No. 19-1392

In the Supreme Court of the United States

THOMAS E. DOBBS, ET AL.,

Petitioners,

V.

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* SCHOLARS OF JURISPRUDENCE JOHN M. FINNIS AND ROBERT P. GEORGE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

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Amici are scholars of jurisprudence and constitutional law and have published on moral and legal questions regarding abortion, the right to life, legal personality, and the identity and nature of human persons from their earliest stages of existence.

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[1] The parties have consented to this brief's filing. No counsel for a party authored any part of this brief, nor has any person or entity funded this brief's preparation or submission. The Witherspoon Institute paid for printing.

INTRODUCTION

Roe v. Wade conceded that if, as Texas there argued, "the fetus is a 'person' within the language and meaning of the Fourteenth Amendment," the case for a constitutional right to abortion "collapses."[2] But then the Court hurdled over text and history to an error-strewn denial that unborn human beings are persons under the Amendment.

Scholarship exposing those errors clears the ground for a reexamination of Texas's position in *Roe*. While recalling that scholarship, this brief sheds fresh light on the Amendment's original public meaning, focusing on common-law history (including primary material) that previous scholarship has not adequately noted or explored. That history proves prohibitions of elective abortions constitutionally obligatory because unborn children are *persons* within the original public meaning of the Fourteenth Amendment's Due Process and Equal Protection Clauses.

SUMMARY OF ARGUMENT

The originalist case for holding that unborn children are persons is *at least* as richly substantiated as the case for the Court's recent landmark originalist rulings.[3] The sources marshalled in such decisions—

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[2] *Roe v. Wade*, 410 U.S. 113, 156-57 (1973); *see also Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 779 (1986) (Stevens, J., concurring). Both *Roe* and Texas overlooked a three-judge district court's cogent defense of fetal constitutional personhood in *Steinberg v. Brown*, 321 F. Supp. 741, 746-47 (N.D. Ohio 1970).

[3] *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

text, treatises, common-law and statutory backdrop, and early judicial interpretations—here point in a single direction.

First, the Fourteenth Amendment, like the Civil Rights Act of 1866 it was meant to sustain, codified equality in the fundamental rights of persons—including life and personal security—as these were expounded in Blackstone's *Commentaries* and leading American treatises. The *Commentaries*' exposition *began* with a discussion (citing jurists like Coke and Bracton) of unborn children's rights as persons across many bodies of law. Based on these authorities and landmark English cases, state high courts in the years before 1868 declared that the unborn human being throughout pregnancy "is a person" and hence, under "civil and common law," "to all intents and purposes a child, as much as if born."[4]

From the earliest centuries at common law, (1) abortion at any stage was to "no lawful purpose," and functioned as a kind of inchoate felony for felony-murder purposes, and (2) post-"quickening" abortion was an *indictable* offense. By the 1860s, the "quickening" line for indictments had been abandoned because science had shown that a distinct human being begins at conception. Obsolete limits to the common law's criminal-law protection of the unborn were swept away by a cascade of statutes in a strong majority of states leading up to the Amendment's ratification.

In the 1880s, this Court reckoned corporations "person[s]" under the Equal Protection and Due Pro-

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[4] *Hall v. Hancock*, 32 Mass. (15 Pick.) 255, 257-58 (1834).

cess Clauses. The rationale—a canon of interpretation first expounded by Chief Justice Marshall and central to originalism today—itself blocks any analytic path to excluding the unborn. Indeed, the originalist case for including the unborn is much stronger than for corporations.

These textual and historical points show that among the legally informed public of the time, the meaning of "any person"—in a provision constitutionalizing the equal basic rights of persons—plainly encompassed unborn human beings.

Second, the only counterarguments by any Justice—and by the sole, widely discredited writer cited in *Roe*—rest on groundless extrapolations and plain historical falsehoods exposed in scholarship and still unanswered.

Finally, acknowledging unborn personhood would be consistent with preserving the nation's long tradition of deference toward state policies treating feticide less severely than other homicides, and guarding women's rights to pressing medical interventions that may cause fetal death. Nor would recognizing the unborn require unusual judicial remedies. It would restore protections deeply planted in law until their uprooting in *Roe*.

ARGUMENT

I. Unborn Children are Constitutional Persons Entitled to Equal Protection of the Laws.

The Fourteenth Amendment bars States from depriving "*any person* of life" "without due process of law" or denying "to *any person*" "the equal protection

of the laws."[5] It was adopted against a backdrop of established common-law principles, legal treatises, and statutes recognizing unborn children as persons possessing fundamental rights.[6]

A. The Common Law Considered Unborn Children To Be Persons.

Authoritative treatises—including those deployed specifically to support the Civil Rights Act of 1866, which the Fourteenth Amendment aimed to codify[7]—prominently acknowledged the unborn as persons. Leading eighteenth-century English cases, later embraced in authoritative American precedents decades before ratification, declared the general principle that unborn humans are rights-bearing persons from conception. And even before a nationwide wave of statutory prohibitions of abortion in the mid-nineteenth century, the common law firmly regarded abortion as an offense from the moment—established by science—when there emerged a new individual member of the human species, a human being.

1. Foundational treatises

Blackstone's *Commentaries* expressly taught that unborn human beings are rights-bearing "persons" and contributed enormously to the term's shared legal

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[5] U.S. CONST. amend. XIV, § 1 (emphasis added).

[6] *Cf. Heller*, 554 U.S. at 605–16 (interpreting original public meaning based on ratification-era treatises, antebellum case law, and Civil War-era legislation).

[7] Congress drafted the Fourteenth Amendment to sustain the Act of 1866. *See* Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1391 (2018).

meaning in 1776-91 and 1865-68. Little wonder that when House Judiciary Committee Chairman James F. Wilson introduced the Civil Rights Act of 1866, he said:

> [T]hese rights … [c]ertainly … must be as comprehensive as those which belong to Englishmen…. Blackstone classifies them … as follows: 1. The right of personal security ... great fundamental rights ... the inalienable possession of both Englishmen and Americans ....[8]

Wilson was quoting Blackstone's *Commentaries*' first Book, "Of the Rights of Persons," and its first Chapter, "Of the Absolute Rights of Individuals." Wilson observed approvingly that the leading American treatise on common law—Kent's *Commentaries*—explicitly adopted Blackstone's categorization of these rights and description of them as "absolute"—natural to human beings.[9]

Blackstone's analysis, presented as uncontroverted and familiar to Wilson's listeners in Congress, begins with the "right of personal security"—"a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health ...." And Blackstone's unfolding of this right of persons opens *immediately*

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[8] CONG. GLOBE, 39th Cong., 1st Sess. 1118 (March 1st, 1866).

[9] *Id.* at 1118 col iii; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *123 ("[A]bsolute rights" are those that "would belong to their persons merely in a state of nature, and which every man is entitled to enjoy[.]"). Blackstone uses "man" synonymously with "human being."

after Wilson's quotation with *two paragraphs* about the rights of the unborn:

> 1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb.[10]

This paragraph continues with two sentences about a shift or ambiguity in *criminal law* about homicide and abortion, addressed below.[11] Then comes Blackstone's second paragraph on unborn children's rights:

> An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It[12] is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.[o13]

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[10] BLACKSTONE, *supra* note 9, at *129-30.

[11] *See infra* section I.A.3.

[12] Blackstone uses "it" of born children as well as unborn. *See* BLACKSTONE, *supra* note 9, at *301 ("…the child, by reason of its want of discretion…").

[13] *Id.* at *129-30 (some footnotes omitted). Footnote [o] reads, translated: "Those who are *in utero* are understood in Civil law to be in the real world, when it is a matter/question of their benefit" (citing Justinian's *Digest* 1.5.26, save the last five words, which in fact give the gist of 1.5.7). Blackstone has cut two words to universalize the principle, which had read: "in *almost* the whole [*toto paene*] of the Civil law."

These paragraphs merit close attention. The first paragraph's first sentence concerns:

- the natural right of a living individual possessing human nature.[14] Blackstone here points to natural realities calling for legal embodiment, including through
- a doctrine of English common-law criminal law—mentioned immediately given the section's topic, the right to *life*—and what may be inferred from its treatment of natural realities "in contemplation of law."

This last phrase, in Blackstone, signals legal fictions:[15] here a legal doctrine's treatment of the infant's ability "to stir in the womb"[16] as the start of life for some purpose. By following this first paragraph on the criminal law's narrow, defendant-protective conception of homicide (requiring a "stir[ring]," perhaps partly for evidentiary reasons) with a paragraph sketching laws *free* from artificial constraints (benefitting all unborn humans), Blackstone hints that the law of personal rights accommodates more than one "contemplation of law" and may be refined.

"Person" can mean (1) a natural reality signified in our civilization by Boethius's definition ("an individual substance of a rational nature"), closely corre-

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[14] *See id.* at *133 ("This natural life" "cannot legally be disposed of or destroyed by any individual…merely upon their own authority.")*.*

[15] *See*, *e.g.*, *id.* at *270 ("in contemplation of law [the King] is always present in court").

[16] For the phrase, not then a legal term of art, *see infra* note 27.

sponding to the sense used in this foundational *Commentaries* text,[17] or (2) a social role signified by the term's root meaning *mask* or *assumed identity*—in which sense the law can deem anything a person (rights-bearing unit).

The Fourteenth Amendment uses "any person" (without qualifiers) paradigmatically in the first sense. Yet the Court, since the 1880s,[18] has also included corporations within "any person" because the meaning of "person"—in the then-prevailing linguistic-conceptual framework of a legally educated public brought up on the *Commentaries*—linked under "the Law of Persons" both natural and artificial persons.[19]

Blackstone's second paragraph on unborn persons' rights states an even more pervasive common-law doctrine (construing common law broadly to include established equitable principles). Also essential to the legal context and meaning of "any person" in the 1868 Clauses, this doctrine treats the unborn as rights-bearing persons *from conception*, in many fields besides criminal law.

2. English and early state court cases

The leading case of *Hall v. Hancock*,[20] which cited many English cases, formulated this doctrine thirty-two years before the debates on the Civil Rights Act

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[17] *See* BLACKSTONE, *supra* note 9, at *130 (citing Coke for "reasonable creature"); *id.* at *300 (using that phrase for human being or person).

[18] *See infra* section I.B.2.

[19] *See, e.g.*, *id.* at *123, *467.

[20] 32 Mass. (15 Pick.) 255 (1834).

of 1866. The Massachusetts Supreme Judicial Court ruled unanimously, *per* Chief Justice Shaw:

> [A] child is to be considered *in esse* [in being] at a period commencing nine months previously to its birth.... [T]he distinction between a woman being pregnant, and being quick with child, is applicable mainly if not exclusively to criminal cases [and] does not apply to cases of descents, devises and other gifts; and … a child will be considered in being, from conception to the time of its birth in all cases where it will be for the benefit of such child to be so considered....
>
> Lord *Hardwicke* says, in *Wallis v. Hodson*,[21] … that a child *en ventre sa mere* is a person *in rerum naturâ*, so that, both by the … civil and common law, he is to all intents and purposes a child, as much as if born in the [testator's] lifetime....
>
> *Doe v. Clarke*[22] is directly in point[,] stat[ing] as a fixed principle that, wherever [it] would be for his benefit, a child *en ventre sa mere* shall be considered as absolutely born.[23]

This doctrine about the real and legal personhood of the unborn *from conception* was enunciated by an esteemed state chief justice not as a technical rule for one purpose but as a "fixed principle" "to all intents

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[21] (1740) 26 Eng. Rep. 472, 2 Atk. 114, 116.

[22] (1795) 126 Eng. Rep. 617; 2 H. Blackstone 393.

[23] 32 Mass. at 257-58.

and purposes": The unborn is "a child, as much as if born" and "is a person *in rerum naturâ*."[24] The Georgia Supreme Court, too, in 1849, expressly applied that principle, paraphrasing Hardwicke and Shaw.[25]

Given this general but pointed principle,[26] and the doctrinal architecture of Blackstone's *Commentaries* and thus of American legal education for the century preceding 1868, the original public meaning of "any person" in the fundamental-rights-regarding Equal Protection Clause included living preborn humans.

3. The unimportance of quickening

This conclusion is not undermined by the (limited, shifting, ultimately transient) relevance at common law of a child's being "quick" or "quickened."

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[24] *See in rerum natura*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("In the nature of things; in the realm of actuality; in existence.").

Hardwicke LC's parallel decision in *Millar v. Turner* (1748) 27 Eng. Rep. 971, 1 Vesey Sr 85, shows how these cases correct the inference, adverse to the unborn, that might be drawn from Coke's statement (3 Inst. 50) that children are accounted *in rerum natura* when born alive. Hardwicke cites 3 Inst. 50 to support his statement that an unborn child "is considered as *in esse*… the destruction of him is murder; which shows the laws [*sic*] considers such an infant as a living creature." *Millar*, 1 Vesey Sr at 86.

[25] *Morrow v. Scott*, 7 Ga. 535, 537 (1849).

[26] *See Botsford v. O'Conner*, 57 Ill. 72, 76 (1870) (holding that a child *en ventre sa mere* is a "person" who "must have an opportunity of being heard, before a court can deprive such person of his rights"); *see also Wallis*, 26 Eng. Rep. at 473; *Beale v. Beale* (1713) 24 Eng. Rep. 353; 1 P. Wms. 244.

a. Before 1849

Archaic views of human generation held sway down into the mid-nineteenth century. Such views mostly supposed that generation involved an unformed fleshy mass undergoing successive "formations" (receptions of new forms—vegetable, animal, etc.) until it was differentiated enough, at around six weeks, to receive a distinctly human form. Such *animation* by a rational soul (*anima*[27]) was supposed to make it a *human* organism. This misperception, despite scientific advances, plagued the public (making "quick" and "quicken"[28] ambiguous) until the mid-nineteenth century. Uncertainty led some courts to leave reform of common law abortion offenses to legislatures.[29] But this did not affect the *legal* question whether prenatal humans—*whenever* science showed they existed—were "person[s]" entitled to life and security. *All along, they have been*, as proven by

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[27] Scientists into the seventeenth century relied on Aristotle, *Historia Animalium* 7.3.583b (cited by *Roe* in its muddled footnote 22) for the view that, at approximately 40 days (at least for males) this mass becomes articulated *and* the first fetal movement occurs. (So too Blackstone's "able to stir in the womb.") Bracton probably held the view Aquinas contemporaneously articulated in *Summa contra Gentiles* II c. 89, summarized in JOHN FINNIS, AQUINAS: MORAL, POLITICAL AND LEGAL THEORY 186 (1998): it takes about six weeks for generation to yield a body sufficiently elaborated (*complexionatum*) and organized (*organizatum*) for animation (receiving the rational, human soul).

[28] Crucial in fomenting if not initiating the confusion was *Rex v. Phillips* (1810) 170 Eng. Rep. 1310 (until quickening no evidence of life).

[29] *Infra* note 42.

courts' and lawmakers' swift extensions of protection as general opinion caught up with science.[30]

The historical legal field is illuminated by distinguishing three distinct senses of "quick(en)":

> i. "quick with child" meant *pregnant*[31]—from pregnancy's start, conception—but was also sometimes used interchangeably with having
>
> ii. "a quick child" (a *live child*), understood to emerge when an embryo had developed enough to receive a rational animating principle (soul) and so had *become* a truly human individual. This term applied—in Bracton's mid-thirteenth century, Coke's early seventeenth, and the educated opinion of Blackstone's time—from the sixth week of pregnancy.[32]

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[30] *Infra* section I.A.3.b.

[31] *See R v. Wycherley* (1838) 173 Eng. Rep. 486, 8 C. & P. 263 (approved in FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 457 (2d ed. 1852)). Even *Wycherley*, however, having emphasized the primacy of sense i (as to a capitally-condemned pregnant woman's right to reprieve during pregnancy), confuses sense ii with iii. Bracton had stated the reprieve principle in terms of pregnancy: "If a woman has been condemned for a crime and is **pregnant**, execution of sentence is sometimes deferred after judgment rendered until she has given birth." 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 429 (Thorne trans., 1968) (emphasis added). The charge to the jury of matrons came to be expressed as determining whether the condemned was "quick with child."

[32] *See, e.g.*, *Embryo*, EPHRAIM CHAMBERS, CYCLOPAEDIA (1728) (defining "embryo" as the beginning of an "animal" before it has "received all the Dispositions of Parts necessary to become animated: which is supposed to happen to a Man on the 42nd day");

iii. "quicken*ing*" (a "quickened child", etc.), from the pregnant woman's perception of a shift in the uterus's position or her child's movements, sometime between the twelfth and the twentieth week (or not at all), but normally about the fifteenth or sixteenth week.

With this clarification, we return to the two sentences earlier left aside in the *Commentaries*' first paragraph on the rights of the unborn:

> For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter.[o] But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor.[p]

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see also, id., *Animation* (reporting that animation occurs "after the female that bears [the foetus] is quick, as the common way of expression is.... The **Common opinion is that [animation] happens about 40 days after conception**," and then adding significantly, "But *Jer. Florentinus*, in a Latin treatise, *Homo Dubius, Sive de Baptismo Abortivorum*, shows this to be very precarious") (emphasis added). Since Florentinus's cited treatise argued embryologically that children are fully human persons as from conception, Chambers is warning readers that the "common opinion" presupposed by Bracton and Coke may move, under pressure of evidence, toward recognizing animation/personhood from conception.

The first sentence's footnote quotes a line from Bracton in Latin[33]; the second's cites a passage in Coke's *Institutes* quoting the same line from Bracton.[34] That line plainly addresses "quick"-ness in the second sense—a supposedly not-yet-human entity's change (by animation) into a human organism. So both Coke and Blackstone effectively taught that abortions were common-law heinous misdemeanors from the sixth week of pregnancy.

Roe contradicts this, launching its discussion of the common law by citing Coke and Blackstone for its claim that "[i]t is undisputed that at common law, abortion performed *before* 'quickening'—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense."[35] False. Again, Coke and Blackstone cited only Bracton, who was referring to a living child, animated by a human form or soul,

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[33] BRACTON, *supra* note 31, at 341 (l.3c.21) ("If one strikes a pregnant woman or gives her poison in order to procure an abortion, if the foetus is already formed or quickened, and especially if it is quickened [*si puerperium jam formatum fuerit, et maxime si fuerit animatum*], he commits homicide."). Thorne's "quickened" is a hazardous translation because of that word's ambiguity; a clearer translation of *animatum* is simply "animated" (as in Twiss's translation of 1879) or even "ensouled" (*anima* = soul).

[34] BLACKSTONE, *supra* note 9, at *129-30. The footnote here reads: "3 Inst. 50." That passage of Coke's *Institutes*, from the chapter on murder and the section about who can be murdered ("*Reasonable creature, in rerum natura*"), sums itself up by quoting in Latin the identical Bracton passage later quoted by Blackstone.

[35] *Roe* at 113 n.27.

months before the mother would feel "recognizable movement" around the "16th to the 18th week."

A leading American case *cited by Roe* made this clear. Relying on Bracton-Coke-Blackstone, Chief Justice Shaw for the Supreme Judicial Court of Massachusetts held in *Commonwealth v. Parker* that indictments for abortion must aver that the woman "was quick with child," but *explicitly declined to hold* that this means she has "felt the child alive and quick within her."[36]

It is no answer to cite *State v. Cooper*[37] in support of *Roe*'s generalization that the common-law offense required perceptible movement. It is true that New Jersey's high court, after holding that abortion involves a woman "quick with child," appeared to take sides (though it was not in issue) on when this occurs, answering: "when the embryo gives the first physical proof of life, no matter when it first received it."[38]

Yet *Cooper*'s framing of the question about "offenses against the person"—as concerning when a human child is "in esse" (in being)—itself tells in favor of the principle that a prenatal human individual warrants protection from its first moment of existence (a principle *Cooper* acknowledges the evidence for and

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[36] 50 Mass. (9 Metcalf) 263, 267 (1845). Massachusetts made the question moot the question a month later with a statute prohibiting any attempt to "procure the miscarriage of a woman." An Act to Punish Unlawful Attempts to Cause Abortion, ch. 27, 1845 MASS. ACTS 406.

[37] 22 N.J.L. (2 Zab.) 52, 54 (1849).

[38] *Id.* at 53-54.

does not rebut).[39] And *Cooper* made clear that it neither contested that a new human life begins before the mother perceives movement,[40] nor questioned the other legal protections for children at those early developmental stages.[41] It also explicitly chose to leave reform to the legislature,[42] and New Jersey lawmakers promptly abolished the distinction between pre- and post-"quickening" and extended prohibition of this "offense against life" to begin when a woman is "pregnant with child"—*i.e.*, conception.[43]

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[39] The court, quoting Bracton's line, rightly admitted that it "at first view might seem to favor a different conclusion." Then, assuming precisely what is here in dispute (the sense of "quick with child"), the court appealed to "the unanimous consent of all authorities, that that offence [of homicide(!)] could not be committed unless the child had quickened." *Id.* at 54.

[40] *Id.* ("It is not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception.... *In contemplation of law*, life commences at the moment of quickening.").

[41] *Id.* at 56-57.

[42] *Id.* at 58 (finding "legislative enactments" "far better" on "this ... debatable" matter, when courts must give "the accused" the benefit of "reasonable doubt").

[43] Against *Roe*'s faulty history, *Cooper* itself clearly confirmed that common law protected the child's right long before "viability," *no later* than the perception of movement four or five months before birth, during which time any "act tending to its destruction" was an indictable offense, a homicide.

b. Antebellum and ratification eras

The high-water mark of treating quick*ening* (felt movement) as relevant was the early nineteenth century[44]; by the last third, that line was virtually gone as it was always destined to be—denounced by the medico-legal treatises as groundless because formation and animation occur at conception.[45] The same treatises also regarded the old Bracton-Coke-Blackstone version of "quick with child" (around six weeks) as equally ridiculous.[46] With modern scientific embryology, that Bracton test was compelled, by its

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[44] Many of the early reforming state statutes referred to a woman "quick with child"; many others referred to her being pregnant with "an unborn quick child."

[45] *See, e.g.*, T.R BECK & J.B. BECK, ELEMENTS OF MEDICAL JURISPRUDENCE 464-66, 468 (1823) ("[N]o other doctrine appears to be consonant with reason or physiology, but that which admits the embryo to possess vitality from the very moment of conception.... [W]e must consider those laws which exempt from punishment the crime of producing abortion at an early period of gestation, as immoral and unjust."); WILLIAM GUY, PRINCIPLES OF MEDICAL JURISPRUDENCE 133-34 (1st Am. ed. 1845) ("[T]he absurd distinction formerly made between women quick and *not* quick is done away with…").

[46] BECK & BECK, *supra* note 45, at 466 (calling the felt-movement criterion "absurd," "injurious," and "wholly unsupported by argument or evidence," and going on to denounce as "no less absurd" the "popular belief" and laws, including English and, implicitly, American law, "denying to the foetus any vitality until after the time of quickening" by "'consider[ing] life not to commence before the infant is able to stir in its mother's womb,'" and declaring (against *both* understandings of "quick/quickening") that non-perception of "motions" is "no proof whatever that such motions do not exist.").

own rationale, to recognize personhood from conception even in the cramped, defendant-solicitous criminal law.[47] Thus, the influential and widely circulated 1803 textbook *Medical Ethics* explained that "to extinguish the first spark of life is a crime of the same nature, both against our maker and society, as to destroy an infant, a child, or a man."[48]

What these treatises taught about the unborn—many describing their destruction as murder or indistinguishable from infanticide[49]—was vigorously promoted and re-asserted in professional medical associations, legal education, and state legislatures. The American Medical Association in 1859 dismissed the fiction "that the foetus is not alive till after the period of quickening" and urged correction of any "defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth as a living being."[50]

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[47] *Cf.* FINNIS, *supra* note 27, at 186 (explaining why, had Aquinas "known of the extremely elaborate and specifically organized structure of the sperm and the ovum ... and the [embryo's] typical, wholly continuous self-directed growth and development ... from the moment of insemination of the ovum," he would have located "personhood {*personalita*s: ScG IV c. 44 n.3}" at conception).

[48] THOMAS PERCIVAL, MEDICAL ETHICS 135-36 (Chauncey D. Leake ed., 1975) (1803).

[49] *See* BECK & BECK, *supra* note 45; JOHN KEOWN, ABORTION, DOCTORS, AND THE LAW 23-24, 38-39, 179-80 (1988) (citing treatises).

[50] *Roe*, 410 U.S. at 141 (citing 12 TRANSACTIONS OF THE AMERICAN MEDICAL ASSOCIATION 73-78 (1859)).

The leading American treatise on criminal law mocked the pegging of legal protection to felt quickening and effectively buried the Bracton-Coke quickening-as-animation criterion. *Wharton's Criminal Law*, from its first edition in 1846, argued that the criminal law of offenses against unborn persons should be aligned with the law of property, guardianship and equity[51] as expounded in cases such as *Hall v. Hancock*, adopting authoritative English equity precedents, which recognized unborn rights at *all* stages of development.

Thus, by 1866 Chief Justice Tenney of the Maine Supreme Court could accurately report that "the [quickening] distinction ... has been abandoned by jurists in all countries where an enlightened jurisprudence exists in practice."[52]

c. Constancies

Whatever the confusions about "quick" and "quickening," the common law indisputably, always and everywhere, made any attempted abortion a serious indictable offense from *at least* 15 weeks (give or take

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[51] WHARTON, *supra* note 31, at 308 (1846); 2 WHARTON at 653 (6th ed. 1868) ("It has been said that [abortion] is not an indictable offence ... unless the mother is *quick* with child, though such a distinction, it is submitted, is neither in accordance with medical experience, nor with the principles of the common law. The civil right of an infant in *ventre sa mere* are equally respected at every period of gestation."); *see also* J.P. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 386 (2d ed. 1858) (re (reviewing cases and preferring the view that abortion is indictable at common law without allegation that the mother was quick with child).

[52] 5 TRANSACTIONS OF THE MAINE MEDICAL ASSOCIATION 38 (1869).

three). Virtually unanimous legislative,[53] professional, and public support for this part of the nation's tradition of ordered liberty, *and then* for following the science and removing the temporal limit in the criminal law's protection, has been extensively documented by scholars since *Roe* and *Casey*.[54] This confirms that "any person" in the fundamental-rights-regarding Equal Protection and Due Process Clauses includes all unborn human beings.

So does the fact that, while prevailing (though not universal[55]) nineteenth-century common law made only post-"quickening" abortion indictable, the common law *always* regarded pre-quickening abortion as "an action without lawful purpose," as Chief Justice Shaw mildly put it in 1849,[56] such that abortions accidentally causing consenting mothers' deaths constituted murders. So even pre-quickening abortion was

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[53] *See infra* section I.B.1.

[54] *See* JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 213-28 (2006) (concluding "that English law regarding abortion was fully received in the [American] colonies, and that the purported 'common law liberty to abort' is a myth"); *see also id.* 263-451 (for all aspects from Independence down to c. 1900).

[55] Limitation to post-"quickening" attempts and abortions was rejected by the courts in Pennsylvania and Iowa. *See Mills v. Commonwealth*, 13 Pa. 631, 632-33 (1850); *State v. Moore*, 25 Iowa 128, 135 (1868).

[56] *Parker*, 50 Mass. at 265. Hale puts it more straightforwardly: the abortifacient is given "*unlawfully to destroy the child within her*, and therefore he, that gives a potion to this end, must take the hazard, and if it kill the mother, it is murder." *R v. Anonymous* (1670), *reported in* 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 429-30 (1736) (emphasis added).

always a kind of inchoate felony for felony-murder purposes.

B. Antebellum Statutes and Post-Ratification Precedents

1. State abortion statutes

The Union in 1868 comprised 37 States, of which 30 had statutory abortion prohibitions.[57] Most were classified as defining "offenses against the person,"[58] with 27 applying before *and* after quickening.[59] And Congress, legislating for Alaska and the District of Columbia shortly after ratification of the Fourteenth Amendment, referred to unborn children as "person[s]."[60]

Many such statutes were adopted or strengthened within a year or two of the Amendment's ratification, as in New York,[61] Alabama,[62] and Vermont.[63] In Florida, Ohio, and Illinois, the very legislatures ratifying

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[57] *See* James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 33 (1985).

[58] *See id.* at 48.

[59] *See id.* at 34.

[60] Act of Jan. 19, 1872, 1872 D.C. ACTS 26-29; Act of Mar. 3, 1899, ch. 429, tit. 1, ch. 2, § 8, 30 STAT. 1253-54 (1899).

[61] *See* Act of Apr. 28, 1868, ch. 430, 1868 N.Y. LAWS 856-68; Act of May 6, 1869, ch. 631 1869 N.Y. LAWS 1502-03.

[62] *See* Act of Feb. 23, 1866, 1866 ALA. PEN. CODE, tit. 1, ch. 5, § 64, at 31 (*codified* ALA. CODE § 3605 (1867)).

[63] *See* Act of Nov. 21, 1867, no 57, 1867 VT. ACTS 64-66.

the Amendment also banned abortion at all stages.[64] About a month after ratifying the Amendment, Ohio's senate committee concluded that given the "now ... unanimous opinion that the foetus in utero is alive from the very moment of conception," "no opinion could be more erroneous" than "that the life of the foetus commences only with quickening, that to destroy the embryo before that period is not child murder."[65]

Thus, state legislators not only viewed these laws as consistent with the Fourteenth Amendment, but also—like any legally informed reader—would have understood equality of fundamental rights for "any person" to include the unborn.

2. Precedent Interpreting the Fourteenth Amendment: The Case of Corporations

The original public legal meaning of "persons" encompassed *all* human beings. On this, the legal meaning fixed by treatises and cases was confirmed by rapid mid-1800s expansions of prenatal protections. And—even apart from the latter evidence—under the *Dartmouth College* principle giving legal meaning primacy over drafters' motivating concerns, the inclusion of children *in utero* could not have been blocked except by wording (easily available, but neither proposed nor adopted) such as "any person wherever born."

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[64] *See* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3 §§ 10-11, ch. 8, §§ 9-11, 1868 FLA. LAWS 64, 97; Act of Feb. 28, 1867, 1867 ILL. LAWS 89; Act of Apr. 13, 1867, 1867 OHIO LAWS 135-36.

[65] 1867 OHIO SEN. J. APP'X 233.

The plain legal meaning and sweep of a constitutional provision "is not to be restricted" by the "existing" problem it was "designed originally to prevent."[66] So declared Justice Field, riding circuit in *Santa Clara County v. Southern Pacific Railroad Co.*, and later affirmed by this Court in its holding that corporations are persons under the Due Process and Equal Protection Clauses. Field quoted Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*:

> It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to ... say that, had this particular case been suggested, the language would have been so varied as to exclude it.... The case being within the words of the rule, must be within its operation....[67]

As Marshall had explained in *Dartmouth College*, it may be–

> more than possible, that the preservation of rights of this description was not particularly in the view of the framers.... But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule,

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[66] 18 F. 385, 397 (C.C.D. Cal. 1883) (Field, J.), *aff'd*, 118 U.S. 394 (1886).

[67] *Id.* (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 644-45 (1819) (Marshall, C.J.)).

> when established [absent] plain and strong reason for excluding it[.][68]

The plain and original meaning of the constitutional text extended to the case, though its application had not been envisaged.[69] (Nor was there any "sentiment delivered by its contemporaneous expounders, which would justify us in making" any exception.[70]) This principle remains an axiom of constitutional (especially originalist) interpretation today.[71]

Here it controls. As a matter of plain original meaning to educated lawyers, just as the college charter considered by Marshall fell under the Contract Clause, and the railroad considered by Field was a "person" under the Equal Protection Clause, so too, but *more* certainly, prenatal humans are "persons" under the Clause, whether or not its drafters and ratifiers specifically had that in mind.[72]

Inclusion of the unborn is *more* certain because of their foregrounding in the discussion of fundamental

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[68] *Dartmouth College*, 17 U.S. at 644.

[69] *Id.* at 645.

[70] *Id.*

[71] *See, e.g.*, *McDonald*, 561 at 787 (rejecting argument that "the scope of the Second Amendment right is defined by the immediate threat that led to the inclusion of that right in the Bill of Rights").

[72] *See* Michael S. Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 23 n.34 (2013) (The unborn should be held to enjoy constitutional protection "for the same interpretive methodological reason that corporations properly can be understood as legal persons—that that was the conventional term-of-art legal usage, and thus bears heavily on what the legal meaning of the term 'person' was at the time[.]") (emphases omitted).

rights to life and security in Blackstone's *Commentaries*, the formative text for educated lawyers of 1776-89 and 1866-68 (in Congress and nationwide), invoked in introduction of a civil rights bill prefiguring the Amendment.[73]

Given the evil they aimed to cure, the Amendment's ratifiers may not have subjectively had in mind that the Equal Protection Clause would affect established antebellum Union rules and institutions at all.[74] But if a state in, say, 1870 had legislated to

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[73] *See supra* section I.A.

[74] That reasoning synthesizes the judicial rationale of several restrictive assumptions about the Equal Protection Clause between 1871-88. *See, e.g.*, *Ins. Co v. New Orleans*, 13 F.Cas. 67, 1 Woods 85 (C.C.D. La. 1871) (corporations not Fourteenth Amendment persons); *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139 (1872) (females and practice of law); *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 133 (1873); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1872); *Strauder v. West Virginia*, 100 U.S. 303, 304 (1879); *The Civil Rights Cases* 109 U.S. 3 (1883); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 188 (1888) (Fourteenth Amendment concerned only with protecting any class "singled out as a special subject for discriminating and hostile legislation").

For example, litigants fighting discrimination against women appealed to the Amendment's first sentence but never its Equal Protection Clause. That is inexplicable except based on early assumptions about that Clause's application that would also have blocked early appeals to the Clause by those seeking to bolster fetal protections. These blocking assumptions, when articulated by courts, proved to concern not the meaning of "any person" but the import of "deny ... the equal protection of the laws." They were soon rejected. Under the corrected understanding of "equal protection," plus the public meaning that the Clause's "any person" phrase always had, the Clause protects the unborn against state laws permissive of elective abortion.

permit all elective abortions, the reasonable ratifier would have agreed that the Amendment's *terms* entitled guardians *ad litem* to obtain equitable relief for unborn children. This could have been denied only on some Fourteenth-Amendment-limiting theory—*e.g.*, of the Amendment's race-specific motivating goals—long and rightly rejected by this Court.

II. *Roe* and *Casey's* Arguments Against Fetal Personhood Are Unsound.

A. Justice Stevens' defense in *Casey* has absurd implications.

Since *Roe*, the only Justice to defend *Roe*'s denial of constitutional personhood—Justice Stevens—clung to a single plank: *Roe*'s claim that unborn children's right to guardians *ad litem* to protect their property interests is no recognition of personhood because those interests are not perfected until birth.[75]

This plank is no affirmative case, merely a response to one counterargument, and still it fails—attempting to drum up a constitutional principle from one narrowly stated[76] sub-constitutional technical rule[77] while ignoring others reflecting the principle

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[75] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 912-13 (1992) (Stevens, J., concurring and dissenting in part).

[76] The *vesting* of rights often counts at least as much as their "perfecting."

[77] Also unavailing is *Roe*'s reliance on a defunct tort doctrine rejecting liability for prenatal injuries. Justice Holmes invented that doctrine well after the Amendment's ratification, in *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 16 (1884), based on the fictions that unborn children are "not yet in being" and so

declared by Blackstone, Shaw and the Lord Chancellors whose rulings they cited: The unborn child "is a person *in rerum naturâ*" under "the civil and common law" and "to all intents and purposes[.]"[78]

Thus, the child *in utero* has had substantive rights to receive income or get an injunction against waste, sufficiently vested to serve her seamlessly through birth and infancy.[79] Then there are the vested rights of the unborn, enforced by courts against their parents' competing rights-claims, in *parens patriae* cases ordering blood transfusions, etc.[80] These civil rights to life—which could hardly override parental rights unless the unborn were themselves persons—had to be ignored by *Roe* and by Justice Stevens. Likewise the convictions, now as

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are merely parts of mothers. State and federal courts gradually exposed those fictions until 1953, when New York's appellate court followed the "clear[]" "biological" reality "that separability begins at conception." *Kelly v. Gregory*, 125 N.Y.S. 2d 696, 697 (App. Div. 1953). By 1971 Prosser could write that almost all jurisdictions have allowed recovery for pre-viability injuries. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 337 (4th ed., 1971). He had approvingly called rejection of Holmes's fictions "the most spectacular abrupt reversal of a well-settled rule in the whole history of the law of torts." *Id.* § 56, at 354 (3d ed. 1964).

[78] *Hall*, 32 Mass. at 257-58.

[79] *See id.* at 258.

[80] *See Raleigh Fitkin-Paul Morgan Mem'l Hosp. & Ann May Mem'l Found. v. Anderson*, 201 A.2d 537, 538 (N.J.), *cert denied* 377 U.S. 985 (1964); *see also* Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 844-48 (1973) (collecting cases).

then, for violations of unborn children's right to life as enforced in feticide laws.[81]

B. *Roe*'s grounds are utterly untenable.

Roe's counterarguments merit no deference, *Roe* having disqualified itself from constitutional-settlement status by refusing to appoint a guardian *ad litem* or hear the contemporaneous Illinois appeal involving an unborn child so represented[82]—and its points fail anyway.

Roe produced three reasons not to recognize unborn humans as persons. Its textual reason, that "person" as used elsewhere in the Constitution gave no "assurance" of "pre-natal application," was concededly inconclusive, and in fact proves too much.[83] Its pragmatic reason was so implausible that it was

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[81] *See generally* Gerard V. Bradley, *The Future of Abortion Law in the United States*, 16 NAT'L CATH. BIOETHICS Q. 633 (2016).

[82] *Doe v. Scott*, 321 F. Supp. 1385, 1387 (N.D. Ill. 1971); *see also* John D. Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment Personhood, and the Supreme Court's Birth Requirement*, 4 S. ILL. U.L.J. 1, 8-9 (1979).

[83] *Roe*, 410 U.S. at 157. Notably, no use gives any indication of *when* one becomes a person or entails that one becomes a person only at birth. *See* Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539, 550-52 (2017). And any reading excluding the unborn from personhood because most uses of "person" cannot apply to them (voting, becoming President, and so forth) applies *a fortiori* to corporations, yet the Court from 1886 has unflinchingly included them within equal protection and due process guarantees for "any person."

framed in questions, not propositions.[84] And its historical reason was a cluster of gross errors drawn solely from two articles by Cyril Means. (No other writer on legal history was cited.) His first article, written while he was general counsel of National Abortion Rights Action League, had been refuted.[85] The second was so recent that no scholar had gotten to examine its sources, and so flawed that it was known to "fudge" the history even by counsel for Jane Roe who cited it.[86] Once scrutinized, its sources crumbled, as did *Roe*'s consequent assertion of a historic "right to terminate a pregnancy."[87]

History "disposes of any claim that abortion was a 'common law liberty,'"[88] a preposterous claim whose putative support is disproven not least by the common law and statutory history above. And *Roe*'s astonishing "doubt[]" that post-quickening abortion was "ever

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[84] It asked how to square unborn personhood with not penalizing the mother, or with penalizing abortion less severely "than the maximum penalty for murder." *Roe*, 410 U.S. at 157 n.158. *But see* Craddock, *supra* note 83, at 562-66.

[85] *See* GERMAIN GRISEZ, ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS 382-92, 395, 434 (1970)

[86] A 1971 memorandum circulated among Roe's legal team said Means's "conclusions sometimes strain credibility" and "fudge" the history but "preserve the guise of impartial scholarship while advancing the proper ideological goals." DELLAPENNA, *supra* note 54, at 143-44, 683-84.

[87] *Roe*, 410 U.S. at 140-41.

[88] DELLAPENNA, *supra* note 54, at 1056; *see also id.* at 336, 351-54, 374-75, 409-10 n.175.

firmly established as a common law crime"[89] contradicts the precedents and authorities since before Bracton in the 1200s. Means's attempt to explain away those precedents, repeated by *Roe*,[90] was soon refuted, not least by original records underlying the inaccurate printed accounts used by Means.[91]

Finally, *Roe* uncritically reported Means's view that "Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law."[92] That case, *R v. Sims*, actually *disproves* the charge: The King's Bench itself authoritatively stated the unborn-child-protective principles at issue.[93]

III. Recognizing Unborn Children as Persons Requires No Irregular Remedies or Unjust Penalties.

Recognizing unborn personhood would be a natural exercise of courts' power to bind parties to a case by applying the law to the facts, disregarding unconstitutional laws, directing lower courts, and enjoining unlawful executive actions.[94] Such a holding would bar lower courts from enjoining prosecutions or vacating convictions of abortionists. Injunctions would lie against officials asked to facilitate abortions, as in

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[89] *Roe*, 410 U.S. at 136.

[90] *Id.* at 135.

[91] DELLAPENNA, *supra* note 54, at 146-50; *see also id.* 134-43.

[92] *Roe*, 410 U.S. at 136 n.26.

[93] (1601) 75 Eng. Rep. 1075, 1076.

[94] *See Barr v. Am. Ass'n of Pol. Consultants, Inc,* 140 S. Ct. 2335, 2351 n.8 (2020).

cases like *Garza v. Hargan*,[95] where guardians *ad litem* could be appointed for the unborn, as before *Roe*.[96]

While state homicide laws would need to forbid elective abortion,[97] here too courts would be limited to customary remedies. Most States have laws tailor-made for "feticide"[98]; any carve-outs for elective abortion would be disregarded by courts as invalid.[99] New laws reducing unborn protection would face legal challenge like any statute *today* that decriminalized homicides of some class—say, the cognitively disabled. State regimes invalidated for denying minimal prenatal protection would, absent amendment, revert to the default, general homicide law.

Moreover, equal protection allows States to treat different cases differently, for legitimate ends.[100] States may consider degrees of culpability as mitigating factors or altogether immunize from prosecution certain participants in wrongful killings. Here such

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[95] 874 F.3d 735, 736 (D.C. Cir. 2017) (en banc), *cert. granted, judgment vacated sub nom. Azar v. Garza*, 138 S. Ct. 1790 (2018).

[96] *See, e.g.*, JOHN T. NOONAN, THE MORALITY OF ABORTION 245 (1970).

[97] *Cf. People v. Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984) (reinstating rape charges against a husband despite a statutory marital-rape exception after holding that the exception violated equal protection and failed rational basis review).

[98] *See* Bradley, *supra* note 81.

[99] *See* John Finnis, *Born and Unborn*: *Answering Objections to Constitutional Personhood*, FIRST THINGS (Apr. 9, 2021), https://www.firstthings.com/web-exclusives/2021/04/born-and-unborn-answering-objections-to-constitutional-personhood.

[100] *See Vacco v. Quill* 521 U.S. 793, 799 (1997).

policy choices serve legitimate purposes by fairly balancing the child's humanity and her unique physical dependence and impact on her mother. And the mother's constitutional rights could require States to allow urgent or life-saving medical interventions even when these would unavoidably result in fetal death.[101]

An enforcement responsibility would fall to Congress if States failed in their duties, which could follow a personhood holding with proportional legislation under Section 5 of the Amendment to protect the unborn.[102]

CONCLUSION

The Court should reverse the judgment of the Fifth Circuit and hold that Mississippi's law is permissible—and required—because the unborn are "person[s]" guaranteed equal protection and due process by the Fourteenth Amendment.

Respectfully submitted,

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[101] *See Roe*, 410 U.S. at 127 (Rehnquist, J., dissenting).

[102] *See City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).