CONGRESS HAS FOURTEENTH AMENDMENT AUTHORITY TO PROTECT HUMAN BEINGS BEFORE BIRTH

THOMAS JIPPING*

INTRODUCTION

The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"[1] and gives Congress power to "enforce" its provisions "by appropriate legislation."[2] Dissenting in *Plessy v. Ferguson*, Justice John Marshall Harlan wrote that this command means the Constitution "neither knows nor tolerates classes among citizens."[3] Since then, the Supreme Court has crystallized the equal protection principle this way: "[A]ll persons similarly circumstanced shall be treated alike."[4]

The equal protection principle constitutes the heart of the pro-life movement. Life itself is the ultimate similar circumstance, and, therefore, the

* Senior Legal Fellow, Edwin Meese III Institute for the Rule of Law, Advancing American Freedom. M.A. in political science, State University of New York (SUNY) at Buffalo, 1989; J.D. *cum laude*, SUNY-Buffalo, 1987; B.A. with honors in Political Science, Calvin College, 1983.

1. U.S. CONST. amend. XIV, § 1, cl. 4. *See* David Smolin, *Equal Protection*, HERITAGE GUIDE TO THE CONSTITUTION, https://www.heritage.org/constitution/#!/amendments/14/essays/171/equal-protection, [https://perma.cc/D4BQ-F2K2]. The Fifth Amendment, which applies to the federal government, provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. While it does include a textual requirement of equal protection, the Supreme Court has held that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo, 424 U.S. 1, 93 (1976). *See also* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n. 2 (1975); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 214–18 (1995).

2. U.S. CONST. amend. XIV, § 5. *See* Roger Clegg, *Enforcement Clause*, HERITAGE GUIDE TO THE CONSTITUTION, https://www.heritage.org/constitution/#!/amendments/14/essays/175/enforcement-clause [https://perma.cc/9UMZ-9AYP].

3. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

4. Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

law should protect equally all who possess it.[5] Whether human beings are similarly circumstanced regarding life itself before, as well as after, birth is not genuinely in dispute. The life of each individual member of the human species begins at conception.[6] Even the "AI Overview" feature in the Chrome internet browser states: "The scientific consensus is that human life begins when a sperm and egg cell unite to form a zygote." The real question, President Ronald Reagan wrote in a 1983 essay, "is not when human life begins, but, *What is the value of human life*?"[7]

These two questions had been integrated for centuries. In *Dobbs v. Jackson Women's Health Organization*,[8] Justice Samuel Alito described "an unbroken tradition of prohibiting abortion"[9] that began in the thirteenth century under the English common law.[10] To be sure, the classification, prosecution, and punishment of this crime reflected the current state of knowledge about human life and development in the womb. "Ensoulment," the marker in the thirteenth century,[11] gave way to "quickening," or the point at which the mother could feel her unborn child move. But knowledge about human life before birth has rapidly advanced since the science of embryology emerged in the early nineteenth century,[12] proving conclusively that a human being's life is a continuum from conception until death. In the mid-nineteenth century, the American Medical Association ("AMA") forcefully rejected what it called the "mistaken and exploded medical dogma[]" that the unborn child has no "independent and actual existence . . . as a living being."[13] In its scientific way, the AMA was telling us that human beings before and after birth are similarly circumstanced and its successful campaign urging state legislatures to prohibit abortion throughout pregnancy naturally followed.[14]

The Supreme Court's decision in *Roe v. Wade*, however, sanctioned the dis-integration of the fact and the value of human life that was already

---

5. *See also* Lewis v. City of Union City, 918 F.3d 1213, 1218 (11th Cir. 2019) (en banc) (explaining that the proper equal protection test is whether persons are "similarly situated in all material respects"). Life is the most material respect shared by human beings.

6. *See, e.g.*, *When Human Life Begins*, AM. COLL. OF PEDIATRICIANS (Mar. 2017), https://acpeds.org/position-statements/when-human-life-begins [https://perma.cc/27NK-HD2P].

7. Ronald Reagan, *Abortion and the Conscience of the Nation*, 30 CATH. LAW. 99, 101 (1986).

8. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

9. *Id.* at 250.

10. *See* Thomas Jipping, *The Attack on Legal Protection for the Unborn Moves to State Courts*, HERITAGE FOUND. (Jan. 5, 2023).

11. *See* John Keown, *Back to the Future of Abortion Law:* Roe*'s Rejection of America's History and Traditions*, 22 ISSUES L. & MED. 3, 5 (2006).

12. *See When Human Life Begins*, *supra* note 6; JOSEPH NEEDHAM & ARTHUR HUGHES, A HISTORY OF EMBRYOLOGY (2d. ed. 1959).

13. *Report on Criminal Abortion*, 12 TRANSACTIONS OF THE AM. MED. ASS'N 75, 75–78 (1859). *See also* Lamb v. State, 10 A. 208, 208 (Md. 1887) (rejecting the idea that "the life of an infant was not supposed to begin until it stirred in the mother's womb").

14. *See* FREDERICK N. DYER, THE PHYSICIANS' CRUSADE AGAINST ABORTION (1999).

underway. Today, some of the loudest voices on social media aggressively reject what animates the equal protection principle, that human beings are similarly circumstanced and should be treated equally. Many of those voices deny not only that each of us was a "person" before birth, but even that we were a human being at all. Such a hostile cultural context makes turning the theory represented by the equal protection principle into practice especially daunting.

This Article will examine whether Congress may exercise its authority to enforce the Fourteenth Amendment's Equal Protection Clause to protect human beings before birth. It will address this by looking at the Constitution, which tells Congress what it *may* do; policy, or what Congress *might* do; and politics, or what Congress *could* do.

I. THE CONSTITUTION

The threshold question is whether human beings before birth are "person[s]" within the meaning of the Fourteenth Amendment. If so, then states may not deny them the equal protection of the laws. During the re-argument of *Roe v. Wade* in October 1972, one Justice suggested that this, in fact, was the "basic constitutional question" in the case.[15] Both sides agreed that whether human beings before birth are Fourteenth Amendment persons makes all the constitutional difference.

Texas argued that they are. "There seems little argument necessary" on the equal protection issue, Texas argued, "if one can conclude the unborn child is a human being with birth but a convenient landmark in a continuing process--a bridge between two stages of life."[16] Sarah Weddington, who represented plaintiff Jane Roe in challenging Texas' abortion ban, conceded that she would have a "difficult case" if "it were established that an unborn fetus is a person within the protection of the Fourteenth Amendment."[17] She agreed that, if it were, a right to abortion "would be the equivalent after the child was born if the mother thought it bothered her health any having the child around, she could have it killed."[18] Writing for the majority in *Roe*, Justice Harry Blackmun agreed: "If this suggestion of personhood is established," he wrote, "the [challenge to the Texas law], of course, collapses."[19]

The Court held, however, that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[20] Blackmun reached this conclusion not by examining the Fourteenth Amendment itself, but by observing that in "*other* provisions of the Constitution" using that term, "it has application only postnatally."[21] This argument fails in at least two ways. First, Blackmun acknowledged that the word "person" applies postnatally in "nearly

15. Transcript of Oral Argument at 39, Roe v. Wade, 410 U.S. 113 (1973) (No. 70–18).
16. Brief of Appellee at 53–54, *Roe*, 410 U.S. (No. 70–18).
17. Transcript of Oral Argument, *supra* note 15, at 20–21.
18. *Id.* at 21.
19. *Roe*, 410 U.S. at 156.
20. *Id.* at 158.
21. *Id.* at 157 (emphasis added).

all" other constitutional provisions. This, of course, leaves open the possibility that its use in the Fourteenth Amendment can indeed apply prenatally. Second, the use of "person" in other in other constitutional provisions reveals nothing about its meaning in the Fourteenth Amendment. The provisions Blackmun listed[22] include:

- "No Person shall be a Representative who shall not have attained to the Age of twenty five Years . . . ."[23]
- "No Person shall be a Senator who shall not have attained to the Age of thirty Years . . . ."[24]
- "[N]o Person holding any Office of Profit or Trust . . . shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."[25]
- "[N]o Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector . . . ."[26]
- "No Person . . . shall . . . be eligible to [the Office of President] who shall not have attained to the Age of thirty five Years . . . ."[27]
- "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."[28]
- "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . . ."[29]
- "The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors . . . ."[30]
- "No person shall . . . hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same . . . ."[31]
- "No Person shall be elected to the office of the President more than twice . . . ."[32]

---

22. *Id.*
23. U.S. CONST. art. I, § 2, cl. 2.
24. *Id.* at art. I, § 3, cl. 3.
25. *Id.* at art. I, § 9, cl. 8.
26. *Id.* at art. II, § 1, cl. 2.
27. *Id.* at art. II, § 1, cl. 5.
28. *Id.* at art. IV, § 2, cl.2.
29. *Id.* at amend. V.
30. *Id.* at amend. XII.
31. *Id.* at amend. XIV, § 3.
32. *Id.* at amend. XXII.

The fact that human beings before birth cannot serve as President, Senator, or House member is true independent of whatever the Constitution says about it. While a thirty-one-year-old cannot be President, a twenty-eight-year-old cannot be a Senator, and a twenty-two-year-old cannot serve in the House of Representatives, no one would suggest that these individuals are not persons within the meaning of the Fourteenth Amendment.[33] Similarly, it does not require a constitutional provision to accept the fact that a human being before birth cannot hold "an office of profit or trust," serve as an elector, be charged with treason and flee to another state, participate in a criminal trial, or engage in insurrection or rebellion. Blackmun's observations, therefore, leave open, rather than foreclose, the possibility that the word "person" in the Fourteenth Amendment includes human beings before birth. The Fourteenth Amendment is, it turns out, the provision for which that interpretation is most appropriate.

Interpreting any constitutional provision requires ascertaining the original public meaning of its text.[34] This approach is necessary because, as the Supreme Court has repeatedly recognized, the Constitution's "meaning does not alter. That which it meant when adopted it means now."[35] The Constitution's meaning "is fixed according to the understandings of those who ratified it."[36] Focusing constitutional interpretation on "the authority that made it"[37] helps "avoid an arbitrary discretion in the courts."[38]

Professors John Finnis and Robert George pursued this objective in the amicus curiae brief they submitted in *Dobbs* by examining the Fourteenth Amendment's foundation in the common law, treatises such as William Blackstone's *Commentaries on the Laws of England*, and English and early American state court decisions. In *Hall v. Hancock*, for example, the Massachusetts Supreme Judicial Court unanimously held in 1834, as a "fixed principle," that "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*."[39] There would be no greater benefit for a human being to be considered a person from conception than legal protection for life itself.

Professor Michael Stokes Paulsen has also examined whether including the unborn as Fourteenth Amendment persons is consistent with its original

---

33. *See also* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 925–26 (1973) ("[The Court] might [also] have added that most of [these other] provisions were plainly drafted with *adults* in mind.").

34. Brief for Scholars of Jurisprudence John M. Finnis and Robert P. George as Amici Curiae in Support of Petitioners, Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) (No. 19–1392). *See also* John Finnis & Robert P. George, *Equal Protection and the Unborn Child: A* Dobbs *Brief*, 45 HARV. J.L. & PUB. POL'Y 927 (2022).

35. South Carolina v. United States, 199 U.S. 437, 448 (1905).

36. New York State Rifle & Pistol Assoc. v. Bruen, 597 U.S. 1, 28 (2022).

37. VanHorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (1795).

38. THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

39. Hall v. Hancock, 32 Mass. (15 Pick.) 255, 257–58 (1834) (emphasis added).

public meaning.[40] His analysis examines constitutional text, history, precedent, and policy to assess what he calls the "plausibility of prenatal personhood."[41] He concludes:

> The plain, common meaning of "person," as used at the time of the adoption of the relevant constitutional texts, certainly does not categorically preclude inclusion of the unborn. The technical, specialized legal-definition meaning of "person," as set forth in Blackstone, the definitive, authoritative legal text of the time in America as in England, specifically includes the unborn, and America's leading legal scholars, and the Constitution's drafters, had Blackstone in view as such a defining source of legal meaning. Based on this evidence, the better conclusion by far—indeed, the presumptively single-right-answer—is that the word "person" as used in the Constitution includes the unborn.[42]

Other scholars have come to a similar conclusion.[43] No doubt unintentionally, Blackmun himself suggested an additional reason why an unborn child can be a Fourteenth Amendment "person" by noting that another clause of the Fourteenth Amendment defines "citizens" as "persons *born or naturalized* in the United States."[44] In the context of statutory construction, the Supreme Court has held that when particular language appears in one section of a statute but not in another, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[45] Applying that principle here, the framers and ratifiers of the Fourteenth Amendment did not limit the Equal Protection Clause, as they did the Citizenship Clause, to human beings after birth.

Some have argued that "person" does not include human beings before birth because no evidence exists that the framers of the Fourteenth Amendment

---

40. *See* Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 15 (2013) ("I make no claim that the legal personhood position is indisputably correct . . . . My argument is . . . for the legal *plausibility* of the personhood position only.").

41. The goal is to determine the "original, objective linguistic meaning in context," or the meaning "a term, or phrase would have had, in the linguistic and cultural-political context in which it was used, to reasonably well-informed speakers and readers of the English language at the time." *Id.* at 19.

42. *Id.* at 32.

43. *See, e.g.*, C'Zar Bernstein, *Fetal Personhood and the Original Meanings of "Person*," 26 TEX. REV. L. & POL. 485, 505–11 (2022) (concluding that "the original meaning of 'person' in the Constitution includes the unborn"); Joshua Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539, 561 (2017) (concluding that the "contemporaneous anti-abortion statutes enacted to protect prenatal life, and the public explanations given by the Framers of the Fourteenth Amendment as to the Amendment's scope of meaning all support extending protections to prenatal life on originalist grounds").

44. U.S. CONST. amend. XIV, § 1 (emphasis added).

45 Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)). *See also* Riegel v. Medtronic, Inc., 552 U.S. 312, 327 (2008).

specifically had them in mind.[46] While this observation is factually correct, the argument based on it conflates *interpretation* of a constitutional provision and the *application* of its meaning to particular facts.[47] Interpreting written text requires "determining what something . . . means; the ascertainment of meaning."[48] The meaning of constitutional text cannot be limited by "what the drafters had in mind" or the facts or circumstances that existed at the time. If it could, the Fourth Amendment's prohibition on "unreasonable searches and seizures" could not be applied to wiretaps[49] or the use of thermal imaging devices,[50] and the Sixth Amendment's guarantee that, in criminal cases, "the accused shall enjoy the right . . . to be confronted with the witnesses against him" could not be applied to testimony by closed-circuit television.[51]

If the Fourteenth Amendment's drafters intended it to apply only to the situation or problem that gave rise to it, they could have written it that way. They did not. The Constitution is a unique kind of law in that it governs government itself. In *McCulloch v. Maryland*, Chief Justice John Marshall explained that a constitution "would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind" if it contained "an accurate detail . . . of all the means by which [its provisions] may be carried into execution."[52] "We must never forget," Marshall wrote, "that it is a constitution we are expounding."[53]

To that end, Professor Paulsen explains, interpretation is a question of "objective linguistic meaning of the words of the text itself."[54] This meaning is separate from the framers' subjective intentions, expected consequences, or

---

46. *See, e.g.*, Clarke D. Forsythe, *The 14th Amendment's Personhood Mistake*, NAT'L REV. (Dec. 21, 2023, 3:43 PM), https://www.nationalreview.com/magazine/2024/02/the-14th-amendments-personhood-myth/ [https://perma.cc/4T53-AYAM] ("It is fairly conceded that the framers who drafted the 14th Amendment, and the 39th Congress that debated it, were not concerned about the abortion issue . . . . Indeed, no data . . . have ever been cited to suggest that the sponsors mentioned abortion or the unborn child at any time during the discussion of the 14th Amendment.").

47. *See* Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) ("[Judges] interpret and apply written law to the facts of particular cases.").

48. BLACK'S LAW DICTIONARY 824 (7th ed. 1999) (further noting that interpreting written text involves "discovering . . . the meaning which the authors . . . designed it to convey to others."). *See also* Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1024 (1992) ("[I]nterpreting a document *means* to attempt to discern the intent of the author.").

49. *See* Olmstead v. United States, 277 U.S. 438 (1928).

50. *See* Kyllo v. United States, 533 U.S. 27 (2001).

51. *See* Maryland v. Craig, 497 U.S. 836 (1990).

52. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

53. *Id.*

54. Paulsen, *supra* note 40, at 21. *See also* John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. UNIV. L. REV. 1371, 1376 (2019) (noting that original public meaning is "the meaning that a knowledgeable and reasonable interpreter would have placed on the words at the time that the document was written").

what the drafters "had in mind."[55] Those are questions of application, not interpretation. The fact that the framers and ratifiers of the Fourteenth Amendment did not, at the time, have abortion specifically in mind, therefore, is irrelevant to interpreting, or determining the objective linguistic meaning of, the words they put in the Constitution. That meaning can certainly be applied in the abortion context so that the Equal Protection Clause applies to human beings before birth.

II. POLICY

A. Personhood

By overruling *Roe* in its entirety, the Supreme Court eliminated any precedent on whether human beings before birth are Fourteenth Amendment persons. Congress, therefore, "has the power to interpret Section 1 of the Fourteenth Amendment when it is legislating to enforce it under Section 5."[56] For the reasons outlined above, Congress would be on solid ground in legislatively defining "person" to include prenatal human beings for purposes of enforcing the Equal Protection Clause.

The Supreme Court's decision in *City of Boerne v. Flores*[57] would pose no obstacle to that legislative course. In *Employment Division v. Smith*,[58] the Supreme Court in 1990 severely limited the First Amendment's protection for the free exercise of religion and Congress enacted the Religious Freedom Restoration Act[59] in 1993 as a legislative attempt to restore that protection. Congress argued that since the Supreme Court had previously incorporated the Free Exercise Clause into the Fourteenth Amendment, Congress could use its Section 5 authority to enforce it.[60]

In *City of Boerne*, however, the Supreme Court held that Congress had gone too far. Congress' power to *enforce* Section 1 of the Fourteenth Amendment, the Court said, does not extend to changing or defining its meaning, that is, "the power to determine what constitutes a constitutional violation."[61] In other words, the Free Exercise Clause means what the Supreme Court *currently* says it means; Congress may enforce *that* meaning and no other. But with *Roe* overruled, no currently binding precedent on that question exists and Congress may act legislatively to answer it. Doing so would be an example

55. Paulsen, *supra* note 40, at 47. *See also* New York State Rifle & Pistol Assoc., Inc. v. Bruen, 597 U.S. 1, 28 (2022) ("Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.").

56. Steven G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 J. CONST. L. 1431, 1433 (2009).

57. City of Boerne v. Flores, 521 U.S. 507 (1997).

58. Emp. Div. v. Smith, 494 U.S. 872 (1990).

59. 42 U.S.C. § 2000bb.

60. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

61. *City of Boerne*, 521 U.S. at 519.

of, as Professor Paulsen describes it, Congress making "interpretive choices falling within the range of the text's meaning in the course of" enforcing the Fourteenth Amendment.[62]

B. Appropriate Legislation

"The plausibility of personhood," Professor Paulsen writes, "only gets you so far. That the word 'person,' as used in the Constitution in the Fifth and Fourteenth Amendments, is broad enough to embrace living but unborn humans does not itself say anything specific about what the precise legal regime must be with respect to abortion."[63] The Supreme Court has broadly defined the "appropriate legislation" that Section 5 allows Congress to enact when enforcing Section 1. In *United States v. Raines*, for example, the Court held that legislation designed to deal with discriminatory state action that is subject to "the ban of that Amendment . . . is 'appropriate legislation' under it."[64] The next question, then, is what form such legislation might take.

The Fourteenth Amendment does not affirmatively dictate the substance of state laws, but it does require that states comply with the Equal Protection Clause when they make those policy choices. A state can violate the Fourteenth Amendment by maintaining separate schools,[65] applying different academic admission criteria,[66] or assigning students to schools[67] based on race, applying different standards for similarly cast election ballots counted in different jurisdictions,[68] or admitting students to state-run educational institutions based on sex.[69] A state enacting laws that protect the lives of some persons but not others can present the same issue.

Concurring in *Bell v. Maryland*,[70] Justice Arthur Goldberg argued that "state conduct which might be described as 'inaction' can nevertheless constitute responsible 'state action' within the meaning of the Fourteenth Amendment."[71] This inaction includes failing to "pass laws for protection."[72] The intersection of current homicide statutes, abortion prohibitions, and fetal

62. Paulsen, *supra* note 40, at 45.

63. *Id.* at 69–70.

64. United States v. Raines, 362 U.S. 17, 25 (1960).

65. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

66. Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023).

67. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

68. Bush v. Gore, 531 U.S. 98 (2000).

69. United States v. Virginia, 518 U.S. 515 (1996).

70. 378 U.S. 226 (1964). In this case, a group of black students challenged their conviction for criminal trespass for participating in a "sit-in" at a Baltimore restaurant. The Supreme Court did not reach the equal protection issue because both Maryland and Baltimore changed the applicable law, "abolish[ing] the crime of which petitioners were convicted." *Id.* at 228.

71. *Id.* at 310–11 (Goldberg, J., concurring).

72. *Id.* at 310 (Goldberg, J., concurring).

homicide laws reveals different ways that states fail to provide equal protection to persons before birth.

C. *Abortion Prohibitions*

Clarity about this issue begins with some basic definitions. A human being is "any member of the species homo sapiens from fertilization until death."[73] *Black's Law Dictionary* defines "homicide" as the "killing of any human creature."[74] In a survey of nearly 5,600 biologists from more than 1,000 academic institutions around the world, ninety-six percent affirmed the view that the life of each human being begins at conception.[75] Abortion is as much a form of homicide, or the killing of a human creature, as whatever killing a human being after birth might be called.

Only twelve states both prohibit homicide after birth and abortion throughout pregnancy.[76] The others deny prenatal persons the equal protection of the laws. Nine states, for example, set no gestational limit on abortion,[77]

---

73. *Human Being*, LAWINSIDER.COM, https://www.lawinsider.com/dictionary/human-being [https://perma.cc/G29T-5NCG]. *See also Human Being*, COLLINS DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/human-being [https://perma.cc/LT9M-SMCB] ("[A]ny individual . . . member of the species *Homo sapiens*"); *Human Being*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/human%20being [https://perma.cc/BHT8-848P] ("belonging to the species *Homo sapiens*").

74. *Homicide*, BLACK'S LAW DICTIONARY (4th rev. ed., 1968). *See also Homicide*, LAW, https://dictionary.law.com/Default.aspx?selected=881 [https://perma.cc/4BTZ-AEKD] ("[T]he killing of a human being due to the act or omission of another."); *Homicide*, BRITANNICA, https://www.britannica.com/topic/homicide [https://perma.cc/X98H-GXQR] ("[T]he killing of one human being by another"); *Homicide*, LAWINFO ("[t]he act of killing someone"); FBI, *2017 Crime in the United States*, FBI: UNIF. CRIME REPORTING PROGRAM https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/offense-definitions (defining "criminal homicide" as "the willful (nonnegligent) killing of one human being by another.").

75. *See* Steven Andrew Jacobs, *The Scientific Consensus on When a Human's Life Begins*, 36 ISSUES IN L. & MED. 221 (2021).

76. These states are Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia. Of the remaining states, four prohibit abortion after six weeks of pregnancy, six at specific points during the second trimester, and nineteen after viability, or the point at which an unborn child might survive outside the womb, generally considered to be at twenty-four weeks. Long before *Dobbs*, Missouri enacted a series of pro-life laws and, after *Dobbs*, enacted a statute banning abortion from conception. Voters in 2024 amended their state constitution to protect abortion until viability. MO. CONST. art I, § 36. A state court judge enjoined several pro-life laws while their constitutionality under this new provision was being litigation. On May 27, 20215, the Supreme Court of Missouri issued a peremptory writ ordering the lower court judge to vacate her injunction. State *ex re.* Michael Kehoe v. The Honorable Jerri Zhang, No. SC101026 (May 27, 2025). Because this litigation is in its early stage, this Article continues to count Missouri as a state allowing abortion until viability.

77. *See State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/state-policies-abortion-bans [https://perma.cc/UZ35-H6SD] (last updated May 28, 2025). These states are Alaska, Colorado, Maryland, Michigan, Minnesota, Missouri, New Jersey, New Mexico, Oregon, and Vermont.

leaving all persons before birth with no legal protection. While the remaining twenty-eight states prohibit abortion after some point in pregnancy, twenty-four of them draw the gestational line so late in pregnancy that they prohibit fewer than ten percent of abortions.[78]

D. Fetal Homicide Laws

In thirty-eight states, a third party causing the death of an unborn child without the mother's consent can be prosecuted for a separate crime commonly referred to as fetal homicide.[79] While states punishing homicide after, but not abortion before, birth deny equal protection to prenatal persons, states with fetal homicide laws do so in other ways.

- In thirty states, for example, the fetal homicide statute defines the victim as a human being from conception.[80] But abortion is legal during most or all of pregnancy in sixteen of them.[81] In other words, all prenatal persons are protected from homicide without the mother's consent, but most are not protected from homicide with the mother's consent.
- Ten states apply their fetal homicide statutes during only a portion of pregnancy.[82] In these states, the law protects some prenatal persons, but not others, from being killed even without their mother's consent.
- Twelve states have no fetal homicide statute, and eleven of them prohibit abortion only after viability or not at all.[83] Since, according to the Centers for Disease Control and Prevention, ninety-nine percent

---

78. Four states prohibit abortion after six weeks, but even that restriction covers only about fifty-five percent of abortions.

79. Abortion is the "voluntary termination of a pregnancy." *Abortion*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/abortion [https://perma.cc/669B-ETE6].

80. *Who Do Fetal Homicide Laws Protect? An Analysis for a Post-*Roe *America*, PREGNANCY JUST., https://www.pregnancyjusticeus.org/wp-content/uploads/2023/05/fetal-homicide-brief-with-appendix-UPDATED.pdf [https://perma.cc/WNE8-A33U]. *See, e.g.*, ALASKA STAT. § 11.81.900 (2024).

81. Florida, Georgia, and South Carolina prohibit abortion after six weeks; Nebraska and North Carolina after twelve weeks; Utah after eighteen weeks; Ohio and Wisconsin after twenty weeks; Kansas after twenty-two weeks; Pennsylvania after twenty-four weeks; and Arizona, Illinois, and North Dakota after viability. PREGNANCY JUST., *supra* note 80.

82. The California Penal Code, for example, defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought," CAL. PENAL CODE § 187(a) (2024), but the California Supreme Court interpreted "fetus" to apply "beyond the embryonic stage of seven to eight weeks." People v. Davis, 872 P. 2d 591, 602 (Cal. 1994). In Montana, "purposely or knowingly caus[ing] the death of a fetus of another with knowledge that the woman is pregnant" is "deliberate," MONT. CODE § 45-5-102 (2023), or "mitigated" homicide, *Id.* § 45-5-103 (2023), but the fetal homicide statute defines a fetus as "an organism of the species Homo sapiens from eight weeks of development." The Montana fetal homicide statute applies after eight weeks. *Id.* § 45-5-116 (2023).

83. Iowa does not have a fetal homicide statute but prohibits abortions after six weeks. Since forty-five percent of abortions occur before six weeks, however, this still means that killing scores of prenatal persons remains legal, with or without the mother's consent, in Iowa. PREGNANCY JUST., *supra* note 80.

of abortions occur before viability,[84] this means that killing prenatal persons is legal in these eleven states, with or without the mother's consent.

Abortion and fetal homicide laws conflict in many states.

- In Alaska, for example, a woman may get an abortion throughout pregnancy but the murder,[85] manslaughter,[86] or negligent homicide[87] of an unborn child, defined as a "member of the species Homo sapiens, at any stage of development, who is carried in the womb,"[88] are felonies.
- In Illinois, a woman may get an abortion until viability but causing the death of "any individual of the human species from the implantation of the embryo until birth" can qualify as intentional homicide,[89] manslaughter, [90] or reckless homicide.[91]
- Arizona law allows a woman to get an abortion until viability but also provides that "an unborn child at every stage of development [is granted] all rights, privileges and immunities available to other persons"[92] and defines "first-degree murder" as "caus[ing] the death of another person, including an unborn child [at any stage of its development], with premeditation."[93]
- In Utah, a woman may get an abortion during the first eighteen weeks of pregnancy but intentionally, knowingly, or recklessly causing the death of an unborn child "at any stage of the unborn child's development" is a felony.[94]

As noted above,[95] abortion advocates acknowledge that defining all human beings as Fourteenth Amendment persons would mean that states could no longer treat killing persons before and after birth differently. They also

---

84. Stephanie Ramer et al, *Abortion Surveillance—United States, 2022*, CDC (Nov. 28, 2024), https://www.cdc.gov/mmwr/volumes/73/ss/ss7307a1.htm [https://perma.cc/57WA-DREW].

85. ALASKA STAT. § 11.41.150 (2019).

86. ALASKA STAT. § 11.41.160 (2006).

87. ALASKA STAT. § 11.41.170 (2006).

88. ALASKA STAT. § 11.81.900 (2024).

89. 720 ILL. COMP. STAT. ANN. §§ 5/9-1.2(b)(1) (2024).

90. 720 ILL. COMP. STAT. ANN. §§ 5/9-2.1(d)(1) (2019).

91. 720 ILL. COMP. STAT. ANN. §§ 5/9-3.2(c)(1) (2021).

92. ARIZ. REV. STAT. ANN. § 1-219 (2021). *See also id.* § 36-2151 (defining "unborn child" as "the offspring of human beings from conception until birth").

93. ARIZ. REV. STAT. ANN § 13-1105 (2009).

94. UTAH CODE ANN. § 76-5-201 (West 2024). In Ohio, where voters added an open-ended right to "reproductive freedom" to their state constitution in 2023, the law defines "unlawful termination of another's pregnancy" as "causing the death of an unborn member of the species homo sapiens, who is or was carried in the womb of another . . . during the period that begins with fertilization and that continues unless and until live birth occurs." OHIO REV. CODE ANN. § 2903.09 (2024).

95. *See supra* notes 18–19 and accompanying text.

concede that making fetal homicide a crime, especially by "recogniz[ing] the fetus as a per se victim"[96] independent of the mother, can undermine the argument for allowing abortion. Considering injury or death "an independent harm sustained only by the fetus" in the same way as such harm sustained by a human being after birth treats them as similarly circumstanced.

Withholding legal protection for human beings before birth that they would receive after, or for some human beings before birth but not others, denies prenatal persons the equal protection of the laws. One way that Congress could address this Fourteenth Amendment violation is by legislation that, based on defining human beings before birth as Fourteenth Amendment persons, authorizes the Attorney General to sue states that deny them equal protection of the laws. The Supreme Court has upheld this approach as an appropriate exercise of Congress' authority to enforce the Fifteenth Amendment.

Like the Fourteenth Amendment, the Fifteenth gives Congress power to enforce it by appropriate legislation.[97] The Civil Rights Act of 1957 gave the Attorney General authority to sue for preventive relief whenever "any person has engaged or . . . is about to engage in any act or practice which would deprive any other person of any right or privilege secured by" the Voting Rights Act.[98] In *Raines*, cited above, the Supreme Court upheld this as a valid exercise of Congress' enforcement power.

To summarize the case so far, Congress *may* use its Section 5 power to enforce the Equal Protection Clause against states that deny that protection to persons before birth. Congress *might* do so by legislatively defining human beings before birth as Fourteenth Amendment persons and authorizing the Attorney General to sue states that deny them the equal protection of the laws. The final question is what Congress *could* do.

III. POLITICS AND CULTURE

Just as the proposition that all human beings are Fourteenth Amendment persons must be put into the form of actual policy, that policy will not help prenatal persons unless it actually becomes law and is consistently implemented and enforced. The Supreme Court imposed a constitutional blockade in *Roe* that prevented theory from becoming practice. Even with that blockade lifted, however, formidable obstacles remain.

---

96. Maddie McClain, *Fetal Homicide Laws and Legal Personhood: How the Criminalization of Fetal Death Infringes on Women's Constitutional Rights and Bodily Autonomy*, GW LAW (Feb. 3, 2022), https://studentbriefs.law.gwu.edu/clb/2022/02/03/fetal-homicide-laws-and-legal-personhood-how-the-criminalization-of-fetal-death-infringes-on-womens-constitutional-rights-and-bodily-autonomy/ [https://perma.cc/LA7B-STH8]. This writer's arguments, presented before *Dobbs* overruled *Roe*, incorrectly posit that fetal homicide laws "create personhood for the fetus in and of itself." *Id.* They do not. The writer's broader point that they signify that human beings, before and after birth, are similarly circumstanced, however, remains.

97. U.S. CONST. amend. XV, § 2.

98. 52 U.S.C. § 10101(c) (originally enacted as the Civil Rights Act of 1957, codified at 42 U.S.C. § 1971).

First, both the House of Representatives and the Senate must, at the same time, have significant pro-life majorities willing to enact pro-life legislation that is more far-reaching and innovative than Congress has ever even considered before. For example, Congress has restricted the use of federal funds to pay for abortions since 1977 through the so-called Hyde Amendment, a provision added to the appropriations bills that fund certain federal departments and agencies.[99] It was first enacted by an overwhelmingly Democratic Congress in 1976, which overrode President Jimmy Carter's veto. Though relatively uncontroversial for a few decades, support for even this modest limitation is deteriorating.

In 2016, for example, the Democratic Party was the first to call in its platform for "repealing the Hyde Amendment."[100] Running for president three years later, Joe Biden reversed his longstanding support for the Hyde Amendment,[101] pledging to work for its repeal, and, as president, submitted budgets that omitted it entirely. Legislation to repeal the Hyde Amendment introduced in the 118th Congress had 188 co-sponsors in the House[102] and thirty-two in the Senate.[103] Legislation to enforce the Equal Protection Clause against states would not only be unprecedented, it would be far more ambitious and sweeping than a limitation on federal funds. It would, in effect, reconfigure the constitutional parameters within which states legislate on these issues. Enacting legislation on far less ideological issues often proves difficult; using the power provided by the Fourteenth Amendment in such an unprecedented and bold way will prove far more so.

Second, even if enough votes existed to pass such legislation, a pro-life Senate majority must be large enough to avoid any filibuster that abortion advocates will certainly use to prevent a final vote on such legislation. The Senate's first rules, adopted in April 1789, allowed a simple majority to end debate and proceed to a final vote on a pending matter by passing a motion "for the previous question."[104] The Senate revised its rules in 1806, dropping this rule "but fail[ing] to impose any other device by which debate might be restricted."[105] As a result, while a simple majority could still pass a bill, ending

---

99. *See* EDWARD C. LIU & WEN W. SHEN, CONG. RSCH. SERV., IF 12167, THE HYDE AMENDMENT: AN OVERVIEW (2022).

100. Gerhard Peters & John T. Woolley, *2016 Democratic Party Platform*, THE AM. PRESIDENCY PROJECT (July 21, 2016), https://www.presidency.ucsb.edu/documents/2016-democratic-party-platform [https://perma.cc/7PF2-86R7].

101. *See* Vandana Rambaran, *Joe Biden Reverses Stance on Hyde Amendment Announces Opposition Amid 2020 Outcry*, FOX NEWS (June 6, 2019, 9:57 PM), https://www.foxnews.com/politics/joe-biden-reverses-stance-on-hyde-amendment-announces-opposition-amid-2020-outcry [https://perma.cc/4E7H-5KTV].

102. *See* H.R. 561, 118th Cong. (2023).

103. *See* S. 1031, 118th Cong. (2023).

104. 1 ANNALS OF CONG. 20–21 (April 16, 1789).

105. Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205, 216 (2004).

debate and proceeding to a final vote now required unanimous consent.[106] The Senate adopted a rule in 1917 to specify a supermajority for ending debate and, since 1975, Rule 22 has required "three-fifths of the Senators duly chosen and sworn," or sixty votes, to invoke cloture on any pending "matter."[107]

A *filibuster* occurs when an attempt to end debate fails. Even if fifty-nine Senators support a bill, forty-one Senators can block its passage by preventing any final vote. Passing legislation to enforce the Equal Protection Clause, therefore, will require at least sixty pro-life Senators ready to vote to end debate on that bill so that a simple majority can pass it. The Senate, however, has never voted on a pro-life measure nearly as sweeping as the Equal Protection Clause enforcement legislation discussed here. In fact, the Senate has voted only once on a resolution to propose a pro-life constitutional amendment, and that proposal merely said that the Constitution does not secure a right to abortion, allowing Congress or the states to restrict or allow abortion. Even so, the forty-nine to fifty Senate vote in June 1983 not only fell far short of the two-thirds required to send it to the states for ratification, but eleven votes short of the sixty needed simply to end debate on it. Both the majority and minority were solidly bipartisan, with fifteen Democrats in support and nineteen Republicans in opposition.[108]

Any bipartisan consensus on abortion has, in fact, steadily dwindled since then and, especially after *Dobbs* overruled *Roe*, does not exist today. Fifty of the fifty-one Senate Democrats in the 118th Congress, for example, co-sponsored the Women's Health Protection Act,[109] which would not only prohibit any government from taking any action or adopting any policy that could limit abortion,[110] but require reversing or repealing any existing one. It is, therefore, very unlikely that a pro-life supermajority of Senators willing to take unprecedented action to protect the unborn will exist in the foreseeable future.

This rules out any strategy for avoiding a filibuster that requires a supermajority. A simple majority can avoid a filibuster, but only through a controversial parliamentary maneuver, often called the "nuclear option," that would reinterpret, rather than amend, the text of Rule 22. If successful, it can change how the Senate operates without actually changing its rules.[111] In

---

106. *Id.* at 209. *See* SARAH S. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE 33–34, 46 (1997).

107. A Joint Resolution to Amend the Constitution to Establish Legislative Authority in Congress and the States with Respect to Abortion, S. J. Res. 3, 98th Cong. (1983).

108. S. Doc. No. 113–18, at 15.

109. *See* S. 701, 118th Cong. (2023); *see also* H.R. 12, 118th Cong. (2023).

110. *See* Melanie Israel, *More Radical Than Roe: House Abortion Bill Would Repeal Existing Laws, Prohibit Future Pro-Life Laws*, DAILY SIGNAL (Sept. 19, 2021), https://www.dailysignal.com/2021/09/19/more-radical-than-roe-house-abortion-bill-would-repeal-existing-laws-prohibit-future-pro-life-laws/ [https://perma.cc/A5B5-QKJA].

111. *See* Generally Orrin G. Hatch, *How 52 Senators Made 60 = 51*, 25 STAN. L. & POL'Y REV. ONLINE 9 (2014). Senate Democrats used the nuclear option in November 2013 to neutralize filibusters of most nominations. Then-Majority Leader Harry Reid (D-NV) made a "point of order,"

December 2021, then-Senate Majority Leader Charles Schumer (D-NY) threatened to use the nuclear option to overcome any filibusters of voting rights legislation[112] and, last year, former Vice President Kamala Harris urged Senate Democrats to take the same step in order to pass the Women's Health Protection Act.[113]

Senate Republicans, even if they supported at least conventional pro-life legislation such as the Hyde Amendment, have generally opposed undermining extended debate, which has long been "one of the Senate's most characteristic procedural features."[114] The prospects are practically non-existent a majority of Senators would be so committed to the pro-life cause that they would not only support sweeping Section 5 legislation, but limit the defining feature of the Senate as a legislative body to enact it.

Other obstacles to enacting and implementing such legislation remain. A boldly pro-life president must be in office when Congress passes legislation to enforce the Equal Protection Clause and be ready to sign it. He or she must have appointed an Attorney General who is impervious to public outcry and ready to implement this legislation. Doing so in a serious way will not only require significantly increasing Department of Justice resources, but training and equipping a significantly expanded group of lawyers dedicated to a fully developed and long-term strategy. And the Department must be equipped and ready to defend the constitutionality of this legislation, which would be challenged on multiple fronts, and to fight legal battles in both state and federal court wherever this strategy is implemented.

These are only some of the political conditions and strategies necessary to turn the theory of using Section 5 to enforce the Equal Protection Clause to help prenatal persons into reality. None of these conditions has ever existed individually, and they certainly have not coalesced to create a deeply life-affirming cultural and political climate. In fact, the current climate is arguably more hostile to the equal protection principle than ever before. The legal landscape for abortion is virtually the mirror-image of what it was before *Roe v. Wade*, with the large majority of states allowing the large majority of

---

or question of procedure, that, "the vote on cloture under rule XXII for all nominations other than for the Supreme Court of the United States is by majority vote." 159 CONG. REC. 8417 (2013). When the presiding officer agreed, the Senate voted 52–48 to ratify the decision, The Senate voted 52–48 along party lines to, in effect, interpret "three-fifths" in Rule 22 to mean "simple majority." *Id.*

112. *See* Carl Hulse, *Senate Republicans Block Voting Rights Bill, Leaving Its Fate in Doubt*, N.Y. TIMES (Oct. 20, 2021), https://www.nytimes.com/2021/10/20/us/politics/senate-voting-rights-filibuster.html (on file with author); Carl Hulse, *Schumer Will Try to Change Senate Rules if G.O.P. Stalls Voting Bill*, N.Y. TIMES (Dec. 20, 2021), https://www.nytimes.com/2021/12/20/us/politics/filibuster-senate-voting-rights.html (on file with author).

113. *See* Megan Messerly, *Harris Backs Ending Filibuster for Abortion Rights Legislation*, POLITICO (Sept. 24, 2024, 10:58 AM), https://www.politico.com/news/2024/09/24/kamala-harris-filibuster-abortion-rights-00180699.

114. RICHARD S. BETH & VALERIE HEITHUSEN, CONG. RSCH. SERV., RL 30360, FILIBUSTERS AND CLOTURE IN THE SENATE 1 (2013).

abortions. After the 2024 election, nearly a dozen states now have a right to abortion or, even more broadly, to reproductive freedom in their constitutions. The total would have been an even dozen but Florida, where fifty-seven percent of voters supported legalizing abortions up to viability, is one of the few states that requires sixty percent of voters to amend the constitution.

Americans United for Life's mission statement is this: "We strive for the day when all are welcomed throughout life and protected in law." [115] The law will not effectively protect those who are not welcomed in life. For this reason, even though all human beings, before and after birth, are persons to whom the Fourteenth Amendment guarantees the equal protection of the laws, and Congress has authority to enforce this guarantee, that plan will not come to fruition without a culture ready to receive and make it successful. This brings to mind the Parable of the Sower in chapter thirteen of Matthew's Gospel. The farmer scattered the same seed but the ground on which the seed fell determined what happened next: rocky places, thorny ground, shallow soil, or good earth. Today at least, the pro-life seeds described here will fall onto inhospitable cultural and political ground. It must first be made the kind of ground from which these seeds will produce, as Matthew put it, "a crop—a hundred, sixty or thirty times what was sown."[116]

In its amicus brief in *Roe v. Wade*, Americans United for Life argued that every living human being is a "person" within the meaning of the Equal Protection Clause.[117] Congress using its power to enforce the equal protection principle to this end, however, can succeed only within a culture that welcomes every human being in life.

115. *Mission*, AM. UNITED FOR LIFE https://aul.org/mission/ [HTTPS://PERMA.CC/99YC-6ZBK] (last visited Jan. 30, 2026).

116. *Matthew* 13:8 (NIV).

117. Brief for Americans United for Life as Amici Curiae in Support of Appellee, Roe v. Wade, 410 U.S. 113 (1971) (No. 70–18), at 9.