The History of Scholarship and Jurisprudence on the Personhood of the Unborn, the Fourteenth Amendment, and Abortion

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Those in the pro-life movement have been presented with an opportunity following the reversal of *Roe v. Wade.* The United States Supreme Court finally returned the issue of abortion to the American people and their elected representatives at the federal and state level. Some believe, in spite of this, that the *Dobbs v. Jackson Women's Health* (2022) decision returned the issue of abortion solely to the states, and so there is no role for federal action. However, the majority opinion in the decision clearly states, "*Held:* The Constitution does not confer a right to abortion; *Roe* and *Casey* are overruled; and the authority to regulate abortion is returned to the people and their elected representatives."[i]

Given this clear statement by Justice Alito, this article will not seek to argue that there is a federal role for Congress to protect unborn human life from abortion. Instead, it will argue for a stronger thesis: that the text of the 14th Amendment, understood in light of its original public meaning with considerations given to the history of protecting unborn life before the *Roe* decision, implies a Constitutional protection for the life of the unborn.

There are disagreements among those committed to protecting unborn life regarding at which point the law should begin such protection—at 15 weeks gestation, six weeks, or from conception. I take it as a given that the pro-life movement should always advocate for the maximum amount of protections for unborn children possible under the law, with the moment of conception, at which a new human being comes into existence, as the ideal goal. As the history and analysis below will show, the 14th Amendment, rightly understood, already protects unborn children from the crucial moment of conception. The humanity of the unborn demands that this always be at the forefront of every piece of legislation that is passed. The job is not done until the unborn child is recognized and protected at the federal level from the moment of conception.

To demonstrate this thesis, this article will survey the past scholarship and jurisprudence related to the personhood of the unborn in the context of sections one and five of the 14th Amendment of the United States Constitution. It will then be argued that the only reasonable conclusion one can draw from this scholarship and jurisprudential history is that unborn children are persons in the context of the 14th Amendment. Both the common law as well as pre-*Roe* statutes passed by the states explicitly and implicitly reflected this fact, as did the indirect intent of the framers of the 14th Amendment and the original public meaning of the word "person.[ii]" Because unborn children have a fundamental right to life under the 14th Amendment, Congress has a duty, according to the Due Process and Equal Protection clauses, to protect all lives from abortion in all 50 states.

A Review of the Scholarship Against and For the Proposition that "Person" within the Context of the 14th Amendment Includes the Unborn

Most modern scholarship supporting the proposition that unborn children are "persons" under the 14th Amendment is a response to contrary claims made in the *Roe v. Wade* (1973) majority decision written by Justice Harry Blackmun. Therefore, it will be useful to first lay out these claims and the arguments of those in agreement with them to see the flaws in their reasoning. The scholarship of those who have proven these claims wrong will then be discussed.

The *Roe v. Wade* decision stated on the topic of fetal personhood:

> The Constitution does not define "person" in so many words … in nearly all these instances [of the occurrence of "person" in the Constitution], the use of the word is such that it has application only postnatally. None indicates with any assurance that it has any possible prenatal application.[iii]

These statements are ironic given that abortion is not only not defined in the Constitution, but never even mentioned. The majority opinion went on to say, "All this together … persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[iv]

Blackmun's most direct attempt to prove that the 14th Amendment's mention of persons does not include unborn children was his unelaborated reference to a set of cases that supposedly dealt with the question directly. These cases include *McGarvey v. Magee Women's Hospital* (1972), *Burn v. New York City Health and Hospitals Corp.* (1972), *Abele v. Markle* (Conn. 1972), *Montana v. Rogers* (1960), etc.

To support his claims indirectly, Blackmun depended on the work of Professor Cyril Means who claimed that there was a common law liberty or right to abortion. Means' scholarship took the form of an article written in 1968 titled *The Law of New York Concerning Abortion and The Status of the Foetus* and a journal article written in 1971 titled *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right about to Arise from the Nineteenth Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?* The former article, referred to as "Means I" in the *Roe* opinion, claimed that there was a common law right to an abortion before quickening at the time of the American founding and that the purpose of laws that prohibited post-quickening abortions was to protect women, not unborn children.[v] The latter article, referred to as Means II in the *Roe* opinion, expanded Means' original claims in his 1968 article and argued that English and American women had a common law right to abortion on demand.[vi]

To defend his hypothesis, Means cited *The Twinslayers* case (1327) which ruled that killing a fetus by beating a woman wasn't murder and *The Abortionists'* case.[vii] Even those on *Roe's* legal team, including Yale law student David Tundermann in a memo,

criticized Means' method of coming to this conclusion. This is how Tundermann described Means' scholarship:

> Begin with a scholarly attempt at historical research; if it doesn't work out, fudge it as necessary; write a piece so long that others will read only your introduction and conclusion; then keep citing it until the courts begin picking it up.[viii]

Scholars have since refuted Means' and Blackmun's claim that 19th-century abortion laws prohibiting both pre- and post-quickening abortions were intended to protect only the life of the mother. James Witherspoon, writing in 1985, noted that if the states' abortion laws were passed only to protect the life of the mother and not the unborn child, "there would be no reason whatsoever for the state legislatures to authorize the judge or jury to assess a greater punishment if it were proven that the attempted abortion killed the fetus."[ix] By the end of 1868, 14 states authorized this punishment of the abortionist and other states allowed for the same range of punishment for an attempted abortion that killed the unborn child or mother.

Witherspoon further noted that state legislatures, were Blackmun's and Means' thesis true, would have never deemed abortion manslaughter or categorized abortion with homicide and other offenses against persons or born children.[x] What Blackmun and Means also fail to mention is that state Supreme Court cases explicitly said that their state abortion laws were designated for the protection of the unborn children. One such case dealt with Oklahoma's abortion law that prohibited all abortions except those necessary to save the life of the mother. In *Bowlan v. Lunsford* (1936), the court noted the Oklahoma law was passed for the protection of the unborn child and, through it, society. Another example of a state explicitly noting that their abortion laws were fashioned to protect not only the mother from dangerous abortion procedures, but also unborn children is the state of Ohio. The Ohio legislature that ratified the 14th Amendment also enacted the state's abortion law limiting abortion to only when it was necessary to save the mother's life. When introducing the bill, the legislature called abortion "child murder" and quoted Thomas Percival, whose influential medical ethics textbook written in 1803 said of abortion, "[T]o 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."[xi]

The majority opinion in *Roe* spent a considerable amount of space claiming that Means' scholarship proved that unborn children were not persons in the context of the 14th Amendment as common law abortion laws only limited abortion after quickening, often thought to be around 16 to 18 weeks' gestation.[xii] In the *Roe* opinion, Justice Blackmun cited the work of English common law legal scholars to prove that abortion before quickening wasn't an indictable offense and that whether abortion after quickening was a felony was still up for debate. Blackmun criticized Sir Edward Coke, a 16th century English lawyer, and Henry de Bracton, a 13th century English jurist, who claimed post-quickening abortions were a crime, with Bracton calling it homicide. Blackmun praised in turn the renowned 18th century English jurist William Blackstone who said that the common law at the time took a "less severe view" of post-quickening abortions which he

still called a "heinous misdemeanor.[xiii]" While he criticized Coke and Bracton's views on post-quickening abortion, he lauded what he classified as their focus on the quickening distinction when crafting abortion laws.[xiv] Blackmun traced the works of these English jurists and scholars to reinforce Means' claim that if unborn children were persons protected under the law, the common law would not have only prohibited abortion after quickening. Expediently, Blackmun left out the work of 19th- century medical and legal experts who claimed that the quickening distinction was groundless because formation and fetal movement occur at conception and that the Bracton-Coke-Blackstone differing definitions of a quick child (six weeks' gestation) and quickening (16-18 weeks' gestation) were inaccurate.[xv]

Blackmun's claims regarding English jurists are simply incorrect. Scholars John Finnis and Robert P. George flesh out Blackmun's errors when discussing the views of Blackstone, Coke, and Bracton regarding the legal status of abortion. Finnis and George point out in their amicus brief in the *Dobbs* case that in the first book of Blackstone's Commentaries, *Of the Rights of Persons* (first chapter, *Of the Absolute Rights of Individuals*), Blackstone starts with the "right to personal security" and describes that right as "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health."[xvi] Abortion takes those very rights away from every unborn child that it kills. The man responsible for introducing the 1866 Civil Rights Act that led to the adoption of the 14th Amendment, Senator James F. Wilson, recounted Blackstone's further description of the rights of the unborn who said that,

> 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 … [A]n infant … in the mother's womb, is supposed in law to be born for many purposes. It 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 …[xvii]

Furthermore, Finnis and George's analysis of Blackstone's original text and Wilson's recounting of it undercuts Blackmun and Means' claim that Blackstone believed the unborn only had rights when they could stir in their mother's womb, which Blackmun et al. claimed was at 16 to 18 weeks. Blackstone claimed that "if a woman quick with child has an abortion, while it is not homicide or manslaughter, it is still 'a very heinous misdemeanor'."" According to Finnis and George, the historical-legal field at the time had three definitions of "quick(en)." "Quick with child" meant "pregnant," or at conception while a "quick child" meant a child at the sixth week of pregnancy and was popular during Blackstone, Bracton, and Coke's time. Lastly, "quickening" or a "quickened child" meant what Blackmun claimed it meant (16-18 weeks).[xviii] Because Blackstone used the term "quick with child" (six weeks' gestation), Blackmun was not correct in affirmatively stating that Blackstone depended on the quickening distinction to inform his views on abortion.

A wealth of other scholarship similarly undermines Blackmun and Means' claim that the concept of fetal personhood did not exist in common law because abortion was only limited after quickening. Robert Byrn, for example, writing directly after the *Roe* decision, noted that the occurrence of quickening was only significant in common law abortion policy because it showed that the unborn child was alive.[xix] Robert Destro echoed Byrn's view and noted that quickening was a standard of proof, used as a practical evidentiary test, to determine if the abortion had caused a child's death. It was not meant to serve as a criterion for the very existence, or inherent value, of the unborn child.[xx]

Quickening, in other words, was a legal concept used to highlight the importance of protecting an unborn child in the womb when the legal and medical community could determine that it was, indeed, alive. Joshua Craddock notes that the common law rule of *corpus delicti* required that a corpse was necessary to prove homicide, and that quickening was the best way lawyers knew how to prove fetal death.[xxi] During Blackstone's time and the time of those drafting common law abortion policies, proof of life had to come via fetal movement as no ultrasounds existed to show what the public and the medical community now have consensus on, that life begins at conception.[xxii] Blackstone's comments on the atrocity of abortion and his belief that life began before quickening led scholar Michael Paulsen to rightly conclude that Blackstone believed legal personhood existed when life can be shown to exist.[xxiii] Craddock and John Keown both note that common law prohibited abortion at the point that the medical technology (fetal movement) at the time could prove the presence of life, and that the quickening distinction was implicated as a tool of criminal law to protect prenatal life as it could, not a tool to exclude unborn children from the idea of personhood.[xxiv]

The dependence of Blackmun and Means on a faulty interpretation of common law scholars' view on quickening led them to falsely claim that a common law right to abortion before quickening existed. What Blackmun and Means fail to mention is that when the human ovum was discovered in 1837, the English Parliament changed its abortion policy by eliminating the quickening distinction and enacting synonymous penalties for abortionists, regardless of gestational age. The case of *R v. Wycherley* in 1838 confirmed this change and documented that the phrase "quick with child" now meant from the moment of conception.

While Blackmun did give credence to the fact that, when given the opportunity, states now in charge of crafting their own statute codes and disposing of common law eliminated the quickening distinction, his treatment of such developments was inadequate. Scholar James Witherspoon summarized such changes, noting that in 1868 when the 14th Amendment was adopted America was composed of 37 states 27 of which punished abortionists equally for performing pre- and post-quickening abortions. In 1870, 32 states had ratified the 14th Amendment, and 27 of those 32 states had abortion statutes that prohibited all abortions except to save the life of the mother.[xxv] The claim by Blackmun that women enjoyed "more freedom" to abort in the 19th century does not hold up considering Witherspoon's analysis. Lastly, Witherspoon poignantly notes that at the

end of 1868, the statutes of at least 23 states and six territories referred to the fetus as a child, something the statutes would not have done if they had not considered the unborn child a person.[xxvi]

Pointing to the lack of legal remedies or punishments for pre-quickening abortions in early America is another way that anti-personhood scholars and Justice Blackmun have attempted to diminish the personhood of the unborn. However, Blackmun and Means' focus on Blackstone's claim that pre-quickening abortions in 19th-century common law were never indictable offenses ignores the fact that state supreme court decisions from that same period said otherwise. In *Commonwealth v. Parker* (1849), a case that Blackmun attempted to use to refute the personhood of the unborn and later used in an amicus brief by the American Historical Association in the *Dobbs* case[xxvii], Chief Justice Shaw stated that the common law always regarded pre-quickening abortion as "an action without lawful purpose." Blackmun and other anti-personhood scholars also fail to mention different 19th-century historical figures and associations that considered all abortions, regardless of the point in pregnancy, as murder. This included the Medical Society of New York, Francis Wharton (an American legal scholar), Dr. Horatio Storer, and the American Medical Association from the time that Storer was in charge until modern times when it became pro-abortion.[xxviii]

As Craddock rightly points out, the determination of whether and how to punish abortionists for abortions at different points in a woman's pregnancy is one that rested on the legal and medical tools available at the time.[xxix] This reliance on tools of the 19th century says nothing about the personhood status of unborn children. What speaks to the question of legal personhood much more clearly than Blackmun and Means' reliance on quickening are the English and state supreme court cases speaking to the issue of personhood directly. In the Massachusetts case of *Hall v. Hancock* (1834), for example, the court noted, "A child will be considered in being, from conception to the time of its birth." In the English case of *Wallis v. Hodson* (1740), Lord Hardwicke first uttered the position that life and legal personhood began at conception in *Hall* as did the court in *Doe v. Clarke* (1795).

Means' scholarship and Blackmun's dependence thereon in the majority opinion of *Roe* have been widely discredited even by abortion advocates.[xxx] Scholar John Hart Ely even noted that the claims of Blackmun and the scholars he depended on are undercut by the proofs that Blackmun tried to provide to support his argument. Ely, who did not oppose legal abortion, went as far as to say:

> To the extent they [the arguments that fetuses are not legal persons] are not entirely inconclusive, the bodies of doctrine to which the Court adverts respecting the protection of fetuses under general legal doctrine tend to undercut rather than support its conclusion. And the argument that fetuses … are not "persons" under the Fourteenth Amendment fares little better.[xxxi]

However, this did not stop subsequent Supreme Court justices and scholars from defending *Roe's* denial of Constitutional personhood for the unborn. Justice Stevens, in the majority opinion of *Planned Parenthood of Southeastern Pennsylvania et al. v. Casey* (1992), stated, "In short, the unborn have never been recognized in the law as persons in the whole sense … Accordingly, an abortion is not 'the termination of a life entitled to Fourteenth Amendment protection.'"[xxxii]

Separate from the scholarship disputing the erroneous claims made about fetal personhood in the *Roe* opinion, pro-personhood scholars have devoted time to discussing how the original meaning of the word "person" at the time the 14th Amendment was ratified lends credence to the fact that the Amendment includes the unborn in its protections. To do this, scholars have focused both on the legal and common meaning of the word at the time of the Amendment's ratification.

The drafting and ratifying members of the federal and subsequent state legislatures did not have a common law definition of the word "person" and did not consider themselves bound to common law judgments, rules, and doctrines on such a topic.[xxxiii] Scholar Michael Paulsen analyzed the Constitutional text, history, precedent, and policy to ascertain whether the unborn are 14th Amendment persons. He found that the word "person" at the time of the 14th Amendment's ratification was synonymous with the phrase "human being," and that the term encompassed all human beings—born and unborn.[xxxiv] Paulsen also found that Blackmun's reasoning in *Roe* claiming that the word person in the 14th Amendment only applied to postnatal contexts was too narrow and that it is plausible that the Amendment could include the unborn.

As for the history and original intent behind the 14th Amendment, Paulsen admitted that the amendment wasn't originally about abortion but also pointed out that it is "reasonably clear that the framers of the 14th Amendment did not distinguish a factual or legal matter between legal persons and biological human beings."[xxxv] Paulsen went on to push back against the claim that there was no judicial precedent for interpreting the 14th Amendment as applying to unborn persons, pointing to the case of *Steinberg v. Brown* (1970). The majority opinion in *Steinberg,* written by District Judge Don Young, said,

> Biologically, when the spermatozoon penetrates and fertilizes the ovum, the result is the creation of a new organism which conforms to the definition of life…Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments imposed upon the state the duty of safeguarding it.[xxxvi]

Although Paulsen declined to fully commit to the claim that the 14th Amendment included the unborn, between the two positions on the topic, he did believe that the evidence supports the personhood position more than it denies it.

However, scholars John Finnis and Robert George claim that the 14th Amendment absolutely included the unborn, and point out that prior Supreme Court decisions rejected categorizing and distinguishing persons in the cases of *Dartmouth College v. Woodward* (1819) and *Santa Clara County v. Southern Pacific Railroad Company* (1886), which

ruled that corporations are persons.[xxxvii] Furthermore, Finnis and George discuss how other rulings rejected distinguishing different classes of people in cases dealing with illegitimate children getting their parents' benefits (*Levy v. Louisiana* [1968] and *Weber v. Aetna Casualty & Surety* [1972]).[xxxviii] Scholar Robert Destro contributed to this area of the conversation by observing that, while the Constitution did not define the word "person," there was no evidence from the time of ratification that they meant to exclude the unborn. Destro reasoned that if the definition of person was broad enough to include corporations, it was broad enough to include the unborn.[xxxix] Joshua Craddock dealt with the issue more directly and noted that while dictionaries at the time of the ratification of the amendment didn't reference birth in their definition of person, they did define persons as human beings, which included prenatal human beings.[xl]

Craddock added to his view that the original meaning of the word "person" in the Constitution implicitly included the unborn by pointing out that state understanding is paramount when ascertaining the original meaning of Constitutional concepts. Craddock noted that state understandings of criminal law at the time of ratification also helped illustrate how a "person" was defined, observing at the time of ratification that nearly every state proscribed abortion and many classified abortions as "offenses against the person" in their criminal law codes.[xli] Craddock mentioned *United States v. Palmer* (1818) to reinforce his claims and noted that Chief Justice Marshall conceded that the term person was broad enough to encompass "every human being" and the "whole human race."

Lastly, on the topic of the intent of the framers of the Amendment, John Gorby reasoned that the right to life is mentioned first in the 14th Amendment because it is a prerequisite to enjoy the other rights listed in the amendment.[xlii] Driving the point home was Robert Byrn, who argued that if the framers of the amendment had meant to exclude the unborn from the 14th Amendment's protections for persons, then it made no sense that, at the same time that three-fourths of state legislatures were ratifying the 14th Amendment, they were contemplating or already had enacted abortion policies that prohibited abortion at all times except to save the life of the mother.[xliii]

Additional scholarship related to this issue has focused on other areas of law that have historically recognized the humanity of the unborn. These areas include property law (*Bonbrest v. Kotz* [1946]), guardianship law (*Hoener v. Bertinato,* 1955), the right of unborn children to life-saving medical care despite the religious beliefs of their parents (*Raleigh v. Fitkin,* 1964), and estate law (*Estate of Warner,* 1971). In the case of *Bonbrest v. Kotz* (1946), the court said, "From the viewpoint of the civil law and the law of property, a child *en ventre sa mere* is not only regarded as a human being, but as such from the moment of conception."[xliv] Current personhood scholars such as Thomas Jipping also point out that 38 states prohibit fetal homicide by applying their general homicide statutes to the homicides of children before and after birth.[xlv] Furthermore, states' child endangerment laws related to maternal drug use during pregnancy have been applied to the unborn in *Ex Parte Ankrom and Kimbrough* (2012). It is hard to believe that such a

large majority of states would do this if they did not consider the unborn victims of homicide as persons. Lastly, there is a federal Unborn Victims of Violence Act currently in effect.[xlvi]

Lastly, there were some jurists and scholars who believed that, while the central holding of *Roe* was wrong and that there was no "penumbral" right to an abortion, the 14th Amendment did not confer personhood on the unborn. Endorsers of this view include the late Justice Antonin Scalia, who believed that while the central holding of *Roe* was littered with errors, abortion policy was best left to individual states.[xlvii] Scholars such as John Finnis, Robert George, and Joshua Craddock dispute this claim of Scalia's and note that because the unborn have a fundamental right to life under the 14th Amendment, the federal government via Congress has the duty to pass legislation or initiate a Constitutional amendment to limit abortion from conception.[xlviii]

Implications of Fetal Personhood for the Current Policy Landscape

The appellant in the *Roe v. Wade* case as well as Justice Blackmun admitted that if fetal personhood for the unborn within the context of the 14th Amendment could be established, the appellant's case would collapse.[xlix] Where Blackmun and all who sympathize with or informed his majority opinion go wrong is in claiming that the 14th Amendment's mention of person does not include the unborn. A wealth of credible scholarship, described above, demonstrates that this proposition is wrong. The original public meaning of the word "person" at the time of ratification, as well as the intent of the framers of the amendment and the actual history of pre-*Roe* abortion policies in America, leave no question as to whether the 14th Amendment includes unborn children under its protection.

The 14th Amendment thus calls for the federal government to step in when states fail to act to protect the fundamental rights of those under its protection. The *Ex Parte Virginia* (1880) decision by the United States Supreme Court noted that whatever legislation is needed to execute the 14th Amendment, including the protection of fundamental rights, can be initiated by Congress. Jipping rightfully pointed out modern Supreme Court precedent (*City of Boerne v. Flores* [1997]) that enforcement legislation regarding the 14th Amendment must be "remedial" not "substantive." However, Jipping concludes that this precedent does not prevent Congress from establishing that the 14th Amendment includes protection for unborn children and enacting subsequent legislation that protects these children in states without gestational limits.

The lack of action on the state level, which justifies intervening federal action, was described by Charles Rice as inaction that denies the child in the womb the equal protection of the 14th Amendment. The ability and duty of the Congress to remedy state inaction in the protection of unborn human life was indirectly put forth in *Bell v. Maryland* (1964) in the concurrence of Justice Arthur Goldberg, who stated, "Denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection."

As Jipping notes, the success of this strategy, if ever pursued, depends on what legal standard the courts will apply—mere rationality or strict scrutiny.[l] As noted in the introduction, the purpose of this paper is not to discuss the political possibility of Congress establishing the personhood of the unborn under the 14th Amendment in the form of legislation or constitutional amendments, or even which method is preferable. The point of discussing and proving that unborn children are persons under the 14th Amendment and thus worthy of equal protection under the law is to remind the pro-life movement that protecting all human beings, born and unborn, from conception to natural death, should always be the foremost goal of the movement.

The pro-life movement should never stop trying to change the public consensus and should work to forge a new consensus that would allow public officials to protect unborn children from conception. The humanity of the unborn demands that this always be at the forefront of every piece of legislation that is passed. The need for federal action does not discount the importance of state action to protect unborn human life, it just highlights that in the constitutional order of the United States, the only surefire way to protect the unborn in every state is at the federal level. The pro-life movement's incrementalism should be aggressive in its attempts to forge consensus on gestational limits while never losing sight of the fact that gestational limits, while important and necessary, are not the end goal. The end goal is to make abortion unthinkable and protect unborn lives from conception.

The pro-life movement has a duty to present better alternatives to women than abortion, supporting them during and after pregnancy, but it also has an equal duty to do the same for unborn children, from the moment that our Creator forms them in their mother's womb until natural death.

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[i] Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022).
[ii] The original public meaning and the original intent of the framers make this argument amenable to both original "public meaning" originalists and original "intent" originalists.
[iii] Roe v. Wade, 410 U.S. 113 (1973), p. 157-158.
[iv] Ibid, 158.
[v] Cyril C. Means, "The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality," *New York Law Forum* 44, no. 3 (1968).
[vi] Cyril C. Means, "The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right about to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?," *New York Law Forum* 17, no. 2 (1971)
[vii] Cyril C. Means, "The Law of New York Concerning Abortion."
[viii] Justin Dyer, "Fictional Abortion History," National Review, December 24, 2012, accessed October 15, 2023, https://www.nationalreview.com/2012/12/fictional-abortion-history-justin-dyer/.
[ix] James Witherspoon, "Reexamining *Roe:* Nineteenth-Century Abortion Statutes and the Fourteenth Amendment," *St. Mary's Law Journal* 17, no. 29 (1986-1986): 38.
[x] Ibid, 70.
[xi] Ibid, 62.
[xii] Roe v. Wade, 132.

[xiii] Henry de Bracton, *De Legibus et Consuetudinbus* (1235); Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: M. Flesher, 1644); William Blackstone, *Commentaries on the Laws of England* (1769), 129-130.
[xiv] Roe v. Wade, 134.
[xv] Theodric Romeyn Beck, John B. Beck, C.R. Gilman, *Elements of Medical Journal Jurisprudence* (1825); William Guy and C.A. Lee, *Principles of Medical Jurisprudence* (New York: Harper & Brothers, 1845).
[xvi] John M. Finnis and Robert P. George, Brief of Amici Curiae Scholars of Jurisprudence in Support of Petitioners, 2021a, Dobbs v. Jackson Women's Health Organization et al., 597 U.S. (2022), 6.
[xvii] Blackstone, Commentaries, 129-130.
[xviii] Finnis and George, Brief of Amici Curiae Scholars of Jurisprudence**,** 13-14.
[xix] Robert M. Byrn, "An American Tragedy: The Supreme Court on Abortion," *Fordham Law Review* 41, no. 4 (1973): 825.
[xx] Robert A. Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," *California Law Review* 63, no. 5 (1975): 1270.
[xxi] Joshua J. Craddock, "Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?" *Harvard Journal of Law and Public Policy* 40, no. 2 (2017): 553.
[xxii] Brief of Biologists as Amici Curiae in Support of Neither Party, Dobbs v. Jackson Women's Health Organization et al., 597 U.S. (2022).
[xxiii] Michael Stokes Paulsen, "The Plausibility of Personhood," *Ohio State Law Journal* 74, no. 14 (2012): 28.
[xxiv] Craddock, "Protecting Prenatal Persons," p. 554; Keown, "Back to the Future of Abortion Law: Roe's Rejection of America's History and Tradition," *Issues in Law and Medicine* 22, no. 1 (2006): 3-4.
[xxv] Witherspoon, "Reexamining Roe," 33-48.
[xxvi] Ibid, 48.
[xxvii] Brief for Amici Curiae American Historical Association and Organization of American Historians in Support of Respondents, Dobbs v. Jackson Women's Health Organization et al., 597 U.S. (2022).
[xxviiixxviii] Byrn, Reexamining Roe, 836; Frederick Dyer, *The Physicians' Crusade Against Abortion* (Science History Publications, 2006); Horatio Robinson Storer, *Criminal Abortion: Its Nature, its Evidence, and its Law* (1868a); Horatio Robinson Storer, *Is it I? A Book for Every Man* (Boston: Lee and Shepherd, 1868b); Horatio Robinson Storer, *On Criminal Abortion in America* (Philadelphia: Lippincott, 1860).
[xxix] Craddock, "Protecting Prenatal Persons," 563; David C. Reardon, Tessa Longbons, Katherine A. Rafferty, "The Effects of Abortion Decision Rightness and Decision Type on Women's Satisfaction and Mental Health," *Cureus* 15, no. 5 (2023).
[xxx] John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," *Yale Law Journal* 82 (1973).
[xxxi] Ely, "The Wages of Crying Wolf," 925.
[xxxii] Planned Parenthood of Southeastern Pennsylvania et al. v. Casey, 505 U.S. 833 (1992), 913.
[xxxiii] John M. Finnis and Robert P. George, "An Enhanced Amicus Brief in *Dobbs*," (2021b): 32-33.
[xxxiv] Paulsen, "The Plausibility of Personhood," 20, 32.
[xxxv] Ibid, 47.
[xxxvi] Steinberg v. Brown, 321 F. Supp. 741, (N.D. Ohio 1970).
[xxxvii] Finnis and George, Brief of Amici Curiae Scholars of Jurisprudence, 23.
[xxxviii] Thomas Jipping, "Can the Fourteenth Amendment be used to Protect Human Life Before Birth?" The Heritage Foundation, 2022, accessed October 15, 2023, https://www.heritage.org/life/report/can-the-fourteenth-amendment-be-used-protect-human-life-birth.
[xxxix] Destro, "Abortion and the Constitution," 1290.
[xl] Craddock, "Protecting Prenatal Persons," 547.
[xli] Ibid, 552.
[xlii] John D. Gorby, "The 'Right' to an Abortion, the Scope of Fourteenth Amendment 'Personhood,' and the Supreme Court's Birth Requirement," *Southern Illinois University Law Journal* 4, no. 1 (1979), 5.
[xliii] Byrn, "Reexamining Roe," 838.
[xliv] Bonbrest v. Kotz, 65 D. Supp. 138, 140 (D.D.C. 1946).
[xlv] Jipping, "Can the Fourteenth Amendment be Used to Protect Human Life Before Birth?"
[xlvi] 18 U.S.C. 1841

[xlvii] Antonin Scalia, "God's Justice and Ours," First Things, 2002, accessed October 15, 2023, https://www.firstthings.com/article/2002/05/gods-justice-and-ours
[xlviii] Finnis and George, Brief of Amici Curiae Scholars of Jurisprudence; Craddock, "Protecting Prenatal Persons."
[xlix] Roe v. Wade, 156-157.
[l] Jipping, "Can the Fourteenth Amendment be Used to Protect Human Life Before Birth?"

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