTER, *supra* note 118, at 974 (including "a self-conscious being" in the definition of "Person").
122. Craddock, *supra* note 104, at 549.
123. WEBSTER, *supra* note 118, at 974.
124. *Id.* at 1197.
125. *Id.*
126. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 28 (2022); *see, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (recognizing the Second Amendment's historically fixed meaning of "arms" does not only apply to "those arms in existence in the 18th century"); United States v. Jones, 565 U.S. 400, 404–05 (2012) (holding that the installation of a tracking device fell within the Fourth Amendment's definition of "search" at the time of the Amendment's adoption).
127. *Bruen*, 597 U.S. at 28.

in the definition of "person" under the Fourteenth Amendment.[128] Rather, the historical context shows they chose not to grant Fourteenth Amendment protections to fetuses.[129]

Because the plain text of the Fourteenth Amendment does not explicitly include fetuses,[130] the Court must consider the historical evidence surrounding "fetal personhood" for implicit inclusion of fetuses in the original public meaning of "person" in the Fourteenth Amendment.[131] The most significant time period for a historical analysis exists at the time of the Amendment's ratification, as "[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*."[132] While there is historical evidence that significantly predates the Fourteenth Amendment's ratification,[133] "it [is] better not to go too far back into antiquity" in interpreting the Constitution.[134] Accordingly, the most significant time period in determining the meaning of the Fourteenth Amendment falls just before and shortly after the Amendment's ratification.

The premise that the framers did not anticipate the issue of whether "person" in the Fourteenth Amendment was meant to include fetuses fails due to the ongoing abortion regulation at the time of the Amendment's ratification.[135] By 1868, the year of the Fourteenth Amendment's ratification, thirty of the thirty-seven states had enacted statues criminalizing abortion,[136] twenty-eight of which criminalized abortion at all stages of pregnancy.[137] Of the nine remaining states, eight criminalized abortion by 1910.[138] While most

128. *See infra* notes 129–60 and accompanying text.
129. *See infra* notes 129–60 and accompanying text.
130. *See* discussion *supra* Section IV.B.
131. *See, e.g.*, *Bruen*, 597 U.S. at 33–34 (using historical sources to interpret the language of the Second Amendment).
132. District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008) (emphasis added).
133. *See* Roe v. Wade, 410 U.S. 113, 129–36 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
134. *Bruen*, 597 U.S. at 35 (citing Funk v. United States, 290 U.S. 371, 382 (1933)).
135. *Dobbs*, 597 U.S. at 248; *see generally* DELLAPENNA, *supra* note 90, at 315–19 (cataloging the development of abortion laws by state).
136. DELLAPENNA, *supra* note 90, at 315.
137. *See Dobbs*, 597 U.S. at 248. In an appendix, the Court provided a chronological list of every statute "criminalizing abortion at all stages of pregnancy in the States existing in 1868." *See id.* at 302–23 (listing in Appendix A statutes passed before 1868, during 1868, and after 1868 by states in existence in 1868). The Court noted that scholars have overlooked Rhode Island's 1861 statute which criminalized abortion at all stages. *Id.* at 248 n.34; *see, e.g.*, DELLAPENNA, *supra* note 90, at 315–16 (asserting that by 1868, only twenty states prohibited abortion at all stages).
138. *Dobbs*, 597 U.S. at 248–49.

of these statutes were classified as "offenses against the lives and *persons* of individuals," "offenses against the *person*," and similar denotations,[139] no evidence has surfaced showing all state legislatures who used this language attributed the term "person" to the fetus rather than the mother.[140] The ongoing regulation of abortion shows both the framers of the Fourteenth Amendment and the public were aware of the general concept of "fetal protection."[141]

The Court in *Roe* used the increase in abortion regulation to assert a negative shift in rights from the liberal abortion practices of the nineteenth century to a more strict criminalization of abortion in the twentieth century.[142] This shift aided the Court in reaching the conclusion that "'person,' as used in the Fourteenth Amendment, does not include the unborn."[143] However, the Court in *Dobbs* refuted *Roe*'s assertion of a trend towards the liberalization of abortion laws.[144]

In *Dobbs*, the Court provided a historical analysis showing states criminalized abortion in some capacity by the states before 1868.[145] The Court found that even those states who "trend[ed] towards liberalization" in the late nineteenth century still regulated abortion more harshly than the *Roe* Court would have allowed.[146] With the seemingly overwhelming disapproval for abortion both prior to and

139. *See* James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 48 & n.59 (1985) (citing a partial list of state abortion statutes categorized as "offenses against the *person*" and the like including, for example, Act of Mar. 3, 1899, tit. 1, ch. 2, § 8, 1899 ALASKA SESS. LAWS ch. 429; Act of Apr. 16, 1850, ch. 99, div. 5, § 45, 1850 CAL. STAT. 229, 233; Act of Apr. 14, 1881, ch. 37, §§ 22–23, 1881 Ind. Acts 174, 177; Act of July 1, 1866, pt. 3, ch. 1, § 42, NEB. REV. STAT. 592, 598–99 (1866)).

140. *See id.*

141. Amanda Gvozden, *Fetal Protection Laws and the "Personhood" Problem: Toward a Relational Theory of Fetal Life and Reproductive Responsibility*, 112 J. CRIM. L. & CRIMINOLOGY 407, 407 (2022) ("Fetal Protection Laws . . . are laws that define and provide punishments for any number of crimes, including homicide, committed 'against a fetus.'"); *see also supra* notes 128–31 and accompanying text. State criminalization of abortion shows that there was a legislative interest in fetal protection even if legislators did not use the term "fetal protection" at the time. *See generally* Gvozden, *supra*, at 414.

142. *See* Roe v. Wade, 410 U.S. 113, 138–40 (1973), *overruled by Dobbs*, 597 U.S. at 231 (2022).

143. *Id.* at 158.

144. *Dobbs*, 597 U.S. 215, 249–50 (2022).

145. *Id.* at 247–50.

146. *Id.* at 250 (citing *Roe*, 410 U.S. at 140) ("[T]hough *Roe* discerned a 'trend towards liberalization' in about 'one-third of the States,' those States still criminalized some abortions and regulated them more stringently than *Roe* would allow.").

after 1868,[147] the framers could have consciously chosen to clarify the Fourteenth Amendment's language and provide protections to fetuses—but they did not.[148] Instead, the historical record shows that states retained the power to regulate abortion from conception, later in pregnancy, or not at all, without violating the Constitution.[149]

While there was a widespread consensus by the nineteenth century that abortion of a quick child[150] constituted a crime, states rarely charged the crime as murder unless it resulted in the death of the mother.[151] Further, despite state criminalization of abortion during the relevant time period,[152] the historical record lacks evidence of fetuses receiving the full status of "personhood" from state or federal legislatures.[153] In other areas of the law, a similar lack of evidence exists of states considering fetuses to be "persons" for the purpose of calculating a state census.[154] Similarly, no evidence exists of the

147. *Dobbs*, 597 U.S. at 249 (finding that, by the end of the 1950s, the "overwhelming consensus" in most states was that abortion was prohibited unless done to "save or preserve the life of the mother"). *See also Roe*, 410 U.S. at 139.

148. *See* U.S. CONST. amend. XIV, § 1; *see also Roe*, 410 U.S. at 157 ("The Constitution does not define 'person' in so many words.").

149. *See supra* notes 135–48 and accompanying text; *infra* notes 150–51 and accompanying text.

150. The Court concluded that there is no "exact" meaning of "quickening" comparing the Scholars of Jurisprudence's definition: "'a quick child' meant simply a 'live' child, and under the era's outdated knowledge of embryology, a fetus was thought to become 'quick' at around the sixth week of pregnancy," with the American Historical Association's definition: "'quick' and 'quickening' consistently meant 'the woman's perception of fetal movement.'" *Dobbs*, 597 U.S. at 242 n.24 (citing Brief of *Amici Curiae* Scholars of Jurisprudence John M. Finnis and Robert P. George in Support of Petitioners at 12–14, n.32; Brief for *Amici Curiae* American Historical Ass'n and Organization of American Historians in Support of Respondents at 6 n.2). *See also* Smith v. Gafford, 31 Ala. 45, 51 (Ala. 1857); Smith v. State, 33 Me. 48, 52 (Me. 1851); State v. Cooper, 22 N.J.L. 52, 54–55 (N.J. 1849).

151. *See, e.g.*, *Gafford*, 31 Ala. at 51 ("[A]ny person, who willfully administers to any pregnant woman any drug or substance, to procure her miscarriage, unless the same is necessary to preserve her life, and done for that purpose, must, on conviction, be fined not more than five hundred dollars, and imprisoned not less than three, nor more than twelve months."); *Smith*, 33 Me. at 54 ("If medicine is given to a female to procure an abortion, which kills her, the party administering it, will be guilty of her murder."); *Cooper*, 22 N.J.L. at 52 ("To cause abortion when the child is quick, is not murder or manslaughter at common law, but a great misdemeanor."); Evans v. People, 49 N.Y. 86, 88 (N.Y. 1872) ("The general laws of the State make the killing of a quick child manslaughter in the first degree when caused by an injury to the mother, which would be murder if it resulted in the death of the mother.").

152. *See supra* notes 145–51 and accompanying text.

153. *See infra* notes 154–56 and accompanying text.

154. *See* H.B. 481, 155 Gen. Assemb., Reg. Sess. § 3(d) (Ga. 2020) (revising GA. CODE ANN. § 1-2-1 to include "unborn child[ren] with a detectable human heartbeat" in

government counting fetuses toward the federal census at any point in time.[155] On the congressional level, the idea of granting personhood status to fetuses was not proposed until 1973, over 100 years after the ratification of the Fourteenth Amendment.[156]

The continued criminalization of abortion by states after the Fourteenth Amendment's ratification and the decision not to charge abortion crimes as murder suggests the original public understanding of the Fourteenth Amendment was that it did not provide rights to fetuses.[157] If the inverse were true, there would be no reason for states to continue to criminalize abortion at all periods of pregnancy because the Fourteenth Amendment would grant a right to life from conception.[158] Specifically, this implies that the lone state that had not criminalized abortion at all stages of pregnancy by 1910 would be depriving "persons" of their constitutional right to life.[159] If the framers believed this was the appropriate interpretation of the Amendment, they would have taken the steps necessary to clarify fetuses were protected, instead of allowing states to freely violate the Constitution. Even in other areas of the law, fetuses historically did not receive the same treatment as born persons and this lack of "equal" treatment went without question for over a century.[160] This leads to the conclusion that fetuses were not understood nor considered to be "persons" under the Fourteenth Amendment at the time of its ratification by either: (1) reasonable persons who knew the

population based determinations). Georgia is the first state to allow population based determinations to include anyone other than born human beings. *Id.* This bill was introduced and passed in 2019. *Id.; see also* Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes.*, N.Y. TIMES, https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html [https://perma.cc/UU95-24F8] (June 21, 2023). The United States Census conducts its own census as mandated by U.S. CONST. art. I, § 2, so the inclusion of fetuses in Georgia's state census would not include them in the United States census. *Id.*

155. *See* U.S. CONST. art. I, § 2.

156. H.R.J. Res. 261, 93d Cong. (1973–74). Eight days after the Court decided *Roe*, legislators proposed the first federal fetal personhood bill, which stated in relevant part that "neither the United States nor any State shall deprive any human being, from the moment of conception, of life without due process of law; nor deny to any human being, from the moment of conception, within its jurisdiction, the equal protection of the laws." *Id.*; *see generally* Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

157. *See supra* notes 135–51 and accompanying text; *infra* notes 158–60 and accompanying text.

158. *See Dobbs*, 597 U.S. at 248–49; U.S. CONST. amend. XIV, § 1.

159. *See Dobbs*, 597 U.S. at 248–49; U.S. CONST. amend. XIV, § 1.

160. *See supra* notes 152–55 and accompanying text.

publicly available facts at the Amendment's drafting or (2) literate and informed members of the public at the time of its promulgation.[161] Therefore, the Court should hold that fetuses are not entitled to the rights granted by the Fourteenth Amendment.

VI. CONCLUSION

The Court has overruled the previous understanding of "personhood" and declined to address the door they have opened.[162] In the wake of *Dobb*s, there remains no understanding of whether a fetus qualifies for the constitutional protections provided by the Fourteenth Amendment. The Court must close this door by addressing the constitutional meaning of "person." For the sake of consistency, the Court must use the same approach it has used to address other recent issues of constitutional interpretation.[163] Despite the negative historical view of abortion,[164] when viewing "person" under a textual analysis,[165] an originalist analysis,[166] or a combination of the two theories,[167] the result is the same—the framers did not intend the Fourteenth Amendment to provide protections to fetuses because they are not "persons" under the Amendment's language.[168]

161. *See supra* Section V.D; *see also* Fallon, Jr., *supra* note 68, at 1425–26; SCALIA & GARDNER, *supra* note 69.
162. Benson v. McKee, 273 A.3d 121, 125 (R.I. 2022), *cert. denied*, 143 S. Ct. 309.
163. *See supra* Part IV.
164. *See supra* notes 136–47 and accompanying text.
165. *See supra* Section V.B.
166. *See supra* Section V.D.
167. *See supra* Section V.C.
168. *See supra* Part V.