Filing # 193776842 E-Filed 03/11/2024 05:57:05 PM

IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: LIMITING GOVERNMENT INTERFERENCE WITH ABORTION
_____/

SC2023-1392

NOTICE OF SUPPLEMENTAL AUTHORITY

Under Florida Rule of Appellate Procedure 9.225, Opponent, Susan B. Anthony Pro-Life America ("SBA Pro-Life America"), submits as supplemental authority Thompson, David, *Basic Rights and Initiative Petition 23-07: Are the Preborn "Natural Persons" Under The Florida Constitution?* (March 8, 2024). A true and correct copy is attached hereto as EXHIBIT A.

The supplemental authority is pertinent to issues raised at oral argument as to whether the initiative: "LIMITING GOVERNMENT INTERFERENCE WITH ABORTION" complies with Florida law requiring the initiative to identify substantially affected provisions of the Constitution, and more specifically whether an unborn child is covered by Article I, section 2 of the Florida Constitution, and whether preborn human beings are "persons" for purposes of Article I, section 9 – the due process provision of the Florida Constitution.

Dated: March 11, 2024

Respectfully Submitted,

/s/ *Samuel J. Salario, Jr.*
Alan Lawson
Florida Bar Number: 709591
Samuel J. Salario, Jr.
Florida Bar Number: 83460
Jason Gonzalez
Florida Bar Number: 146854
Caroline May Poor
Florida Bar Number:1018391
LAWSON HUCK GONZALEZ, PLLC
215 South Monroe Street, Suite 320
Tallahassee, FL 32301
850-825-4334
alan@lawsonhuckgonzalez.com
samuel@lawsonhuckgonzalez.com
jason@lawsonhuckgonzalez.com
caroline@lawsonhuckgonzalez.com
michelle@lawsonhuckgonzalez.com
marsha@lawsonhuckgonzalez.com

Counsel for Susan B. Anthony Pro-Life America

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been filed with the ePortal website and served on March 11, 2024, to the following:

Cord Byrd
Secretary of State
Florida Department of State
R.A. Gray Building
500 S. Bronough St.
Tallahassee, FL 32399-0250
Joseph.VandeBogart@dos.myflorida.com

Raymer Maguire
Chairperson, Floridians Protecting Freedom, Inc.
P.O. Box 4068
Sarasota, FL 34230

Ron DeSantis
Governor, State of Florida
The Capitol
400 S. Monroe St.
Tallahassee, FL 32399-0001

ryan.newman@eog.myflorida.com
Kathleen Passidomo President, Florida Senate Senate Office Building
404 S. Monroe St. Tallahassee, FL 32399-1100
carlos.rey@flsenate.gov

Paul Renner
Speaker, Florida House of Representatives 420 The Capitol
402 S. Monroe St.
Tallahassee, FL 32399-1300
david.axelman@myfloridahouse.gov

Nathan A. Forrester
Senior Deputy Solicitor General Office of the Attorney General
State of Florida
PL-01, The Capitol
Tallahassee, FL 32399-1050
nathan.forrester@myfloridalegal.com

Courtney Brewer
P.O. Box 3441
Tallahassee, FL 32315
Cbrewer.law@gmail.com

Counsel for Floridians Protecting Freedom, Inc.

Helene Barthelemy
Daniel Tilley
Michelle Morton
ACLU Foundation of Florida
4343 W. Flagler Street, Suite 400
Miami, FL 33134
hbarthelemy@aclufl.org
dtilley@aclufl.org
courts@aclufl.org
mmorton@aclufl.org

Counsel for Floridians Protecting Freedom, Inc.

/s/ *Samuel J. Salario, Jr.*
Attorney

EXHIBIT A

Basic Rights and Initiative Petition 23-07: Are the Preborn "Natural Persons" Under The Florida Constitution?

38 Pages
Posted:

David Thompson (https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=6567632)
Cooper & Kirk, PLLC

Date Written: March 8, 2024

Abstract

An initiative petition entitled "Amendment to Limit Government Interference with Abortion" had been circulating in Florida since May 2023. The proposed amendment, which would effectively ban pro-life legislation, recently garnered enough signatures to trigger review of the initiative by the Florida Supreme Court. At oral argument, Florida's Chief Justice asked whether an unborn child is covered by Article I, section 2 of the Florida Constitution. This article addresses that question, and another question left unasked: whether preborn human beings are "persons" for purposes of Article I, section 9—the due process provision of the Florida Constitution. It does so by examining the historical context and development of Florida's basic equality and due process provisions, in addition to numerous historical sources. The Article concludes that, in 1968, the public would have understood the words "natural person" and "Person," as used in Article I, sections 2 and 9, to mean a living human being, including a preborn child. Of course, this conclusion means that the initiative petition cannot survive the Florida Supreme Court's review. For it would be clearly invalid under Florida law because it fails to identify substantially affected provisions of the Constitution. More than that, though, any attempt to create a constitutional right to abortion would violate the "single-subject" rule by attempting to revoke multiple fundamental rights guaranteed by different sections of the Constitution. A long line of Florida Supreme Court precedent holds that such "cataclysmic" change may not be accomplished by initiative petition.

(https://plu.mx/ssrn/a/?ssrn_id=4753223)

Related eJournals

Law & Society: Public Law - Constitutional Law eJournal (https://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalBrowse&journal_id=991871)

Follow

Feedback

Submit a Paper > (https://hq.ssrn.com/submissions/CreateNewAbstract.cfm)

SSRN Quick Links

SSRN Rankings

About SSRN

(https://www.facebook.com/SSRNcommunity/)
(https://www.linkedin.com/company/493409?trk=tyah&trkInfo=clickedVertical%3Acompany%2CentityType%3AentityHistoryName%2CclickedEntityId%3Acompany_493409%
(https://twitter.com/SSRN)

Basic Rights and Initiative Petition 23-07: Are the Preborn "Natural Persons" Under The Florida Constitution?

David H. Thompson[1]

Abstract

An initiative petition entitled "Amendment to Limit Government Interference with Abortion" had been circulating in Florida since May 2023. The proposed amendment, which would effectively ban pro-life legislation, recently garnered enough signatures to trigger review of the initiative by the Florida Supreme Court. At oral argument, Florida's Chief Justice asked whether an unborn child is covered by Article I, section 2 of the Florida Constitution. This article addresses that question, and another question left unasked: whether preborn human beings are "persons" for purposes of Article I, section 9—the due process provision of the Florida Constitution. It does so by examining the historical context and development of Florida's basic equality and due process provisions, in addition to numerous historical sources. The Article concludes that, in 1968, the public would have understood the words "natural person" and "Person," as used in Article I, sections 2 and 9, to mean a living human being, including a preborn child. Of course, this conclusion means that the initiative petition cannot survive the Florida Supreme Court's review. For it would be clearly invalid under Florida law for failure to identify substantially affected provisions of the Constitution. More than that, though, any attempt to create a constitutional right to abortion would violate the "single-subject" rule by attempting to revoke multiple fundamental rights guaranteed by different sections of the Constitution. A long line of Florida Supreme Court precedent holds that such "cataclysmic" change may not be accomplished by initiative petition.

1 David H. Thompson is the Managing Partner of Cooper & Kirk. He has litigated cases in over 30 federal district courts, argued in each of the 13 federal circuit courts of appeal and before the U.S. Supreme Court, as well as in many state courts. Mr. Thompson has also served as an adjunct faculty member at Georgetown University Law Center and a visiting professor at the University of Georgia Law School's DC campus.

INTRODUCTION

An initiative petition entitled "Amendment to Limit Government Interference with Abortion" had been circulating in Florida since May 2023. By September, the proposed amendment, under which "[n]o law shall prohibit, penalize delay, or restrict abortion before viability or when necessary to protect the patient's health, as determined by the patient's healthcare provider," had garnered enough signatures to trigger a unique state procedure requiring the Florida Supreme Court's approval.[2]

At oral argument, Florida's Chief Justice raised the issue of whether an "unborn child at any stage of pregnancy is covered by Article I, section 2."[3] That provision of the constitution, entitled "Basic rights," states:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. No person shall be deprived of any right because of race, religion, national origin, or physical disability.[4]

Florida's lawyer declined to take a position on that issue. And later in the argument, the other side also declined to answer this question. Undeterred, the Chief Justice repeated the question: "[M]aybe a more direct question for you would be, can we say as a matter of law that the term 'all natural persons' excludes unborn children?"[5] The lawyer advocating for the initiative expressed doubt that the question was before the Court, prompting a final attempt from the Chief: "So, do you have any authority under Florida law that would allow us to say that "natural persons' does not include the unborn?"[6] Counsel answered that she did not think there was any

---

[2] Petition, *Advisory Op. to the Att'y Gen. re Limiting Gov. Interference with Abortion,* No. SC2023-1392 (Fla. Oct. 9, 2023).
[3] Florida Supreme Court, *Oral Arguments: Wednesday, February 7, 2024,* YOUTUBE at 16:11 (Feb. 7, 2024), https://www.youtube.com/watch?v=kdTCtxBJd9w.
[4] Fla. Const. art. I, § 2.
[5] *Id.* at 42:08.
[6] *Id.* at 43:06.

authority under Florida law to say that the term *does* include the unborn and reiterated that the question was not before the Court.

This article addresses the question left unanswered at oral argument, and another question left unasked: whether preborn human beings are "persons" for purposes of Article I, section 9—the due process provision of the Florida Constitution.

Section I examines the historical context and development of Florida's basic equality and due process provisions, the former's relationship to the "equality principle" articulated in the Declaration of Independence, transcripts and journals from the relevant constitutional convention and Constitution Revision Commissions, contemporaneously enacted statutes, interpretive canons, and dictionary definitions. It concludes that, in 1968, the public would have understood the words "natural person" and "Person," as used in Article I, sections 2 and 9, to mean a living human being, including a preborn child.

Section II discusses the implications for Initiative Petition 23-07 and for attempts to enshrine a right to abortion in the Florida Constitution more generally. Initiative Petition 23-07 would be clearly invalid under section 101.161, Florida Statutes, for failure to identify substantially affected provisions of the Constitution. More than that, though, any attempt to create a constitutional right to abortion would violate the single-subject rule by attempting to revoke multiple fundamental rights guaranteed by different sections of the Constitution. A long line of Florida Supreme Court precedent holds that such "cataclysmic" change may not be accomplished by initiative petition.

I. THE MEANING OF "NATURAL PERSONS" IN ARTICLE I, SECTION 2

Start with the text. Article I, section 2 of the Florida Constitution states:

> All *natural persons,* female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess, and protect property. No *person* shall be deprived of any right because of race, religion, national origin, or physical disability.

(emphasis added). The Florida Supreme Court subscribes to the "supremacy-of-text principle," which endeavors to interpret texts "on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued."[7] The Court also follows the corollary "ordinary-meaning rule," that "[t]he rules and terms of a Constitution are to be interpreted in their most usual and obvious meaning, unless the text suggests that they have been used in a technical sense[.]"[8] When a contested term is not defined in the text or by precedent,[9] the Court looks to contemporaneous dictionaries for the "best evidence of … ordinary meaning."[10]

A. Dictionary Definitions.

While the "basic equality provision" existed in various forms in previous iterations of the Florida Constitution, the words "natural person" first entered the provision in 1968, with the ratification of the current Constitution.[11] Three dictionaries appearing in *Reading Law's*

---

[7] "[W]e follow the 'supremacy-of-text principle' – namely, the principle that '[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.'" *Ham v. Portfolio Recovery Assocs., LLC,* 308 So. 3d 942, 946 (Fla. 2020) (quoting Antonin Scalia & Bryan Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 33, 56 (2012)).

[8] *Wilson v. Crews,* 160 Fla. 169, 175 (Fla. 1948); *see also Advisory Op. to Governor re Implementation of Amend. 4, The Voting Restoration Amend.,* 288 So. 3d 1070, 1081-82 (Fla. 2020) (rejecting non-state parties' attempt to interpret the word "sentence" "in a technical sense absent any suggestion in the text of Amendment 4 that the word was to be given something other than its most usual and obvious meaning" and accepting the Governor's interpretation which gave the words the "natural and popular meaning" that "the voters would understand") (citing Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 157-58 (1833); Scalia & Garner, READING LAW 69 ("The ordinary-meaning rule is the most fundamental semantic rule of interpretation. It governs constitutions, statutes, rules, and private instruments.")).

[9] The Florida Supreme Court has not previously addressed the question of whether preborn human beings are "natural persons" or "persons" for purposes of Article I, section 2 or 9. *See Oral Arguments, supra* n. 2 at 19:32. ("I've tried to read through all of our cases. We clearly haven't directly analyzed this issue, but the Constitution says what it says, the words mean what they mean.").

[10] *Conage v. United States,* 346 So. 3d 594, 599 (Fla. 2022).

[11] Article I, section 2 has been amended three times since 1968. An amendment in 1974 prohibited discrimination on the basis of a physical handicap. Fla. Const. art. I, section 2 (1974); *see also* Florida Constitution Revision Commission, *Analysis of the Revisions for the November 1974 Ballot,* http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1074amen.html. In 1998, the term "physical handicap" was replaced with "physical disability," "national origin" was added to the list of bases on which the government may not deny rights, and the words "female and male alike" (and offsetting commas) were added after "natural persons." The first sentence of the section then read, "All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess, and protect property; *except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for*

"Appendix A – A Note on the Use of Dictionaries"[12] were published in the 1960s. They each define "natural person" or "person" interchangeably with a living human being. Webster's Third New International Dictionary (1961) defines "natural person" as "a human being as distinguished in law from an artificial or juristic person."[13] The first edition of the American Heritage Dictionary of the English Language (1969) does not include an entry for "natural person," but "person" is defined as "1. A living human being, especially as distinguished from an animal or thing…. 7. *Law.* A human being or organization with legal rights and duties."[14] The third edition of Ballentine's Law Dictionary (1969) defines "natural person" as "[a]n individual; a private person, as distinguished from an artificial person, such as a corporation"; "individual" is defined as "a person"; "person" is defined as "an individual man, woman, or child or as a general rule, a corporation."[15] Other legal dictionaries of the era similarly define "natural person" as "[a]ny human being who as such is a legal entity as distinguished from an artificial person, like a corporation, which derives its status as a legal entity from being so organized in law."[16] But dictionaries are only one tool in the tool belt. The Florida Supreme Court also "look[s] to the context in which [a word] appears, and what history tells us about how it got there,"[17] and it turns out that history has a long story to tell about how the words "natural" person found their way into Article I, section 2.

---

citizenship may be regulated or prohibited by law." Fla. Const. art. I, section 2 (1998): *see also* Florida Constitution Revision Commission, *Analysis of the Revisions for the November 1998 Ballot,* http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/tabloid.html. The italicized language was removed in 2018. Fla. Const, art. I, section 2 (2018); *see also* Florida Department of State, Division of Elections, *Proposed Constitutional Amendments and Revisions for the 2018 General Election,* https://files.floridados.gov/media/699824/constitutional-amendments-2018-general-election-english.pdf.

[12] Scalia & Garner, READING LAW Appx. A ("Among contemporaneous-usage dictionaries – those that reflect meanings current at a given time – the following are the most useful and authoritative for the English language generally and for the law.").

[13] *Natural person,* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged (1961).

[14] *Person,* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1969).

[15] *Natural person,* BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

[16] *See Natural person*, RADIN LAW DICTIONARY (2d ed. 1970).

[17] *Tomlinson v. State,* 369 So. 3d 1142, 1146 (Fla. 2023).

B. Contextual and Historical Analysis

In the mid-1950s, at Governor LeRoy Collins' behest, the Legislature created the Florida Constitution Advisory Commission to "prepare recommendations for the revision of the state constitution."[18] The Commission, however, "was instructed to preserve the full meaning and effect of the Declaration of Rights."[19] "Committee 1," which included Supreme Court Justice H.L. Sebring and Attorney General Richard W. Ervin, took the first stab at the bill of rights.[20] The Committee first moved the slimmed-down basic equality provision to section 4: "All persons are equal before the law and have inalienable rights to life, liberty, and property."[21] The Advisory Commission's final draft would move the provision to section 2 and feature a more robust list of inalienable rights and "[a]dditions based upon case law" regarding noncitizens:

> All persons, including foreigners eligible to become citizens of the United States, are equal before the law and have inalienable rights. Among these are the right to enjoy life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess, and protect property; but the legislature may regulate or prohibit the ownership, inheritance, disposition, or possession of real property by persons ineligible for citizenship.[22]

---

[18] Florida Constitution Advisory Commission, Handbook on Recommended Constitution for Florida at iii (1957), available at https://babel.hathitrust.org/cgi/pt?id=umn.31951d02426392y&seq=9.

[19] *Id.*

[20] The other committee members were Senator Harry E. King of Winter Haven, Representative Roy Surles of Polk County, and attorneys H. Plant Osborne and William A. McRae, who served as chair. Florida Constitution Advisory Commission, Members of the Constitution Advisory Commission – Addresses, on file with Florida Department of State, Division of Library and Information Services, State Archives of Florida ("Archives"), *Lists, names for mailing,* catalogue no. 001007 /.S 726-00004.00002.

[21] Florida Constitution Advisory Commission, Report of Committee 1 at 3, on file with Archives, *Committee Reports on Article I though XX,* catalogue no. 001007 /.S 00001.00006. A letter dated July 31, 1956, from Committee 1's chairman, attorney William A. McRae, to the Advisory Commission's technical director begins, "I am enclosing an original and one copy of the recommendations of Committee 1 with reference to our assignment of work." The letter, composed on Holland, Bevis, McRae, and Smith letterhead (now Holland and Knight), reveals that "Harry Reinstine wrote the draft of the Preamble and the Bill of Rights." Letter from Wm. A. McRae, Jr. to Mr. George John Miller (July 31, 1956), on file with Archives, *Drafts, committees 1-6,* catalogue no. 001007 /.S 726-00003.00028. The author of this note was unable to find additional information about Mr. Reinstine, who was not a member of the Advisory Commission and whose name did not appear elsewhere in the records reviewed.

[22] Handbook on Recommended Constitution for Florida, *supra* at 2; *see also* Florida Constitution Advisory Commission, Draft of Constitution, on file with Archives, *Draft of Constitution proposal (1957),* catalogue no. 001007 /. S 726-00001.00010.

The final report explained that the revisions to the bill of rights were "for the primary purpose of achieving a more acceptable style" and that "the fundamental provisions of the present Bill of Rights are preserved in this redraft."[23]

The next stop was the Legislature, which repackaged the proposed constitution as 14 separate joint resolutions to be submitted to the people at the 1958 general election.[24] While the joint resolutions often contained numerous departures from the Advisory Commission's recommendation, Article I, section 2 was accepted as recommended.[25]

In January 1966, CRC Chairman Chesterfield H. Smith[26] wrote a letter delegating to the "Committee on Human Rights" "general jurisdiction over all matters of constitutional guarantees, individual freedoms, such as are found in the Bill of Rights or our present Declaration of Rights and all other freedoms and responsibilities."[27] The letter came with instructions to transmit a preliminary report to the full commission by June 1, which was to include a list of any "significant philosophical questions" requiring debate and resolution.[28] The Committee on Human Rights was composed of five members: Florida Supreme Court Justice B.K. Roberts serving as chair, Representative Donald H. Reed, attorneys Raymond C. Alley and Richard T. Earle, and vice-chair Charlie Harris.[29] After holding public meetings in West Palm Beach and Miami throughout the spring to "hear[] suggestions from interested

---

[23] Florida Constitution Advisory Commission, Report of Committee 1 at 1, on file with Archives, *Committee Reports on Article I through XX,* catalogue no. 001007 /.S 726-00001.00006.
[24] *Rivera-Cruz v. Gray,* 104 So. 2d 501, 503 (Fla. 1958).
[25] Florida Constitution Advisory Commission, A Comparison of Article I, on file with Archives, *Comparison of Senate Joint Resolution #1390 with House Joint Resolution #2113,* catalogue no. 001007 /.S 726-00002.00002.
[26] Chairman Smith was a partner at Holland, Bevis, McRae, & Bartow (now Holland Knight) and president of the Florida Bar. He would later become president of the American Bar Association. AP, *Chesterfield Smith, 85, President of Bar Group and a Nixon Critic,* The New York Times (July 23, 2003), https://www.nytimes.com/2003/07/23/us/chesterfield-smith-85-president-of-bar-group-and-a-nixon-critic.html.
[27] Constitution Revision Commission ("CRC") (1965-1967), Letter from Chesterfield H. Smith to the Honorable B.K. Roberts at cover page (Jan. 21, 1966), on file with Archives, *HUMAN RIGHTS (COMMITTEE #5): Lists of members, letter of transmittal of duties,* catalogue no. 001006/ .S 720-00004.00004.
[28] *Id.* at 2-3.
[29] CRC (1965-1967), Florida Constitution Revision Commission, on file with Archives, *HUMAN RIGHTS (COMMITTEE #5): Lists of members, letter of transmittal of duties,* catalogue no. 001006/.S 720-00004.00004.

parties," the committee submitted a preliminary report on May 18 which mirrored the Advisory Committee's proposal from nine years earlier:

> All persons, except as hereinafter provided in this section, are equal before the law and have inalienable rights. Among them are the right to enjoy life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess, and protect property; but the legislature may regulate or prohibit the ownership, inheritance, disposition, or possession of real property by aliens or persons ineligible for citizenship.[30]

Neither the correspondence received by the committee nor the "significant philosophical questions" it posed to the full CRC discussed the transition from "all men" to "all persons."[31] The committee primarily concerned itself with homestead exemptions.[32]

When the Committee on Human Rights reconvened in September, it did so with a "directive" from Chairman Smith to reexamine the basic equality provision in light of the civil rights leaders' request, as well as the suggestions of the Style and Drafting Committee.[33] By the time the committee adjourned sine die on September 17, 1966, the basic equality provision read accordingly:

> All persons are equal before the law and have inalienable rights, among which are the right to enjoy life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess, and protect property; but the ownership, inheritance, disposition, and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of his rights because of race or religion.[34]

---

[30] CRC (1965-1967), Preliminary Report of the Human Rights Committee (Feb. 21, 1966), on file with Archives, *Drafts, roll calls, amendments,* catalogue no. 001006/.S 720-00004.00007. *See also* CRC, Minutes of the Human Rights Committee at 2 (Feb. 11, 1966), on file with Archives, *Minutes : February 11, (West Palm Beach); February 21, April 21, May 23, (Orlando); September 8-9 (Tallahassee), 1966,* catalogue no. 001006/.S 720-00004.00010 ("Mr. Earle moved that for Sections 1 and 18 of the existing Declaration of Rights, substitute Section 2, Article I of the 1957 proposal, however, inserting in the 1957 proposal, after the words "all persons" that the following be included: 'except as hereinafter provided in this section', [sic] and strike the language 'including foreigners eligible to become citizens of the United States,'. The motion was seconded by Mr. Alley and carried.").

[31] CRC (1965-1967), Preliminary Report of the Human Rights Committee (Feb. 21, 1966), on file with Archives, *Drafts, roll calls, amendments,* catalogue no. 001006/.S 720-00004.00007.

[32] *Id.*

[33] CRC (1965-1967), Final Report of the Human Rights Committee at cover page (Sept. 20, 1966), on file with Archives, *Drafts – Final Report of Committee : September 20, 1966, re-examination,* catalogue no. 001006/.S 720-00004.00009.

[34] *Id*. at 1.

On September 21, Justice Roberts wrote to Chairman Smith of a public meeting held earlier in the week: "A representative of the NAACP was present for awhile and appeared to be satisfied with the inclusion of the last sentence of Section 1, Declaration of Rights."[35]

The full CRC met in Tallahassee on November 28 for a three-week meeting.[36] Transcripts of the meeting reveal heated debate about whether to include sex as a protected characteristic in the second sentence of Article I, section 2. Yet the change from "all men" to "all persons" came up just once, in an aside offered by John Elie Mathews, a former Florida Supreme Court Justice: "Let me just point out, we are dealing with Section 1 of the preamble of the constitution. Now, Section 1 enumerates certain rights that all persons should have and it says 'persons' and 'person' is everybody …. A 'person' is a human being."[37] Sex was left out, much to the displeasure of some. The only edit made to the draft basic equality provision was its placement in section 2, as suggested by the Advisory Committee in 1957.

The Legislature ingested the CRC's proposal, debated, and produced three joint resolutions for the voters' consideration. House Joint Resolution 1-2X constituted the entire revised constitution other than Articles V, VI, and VIII. Articles VI and VIII were proposed by Senate Joint Resolutions 4-2X and 5-2X, respectively. Having reached an impasse on issues related to the judiciary, the Legislature carried forward Article V from the Constitution of 1885.[38] The House Joint Resolution left Article I, section 2 untouched, with one important exception: it inserted the word "natural" between "all" and "persons." The amendment was offered to avoid confusion—expressed during legislative debates—that persons includes

---

[35] CRC (1965-1967), Letter from B.K. Roberts to Honorable Chesterfield H. Smith (Sept. 21, 1966), on file with Archives, *Correspondence: August 4 – December 29, 1966,* catalogue no. 001006/.S 720-00004.00006.
[36] Letter from Chesterfield H. Smith to James W. Matthews, Esquire, *supra*.
[37] CRC (1965-1967), Transcript of Proceedings – Selections, on file with Archives, *Volume 2: Declaration of Rights, Section 2, Basic Rights,* catalogue no. 001006/.S 722-00002.00002.
[38] *See* Florida Senate, *Constitution of the State of Florida as Revised in 1968 and Subsequently Amended,* https://www.flsenate.gov/laws/constitution#:~:text=THe%20Constitution%20of%20the%20State,article%20carried%20forward%20from%20the.

corporations.[39] The amendment carried, and, despite a yearlong delay caused by a rejected apportionment map, the Legislature passed HJR 1-2X in July 1968.[40] The new constitution was adopted on November 8 with 55% of the vote.[41]

The Florida Supreme Court explained the significance of the move from "all men" to "all natural persons" two years later in *Faircloth v. Mr. Boston Distiller Corporation:* there was none. Justice Edward Harris Drew's concurrence explained that "'[a]ll men' were guaranteed equal protection by the 1885 wording, whereas in the 1968 Revision that guarantee is now afforded to 'all natural persons.' By including the term 'natural,' the drafters of the 1968 Revision have retained in different words the meaning of 'all men' used in the 1885 version[.]"[42] If anyone was an expert on the matter, it was Justice Drew – he authored the Florida Bar draft.[43] Sandy D'Alemberte's commentary on the 1968 constitution, published the same year as *Faircloth,* likewise observed that "[b]y comparison to the provisions of Section 1 and 18, Declaration of Rights, the 1885 Constitution as amended, some changes are merely editorial. The section now applies to 'all natural persons' where before it applied only to 'all men[,]' there is a reference to 'inalienable rights' rather than 'certain inalienable rights,' and the right to 'obtain safety' is deleted."[44]

---

[39] *Faircloth v. Mr. Bos. Distiller Corp., 245 So. 2d 240, 250 n.2 (Fla. 1970) (Drew, J. concurring) (citing unofficial tape recording of the House of Representatives sitting as the Committee of the Whole (Aug. 26, 1967), on file in the Library of the Supreme Court of Florida).*

[40] Mary E. Adkins, The Same River Twice: A Brief History of How the 1968 Florida Constitution Came to Be and What it Has Become 18 Fla. Coastal L. Rev. 5, 18 (2016), available at https://scholarship.law.ufl.edu/facultypub/784/.

[41] Florida Secretary of State Tom Adams, Tabulation of official votes cast in the general election (1968), https://archive.org/details/Tabulationofofficialvotescastinthegeneralelection1968.

[42] *Mr. Bos. Distiller Corp.,* 245 So. 2d at 249-50 (Drew, J., concurring).

[43] Florida Supreme Court, *Justice Edward Harris Drew*, https://supremecourt.flcourts.gov/Justices/Former-Justices/Justice-Edward-Harris-Drew *(*last visited Mar. 8, 2024),.

[44] Talbot D'Alemberte, THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE at 27-28 (2d ed. 2017). The rights to "pursue happiness" and "be rewarded for industry" were also added to the 1968 declaration of rights, as well as the exception to the right to acquire, possess, and protect property for aliens ineligible for citizenship, which was taken out in 2018.

This history leaves a clear impression that the switch from "all men" to "all natural persons" was not intended or understood to affect the scope of inalienable rights-bearers. In other words, "what history tells us" is that there is more history.

Florida has been governed by six state constitutions since its admission into the Union in 1845. The first of these, the Constitution of 1838, borrowed extensively from the Alabama Constitution of 1819,[45] including its declaration of rights: "That all freemen, when they form a social compact, are equal; and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty; of acquiring, possessing, and protecting property and reputation; and of pursuing their own happiness."[46] A month after the election of Abraham Lincoln in November 1860, the Florida Legislature called a "Convention of the People," where delegates voted 62-7 to leave the Union. The convention converted the state constitution to an Ordinance of Secession, carrying over the declaration of rights provision unchanged, save for the conversion of a comma to a semicolon. When the Union military occupied Florida in May 1865, President Johnson appointed Judge William Marvin as provisional governor and directed him to call a convention.[47] The resulting Constitution of 1865 contained a declaration of rights even more hostile than its predecessors. It retained "all freemen" as its subject, inserted "social compact" in place of "government," and, perhaps most spitefully, removed the words "are equal, and."[48]

---

[45] Florida Department of State, Division of Library and Information Services, State Archives of Florida, Florida's Historic Constitutions, Florida Memory Project, https://www.floridamemory.com/discover/historical_records/constitution/.

[46] Fla. Const. art. I, § 1 (1838), http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1838con.huml. *Compare* Ala. Const. art. I, § 1 (1819), https://avalon.law.yale.edu/19th_century/ala1819.asp.

[47] Florida Department of State, Division of Library and Information Services, State Archives of Florida, Florida's Historic Constitutions, Florida Memory Project, https://www.floridamemory.com/discover/historical_records/constitution/.

[48] Fla. Const. art. I, § 1 (1865), http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1865con.html

The Constitution of 1865 also refused to extend suffrage to African Americans, and so the Republican-dominated Congress, having passed the Reconstruction Acts in 1867 and 1868, refused to readmit Florida into the Union.[49] The United States military reoccupied the state and registered all eligible men over the age of 21, regardless of race, to elect delegates to submit a new constitution to Congress.[50] The constitutional convention of 1868, composed almost exclusively of Republicans elected by newly-freed African Americans, produced the modern declaration of rights: "All men are by nature free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness."[51]

Having gained readmission, another convention was convened in 1885, which proposed a constitution that instituted poll taxes (Article VI, section 8), mandated racial segregation in schools (Article XII, section 12), and prohibited marriage between "a white person and a person of negro descent" (Article XVI, section 24).[52] [53] In perhaps another example of the constitution's regression, the words "by nature free and equal" in section 1 of the Declaration of Rights were changed to "equal before the law"; however, "all men" w[54][55] The upshot here is that, to ascertain the meaning of "all natural persons" in Article I, section 2 of the current Constitution, one must ascertain the meaning of "all men" in section 1 of the Constitution of 1868's Declaration of Rights. This is so because Florida's basic equality provision was revised in 1868 to guarantee the inalienable rights of "all men"—that is, all human beings.

---

[49] Florida Memory, supra n.48
[50] *Id*.
[51] Fla. Const. Declaration of Rights, $ 1, (1868), http://libtary.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1868con.html.
[52] *Id*.
[53] Governor LeRoy Collins, *Special Message on the Constitution to the Joint Session of the Senate and the House of Representatives of the Florida Legislature in the Chamber of the House of Representatives* (Apr. 9, 1959), on file at the Florida State University College of Law Library, reference no. KFF401 1885.283.
[54] Fla. Const. Declaration of Rights, § 1, (1885).
[55] Fla. Const. art. I, § 2, (1968), http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1968con.html.

Despite being composed of 43 Republicans to just three Conservatives (former Democrats and Whigs),[56] the Constitutional Convention of 1868 was a tumultuous affair. After much infighting, the delegates elected moderate Horatio Jenkins Jr. as president and submitted a constitution that had been drafted in Monticello to General Meade, which he accepted. It permitted ex-Confederates to hold public office and capped the number of representatives at four per county, leaving counties with large numbers of African Americans underrepresented in the Legislature. However, its declaration of rights arguably reads more "radically" than the Billings draft. It reinserted the list of inalienable rights, used the words "all men" rather than "all citizens, subjects and people of this State," and attributed the freedom and equality of all men to their "nature," as opposed to their "birthright":

> All men are by nature free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.[57]

Recordkeeping at the rump conventions was unsurprisingly poor, but the journal demonstrates that, for all their infighting, both factions agreed in at least one respect: they believed they were creating a constitution guaranteeing universal human rights. This is evidenced by two speeches bookending the convention. The first was delivered by Daniel Richards, the initial radical president, on the first day of the convention:

> Ours is the opportunity and privilege of elevating and benefiting humanity by forming for a whole State a fundamental law that shall tend to promote patriotism, permanent peace and enduring prosperity with all our people... The great questions of liberty, justice and equal rights to all are committed to us, and may we heed the voice of humanity, and may a merciful Providence aid us in our counsels and direct us in our conclusions. With the mantle of charity we would cover the mad heresies, monstrous injustice and red-handed cruelty of the past, and with malice towards none and charity for all, and "firmness in the right as God gives us light," let us enter upon the majestic work of laying deep the foundations of a Government that shall sacredly care for and

[56] Jerrell H. Shofner, *The Constitution of 1868*, 41 Fla. Hist. Q. 356, 359 (Apx. 1963).
[57] Journal of the Proceedings of the 1868 Constitutional Convention of the State of Florida at 71-72, available at https://catalog.hathitrust.org/Rccord/010446386.
The Monticello draft also removed the language demanding "paramount allegiance" to the United States.

> protect the rights of all, and that shall deserve and receive the respect, love and confidence of all our citizens.[58]

On the final day of the convention, moderate president Horatio Jenkins Jr. issued similar remarks: "I congratulate you on the result, as well as on the end, of our important work. Avoiding the extremes of partisan bigoty, prejudice and animosity, you have succeeded in framing a Constitution and Civil Government which, in all its features, is founded on the principles of universal justice and the equal rights of all men."[59]

Contemporaneous dictionaries confirm that "man" meant an individual human being. The first two editions of Webster's American Dictionary of the English Language (1828 and 1841) defined "man" as "1. Mankind; the human race; the whole species of human beings; beings distinguished from all other animals by the powers of reason and speech, as well as by their shape and dignified aspect; 7. An individual of the human species,"[60] with "men" defined as "[persons; people; mankind; in an indefinite sense."[61] The third edition (1864) defined "man" as "1. An individual of the human race; a human being; a person; 3. The human race; mankind; the totality of man."[62] "Man" was defined by the first edition of the Universal Dictionary of the English Language (1897) as "1. An individual of the human race; a human being; a living person."[63] The first edition of Black's Law Dictionary (1891) defines "man" as either "[a] person of the male sex... [a] male of the human species above the age of puberty" or "[a] human being."[64]

However, the proverbial "reasonable person" going about his or her business in 1868 would not have needed to resort to a dictionary to understand what was meant by the statement

---

[58] *Id.* at 6.
[59] *Id*. at 133.
[60] *Man*, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828)
[61] *Men*, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1841)
[62] *Man*, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1864)
[63] *Man*, UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1897).
[64] *Man*, BLACK'S LAW DICTIONARY (1st ed. 1891).

"all men are by nature free and equal." Those words as used in the "social context" of the Reconstruction South, conveyed a more bitter meaning.[65] The declaration of rights chosen at the convention of 1868 bore an unmistakable kinship with the Virginia Declaration of Rights, penned by George Mason in 1776: "That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[66] The Virginia Declaration would serve as the model for many other state constitutions' declarations of rights, and in 1776, young Virginia House of Burgesses delegate Thomas Jefferson used it as the blueprint for the heralded second sentence of the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[67]

Whether the Declaration of Independence's "equality principle" was understood at the time to be a manifesto of universal human equality has been the subject of some debate.[68] Some historians conclude that "[w]hat [Jefferson] really meant was that the American colonists, as a

---

[65] Justice Alito, in his dissent in *Bostock v. Clayton County, Georgia*, emphasized the importance of examining "the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment." 590 U.S. 644, 706 (2020) (Alito, J., dissenting).

[66] Va. Const. Bill of Rights, § 1 (1776).

[67] Declaration of Independence, NATIONAL ARCHIVES, available at https:///ww.archives.gov/founding-docs/declaration-transcript. See also Pauline Maier, *The Strange History of "All Men Are Created Equal,"* 56 Wash. & Lee L. Rev. 873, 878 (1999). The *Pennsylvania Gazette* published Mason's draft on June 12,1776, the day after Congress appointed a drafting five-member drafting committee and perhaps the day that committee first met. *Id.*

[68] Se Melissa De Witte, *When Thomas Jefferson penned "all men are crated equal," he did not mean individual equality, says Stanford scholar*, Stanford News Service July 1, 2020), https://news.stanford.edu/press-releases/2020/07/01/meaning- declarince-changed-time/#::text=july%201%2C%202020-,Whcn%20Thomas%20Jefferson%20penned%20%2%80%9Cal%20men%20are%20created%20equal%2C%2%80 %9D, says%20Stanford%20historian%20Jack%20Rakove; Hillel Italie, *Centuries-long debate continues over 'all men are created equal*,' PBS News Hour (uly 3, 2022), https://www.pbs.org/newshout/nation/centuries-long-debate-continues-over-all-men-are-ctested-equal; Steve Inskeep, *Examining a line from the Declaration of Independence: All men are created equal*, npr (July 4, 2023), https://www.npr.org/2023/07/04/1185922767/examining-a-line-from-the-declaration-of-independencc-all-men-arc-created-equal.

people, had the same rights of self-government as other peoples, and hence could declare independence, create new governments and assume their 'separate and equal station' among other nations."[69] Others[70] have pointed out that this view is at odds with the fact that Mason and Jefferson drew heavily from John Locke's essays on the source of individual liberty:

> Men being, as has been said, by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own Consent. The only way whereby any one devests himself of his Natural Liberty, and puts on the bonds of Civil Society is by agreeing with other Men to joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it.[71]

In other words, it is the individual whom God creates free and equal, not the "Communities" into which such individuals "joyn and unite." Indeed, in a letter sent a year before his death, Jefferson stated that the Declaration of Independence did not "aim at originality of principle or sentiment" and credited its principles to "Aristotle, Cicero, Locke, [Algernon] Sidney, Etc."[72] Historians therefore conclude that "the statement of equality in the Declaration is a statement about the natural equality of all people."[73]

This was certainly the interpretation of John Adams, another member of the Committee of Five, who in a letter to his son Charles dated January 9, 1794, elaborated on the meaning of the analogous provision in the Massachusetts Declaration of Rights, which he composed in 1780, borrowing extensively from the Virginia Declaration of Rights:

> I drew the Article in the Massachusetts Declaration of Rights, which has given so much offense. All Men are by Nature free And equal. It was opposed in Convention and I was called upon to defend and explain it.— I asserted it to be a fundamental elementary Principle of the Law of Nature: and We were then in a state of Nature laying down first

---

[69] De Witte, *supra* n.68.
[70] Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1313-19 (2015).
[71] John Locke, Second Treatise on Government $ 95, available at https://press- pubs.uchicago.edu/founders/documents/vich4s1.html.
[72] Letter from Thomas Jefferson to Henry Lee (May 8, 1825), NATIONAL ARCHIVES, https://founders.archives.gov/documents/jefferson/98-01-02-5212.
[73] *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 718 (2019) (Stegall, J., dissenting) (citing Jonathan K. Van Patten, *The Enigma of the ERA*, 30 S.D. L. Rev. 8, 9 (1984)).

> Principles. It meant not a Phisical but a moral Equality, common sense was sufficient to determine that it could not mean that all Men were equal in fact, but in Right. not all equally tall, Strong wise handsome, active: but equally Men, of like Bodies and Minds, the Work of the Same Artist, Children of the Same father, almighty. all equally in the Same Cases intitled to the Same Justice.[74]

Regardless of whether the Declarations were initially intended to embody a principle of equality between individual human beings, that understanding—as well as its implications for the institution of slavery—quickly emerged. In 1783, the Massachusetts Supreme Judicial Court held that slavery had been abolished by the state constitution, reasoning that the institution was incompatible with the declaration that "all men are born free and equal; and that every subject is entitled to liberty."[75] Virginians had amended their Declaration of Rights to avoid such a result, and Jefferson's failure to take up the cause of the slave during his governorship from 1779–1781 earned the rebuke of African-American mathematician and astronomer Benjamin Banneker:

> You publickly held forth this true and invaluable doctrine, which is worthy to be recorded and remember'd in all Succeeding ages. We hold these truths to be Self evident, that all men are created equal, and that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happyness.' .... [B]ut Sir how pitiable is it to reflect, that altho you were so fully convinced of the benevolence of the Father of mankind, and of his equal and impartial distribution of those rights and privileges which he had conferred upon them, that you should at the Same time counteract his mercies, in detaining by fraud and violence so numerous a part of my brethren under groaning captivity and cruel oppression, that you should at the Same time be found guilty of that most criminal act, which you professedly detested in others, with respect to yourselves.[76]

---

[74] Letter from John Adams Charles Adams Jan. 9, 1794), National Archives, https://founders.archives.gov/documents/Adams/04-10-02-0007-0003.

[75] John D. Cushing, *The Crushing Court and the Abolition of Slavery in Massachusetts*, 5 AM. J. LEG. HIST. 132-33 (1961). The court's opinion stated, "without resorting to implication in constructing the constitution, slavery is in my judgement as effectively abolished as it can be by the granting of rights and privileges wholly incompatible and repugnant to its existence." *Id.*

[76] Letter from Benjamin Banneker to Thomas Jefferson (Aug. 19, 1791), NATIONAL ARCHIVES, https://founders.archives.gov/documents/jcfferson/01-22-02-0049 Maier, supra n. 67 at 882.

Calls of hypocrisy intensified in the Nineteenth Century, as tension over the slavery reached a fever pitch. In his remarks to the Colonization Society on July 4, 1829, abolitionist William Lloyd Garrison expressed his frustration: "Every Fourth of July, our Declaration of Independence is produced, with a sublime indignation, to set forth the tyranny of the mother country, and to challenge the admiration of the world. But what a pitiful detail of grievances does this document present, in comparison with the wrongs which our slaves endure . . . I am sick of our unmeaning declamation in praise of liberty and equality; of our hypocritical cant about the unalienable rights of man."[77] The same sentiment was at the heart of Frederick Douglas's "The Meaning of July Fourth for the Negro" speech, delivered on July 5, 1852.[78]

Slavery's defenders, acknowledging that the Declaration of Independence declared the God-given equality of all humans, wrote the principle out of their state constitutions. The Mississippi Constitution of 1817 abandoned "all men" in favor of "all freemen, when they form a social compact."[79] Alabama followed suit in 1819,[80] Arkansas in 1836,[81] and Florida in 1838.[82] Texas used the classical "all men" in its 1836 constitution before switching to "all

[77] William Lloyd Garrison, *Address to the Colonization Society in Washington, D.C.* (July 4, 1829), available at https://teachingamericanhistory.org/document/address-to-the-colonization-society/-

[78] Frederick Douglass, *The Meaning of July Fourth for the Negro in Rochester*, New York July 5, 1852), available at https://masshumanites.org/wp-content/uploads/2019/10/spcech_complete.pdf ("Americans/your republican politics, not less than your republican religion, are flagrantly inconsistent. You declare before the world, and are understood by the world to declare that you hold these truths to be self-evident, that all men are created equal; and are endowed by their Creator with certain in alienable rights, and that among these are, life, liberty, and the pursuit of happiness'; and yet, you hold securely, in a bondage which, according to your own Thomas Jefferson, is worse than ages of that which your fathers rose in rebellion to oppose,' a seventh part of the inhabitants of your country.").

[79] Miss. Const. at. 1, 5 1 (1817), https://www.mshistorypow.mdah.ms.gov/issue/mississippi-constirution-of-1817.

[80] Ala, Const. art. 1, § 1 (1819), https://avalon.law.yale.edu/19th_century/ala1819.asp.

[81] Ark. Const. RILE 1 (1836), https://digitalheritage.arkansas.gov/constitutions/5/#:~text=The%201836%20Ackansas%20Constitution%20was,the %20tights%20o/%20Atkansas%20citizens.

[82] Fla. Const. art. I, § 1, http://library.jaw.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1838con.html

freemen" in 1845.[83] Missouri's constitution of the same year had no declaration of equality.[84] John Randolph of Virginia summed up the pro-slavery attitude in remarking to his colleagues in the United States Senate that "(this) principle] [that all men are created equal]... I can never ascent to, for the best of all reasons, because it is not true... fit is) a false hood, and a most pernicious falsehood, even though I find it in the Declaration of Independence."[85] Vice President-turned-South Carolina Senator John C. Calhoun agreed that there was "not a word of truth" in the notion that all men are created equal.[86] Indiana's John Pettit called it "a self-evident lie.[87]

Against this backdrop, the Supreme Court took up the now infamous *Dred Scott* case in 1857. The slave, Dred Scott, argued that he should be free because his master took him from Missouri (a slave state) to Illinois (a free state). Scott relied on the provision in Article Ill, section 2 of the United States Constitution giving federal courts jurisdiction over cases "between Citizens of different States." The question presented was: "Can a negro, whose ancestors were imported into this country, and sold as slaves, become a ... citizen?"[88]

He could not, according to Chief Justice Roger Taney's majority opinion. "We think . . . that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time (of America's founding) considered as a subordinate and inferior class of beings

---

[83] Tex. Const. Declaration of Rights, 1 (1836), https://wheretexasbecametexas.org/wp-content/uploads/2015/02/Constitution-of-the-Republic-of-Texas.pdf; Tex. Const. art. https://tarltonapps.law.utexas.edu/imgs/constitutions/documents/texas1845/texas1845.pdf. 1, $ 2 (1845),
[84] Mo. Const. art. XI (1845), https://scholarship.law.missouti.cdu/cgi/viewcontent.gi?article=1000&econtext=mo_constitutions_race.
[85] Maier, *supra* n. 67 at 883, See alto Letter from John Adams, supra n. _ ('I have heard such Men as Mr Gerry Mr Parsons & Mr Bradbury say lately that they wished this Article out of the Constitution because it is not true.").
[86] Maier, *supra* n.67, at 884.
[87] *Id*.
[88] *Scott v. Sandford*, 60 U.S. 393, 403 (1857).

who had been subjugated by the dominant race."[89] The Declaration of Independence, of course, was inconvenient. Taney acknowledged that "[the] general words above quoted [that all men are created equal and endowed by their Creator with certain unalienable rights] would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood."[90] But surely the "African race were not intended to be included"—otherwise, "the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted."[91]

The delegates who gathered in Tallahassee in 1868—most of whom freed slaves or Union army veterans[92]—rejected Taney's reasoning. The cornerstone of their constitution was a basic rights provision that used language that had been fully liquidated over the previous half century—in the courts, through the public discourse, and, ultimately, on the battlefield—and that could not have been understood but to, in Chief Justice Taney's words, "embrace the whole human family."

C. The due process provision of Article I, section 9 also extends to all human beings.

Summarizing what we know so far, Article I, section 2 says that all natural persons have an inalienable right to enjoy life. "Natural persons" replaced all men" in 1968, but the change was not intended or understood to affect the meaning of the section. The words "all men" replaced "all freemen" in 1868, when Republicans gathered to write "racial prejudice" out of Florida's constitution in favor of "principles of universal justice and the equal rights of all." Fifty years of national debate and four years of bloodshed had attached a settled and definite

---

[89] *Id*. at 404-05.
[90] Stephen Douglass, Fifth Lincoln Douglass Debate in Galesburg, Illinois (Oct. 7, 1858), https://www1.cmc.edu/pages/faculty/JPitney/lincdoug.html/.
[91] *Id*.
[92] Eighteen African Americans served as delegated to Florida's constitutional convention of 1868. All but five were former slaves. Richard L. Hume, *Membership of the Florida Constitutional Convention of 1868: A Case Study of Republican Factionalism in the Reconstruction South*, 51 Fla. Hist. Q. 1, 9-10 (1972). Many of the white delegates were northerners who arrived t=in Florida as part of the occupying Union army. *Id.* at 13.

meaning to the words "all men," namely, all members of the human family. Contemporaneous dictionaries confirm that "men" meant "human beings" in 1868 and that "natural persons" meant "human being" in 1968. Allow me now to turn to what I have called the question left unasked—Article I, section 9.

Chief Justice Muniz's questioning at oral argument was laser–focused on Article I, section 2. Curiously, he did not mention the provision appearing just a few sections later that "[n]o person shall be deprived of life, liberty or property without due process of law[.]"[93] But there is reason to believe that whoever counts as a "natural person" for one counts as a "person" for the other. "[I]n construing multiple constitutional provisions addressing a similar subject, the provisions must be read *in pari materia* to ensure a consistent and logical meaning that gives effect to each provision."[94] Florida Courts have taken note of the "shared and overlapping history" between the basic equality and due process provisions in Article I, sections 2 and 9 and their analogues in the Fourteenth Amendment of the United States Constitution.[95]

The evolution of Florida's due process clause tracks that of the basic equality provision. It appeared in section 8 of the Constitution of 1838's Declaration of Rights but, like section 1, excluded slaves: "[n]o *freeman* shall be . . . deprived of his life, liberty, or property, but by the law of the land." This phraseology was carried over in the 1861 Ordinance of Secession and the Constitution of 1865. The modern due process clause emerged in the Constitution of 1868: "no freeman" was changed to "no person" and "but by the law of the land" was changed to

---

[93] Fla. Const. art. I, § 9, Oddly enough, Susan B. Anthony Pro-life America mentions Article I, section 9 offhandedly in arguing that Initiative Petition 23-07 alters or performs the functions of multiple branches of government, but in so doing, suggests that the fetus would be entitled to due process only upon being partially born: "The proposed amendment also trenches on a traditionally judicial function . . . . Someday, for example, a court may be asked to determine whether a state sanctioned partial birth abortion, even when related to the mother's health, violates the partially born child's rights to due process under article I, section 9." Initial Brief of Susan B. Anthony Pro-Life America in Opposition to the Initiative at 39, *Advisory Op. to the Atty Gen. ne Limiting Gon Interference with Abortion*, No. 23-1392 (Fla. Oct. 31, 2023).

[94] *Thompson v. DeSantis*, 301 So. 3d 180, 185 (Fla. 2020).

[95] *State, Dep't of Health & Rehab. Servs. V. Cox*, 627 So. 2d 1210, 1217 (Fla. 2d DCA 1993), *quashed in part on other grounds and affirmed in relevant part by Cox v. Fla. Dep't of Health & Rehab. Servs.*, 656 So. 2d 902 (Fla. 1995).

"without due process of law." The location of clause changed with successive constitutions (to section 12 of the Declaration of Rights in 1885, then to its present home of Article I, section 9 in 1968), but the language remained the same.[96]

The 1868 revision to the Due Process Clause was lifted from the first section of the proposed Fourteenth Amendment to the United States Constitution, which had been transmitted by Secretary of State William Seward to the governors of the several states on June 16, 1866.[97] The Due Process Clause provided, "No state shall . . . deprive any person of life, liberty, or property, without due process of law." The Amendment was ratified by the Florida Legislature on June 9, 1868, just one month and 5 days after the Florida Constitution of 1868 was adopted by the voters. Secretary Seward issued a proclamation certifying the adoption of the Fourteenth Amendment later that summer.[98] Given their temporal proximity and textual similitude, Florida courts have generally[99] interpreted the two due process clauses in lockstep. One District Court of Appeal put it this way: "The due process provisions of the Florida and federal constitutions . . . use virtually identical language . . . . To interpret identical language in a virtually identical context in an identical manner is only common sense."[100]

---

[96] *See* Florida Constitution, *supra* n. 135-136, 138, 141, 142, 144.
[97] 14 Stat. 358 (1866).
[98] Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 Ala. L. Rev. 555, 574 (2002).
[99] Library of Congress, *Today in History – July 29: The Fourteenth Amendment*, https://www.loc.gov/item/today-in-history/july-28/#:~:text=to%20this%20page-,The%20Fourteenth%20Amendment,earlier%20on%20July%209%2C%20186B.
[100] *See also Simmons v. State*, 944 So. 2d 317, 324 (Fla. 2006) (noting the similarity between the due process clauses in the United States Constitution and the due process guarantee in article I, section 9); *State, Dep't of Health & Rehab. Servs. v. Cox*, 627 So. 2d 1210, 1217-18 (Fla. 2d DCA 1993) ("The Due Process Clause in the United States Constitution and the similar clauses in the state constitutions . . . have a shared and overlapping history. We conclude that it is not appropriate for this court, as a matter of state constitutional law, to depart from a . . . United States Supreme Court ruling under a virtually identical federal constitutional clause unless we are convinced that aspects of Florida's constitution, law, or announced public policies clearly justify such a departure.") *affirmed in relevant part by Cox v. Fla. Dep't of Health & Rehab. Servs.*, 656 So. 2d 902 (Fla. 1995) (Kogan, J. concurring in part) ("Without analysis, the majority essentially is affirming the district court's determination that no valid due process issue exists.").

As detailed by Professor Michael Stokes Paulsen,[101] statements by the Fourteenth Amendment's architects indicate that it was intended to extend protections to human beings of all kinds. Representative Thaddeus Stevens, a Radical Republican leader who had served as chairman of the House Ways and Means Committee during the Civil War, said that "[a]ccidental circumstances, natural and acquired endowment and ability, will vary their fortunes . . . . But equal rights to all the privileges of the Government [extend to] every immortal being, no matter what the shape or color of the tabernacle which it inhabits."[102] Senator Charles Sumner, a prominent abolitionist from Massachusetts, in discussing the meaning of the word "persons" within the Due Process Clause of the Fifth Amendment, stated: "[I]n the eye of the Constitution, every human being within its sphere, whether Caucasian, Indian, or African, from the President to the slave, is a person. Of this there can be no question."[103] Illinois Senator Lyman Trumbull, described by Paulsen as "a pivotal figure in the debates over the Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1866," explained that, under the Reconstruction Amendments, "any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the Constitution."[104] Senator B. Gratz Brown, whose efforts had helped keep Missouri in the Union, equated personhood with human existence: "[D]oes the term 'person' carry with it anything further than a simple allusion to the existence of the individual?"[105] And for Ohio Senator John Bingham, whom Justice Hugo Black called "the Madison of the Fourteenth Amendment," the Due Process Clause was the constitutional embodiment of the Declaration of Independence's equality principle:

---

[101] Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 Ohio St. L. J. 14 (2012).
[102] *Id*. at 50.
[103] *Id*. at 49.
[104] *Id*. at 50.
[105] *Id*. at 49.

> [T]he Constitution of the United States . . . declared that 'no person shall be deprived of life, liberty, or property without due process of law.' By that great law of ours it is not to be inquired whether a man is 'free' by the laws of England; it is only to be inquired is he a man, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty . . . . Before that great law the only question to be asked of a creature claiming its protection is this: Is he a man? Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal.[106]

Dictionaries of the day confirm that regular folks would have shared the understanding that the word "person," like the word "man," meant a living member of the human species.[107] Webster's *An American Dictionary of the English Language* (1864) defined "person" as relating "especially [to] a living human being; a man, woman, or child; an individual of the human race."[108] The entry for "human" included all those belonging to "the race of man."[109] Alexander M. Burrill's *A New Law Dictionary and Glossary* (1851) defined "person" as "[a] human being, considered as the subject of rights, as distinguished from a thing."[110] Indeed, in weighing the applicability of a criminal statue to pirates who had "feloniously set upon . . . and enter[ed] a certain ship called the *Industria Raffaelli*," Chief Justice John Marshall observed that "[t]he words 'any person or persons,' are broad enough to comprehend every human being . . . . [T]he words ' any person or persons,' comprehend the whole human race."[111] The United States Supreme Court reaffirmed this view 150 years later in *Levy v. Louisiana*: "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their

---

[106] *Id*. at 50-51.
[107] Dictionaries also equated "persons" with human beings in 1791, when the Fifth Amendment was ratified. *See Person*, James Barclay, A Complete and Universal English Dictionary (1792) ("An individual, or particular man or woman. A human being."); *Person*, Thomas Sheridan, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1790) ("Individual or particular man or woman; human being; a general loose term for a human being."); *Person*, John Walker, A Critical Pronouncing Dictionary (1791) ("human being; a general loose term for a human being"); *Person*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1792) ("Individual or particular man or woman . . . . A general, loose term for a human being.").
[108] *Person*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1864).
[109] *Human*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1864).
[110] *Person*, Alexander M. Burrill, A NEW LAW DICTIONARY AND GLOSSARY (1st ed. 1851).
[111] *United States v. Palmer*, 16 U.S. 610, 631-32 (1818).

being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."[112]

Levy was decided in May 1968, some six months before the prohibition depriving a "person" of any right because of race or religion was added to article I, section 2 of the Florida Constitution.[113] Again, Florida caselaw holds that it is "not appropriate . . . as a matter of state constitutional law, to depart from a recent United States Supreme Court ruling under a virtually identical federal constitutional clause [in that case, the Fourteenth Amendment] unless we are convinced that aspects of Florida's constitution [in that case, the due process clause of Article I, section 9], law, or announced public policies clearly justify such a departure."[114]

It is time for the Florida Supreme Court to undertake an originalist analysis of the ordinary meaning of "natural persons" and "person" at the time the provisions bearing those terms were ratified. Social context, dictionaries, canons of construction, drafting history, and contemporaneous statements from drafters unanimously point to the conclusion that when

---

[112] *Levy v. Louisiana*, 391 U.S. 68, 70 (1968).

[113] It is unclear whether the use of the word "person" rather than "natural person" in the second sentence of Article I, section 9 was intended or understood to extend protections to corporations. As discussed above, the word "natural" was added to the section's first sentence by Representative Bassett's amendment to HJR 1-2X. The amendment did not add the word natural in the second sentence. The word "person" in the fourteenth Amendment has been interpreted to include artificial person (e.g., corporations) as well as natural persons since 1886. *Santa Clara Cnty. v. S. Pa. R. Co.*, 118 U.S. 394 in headnote (1886). Under the "presumption of consistent usage," "[a] word or phrase is presumed to bear the same meaning throughout a text." *Lab'y Corp. of Am. v. Davis*, 339 So. 3d 318, 324 (Fla. 2022). Article I, section 2 uses different words in the same provision, creating the inverse implication that, while the first sentence applies only to natural persons, the second may apply to natural persons and corporations. On the other hand, the drafters may have assumed that the traits of race and religion apply only to natural persons, not corporations, and therefore it was unnecessary to specify. *Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 897 (Fla. 2001) ("FCRI maintains that while the term 'persons' is not defined, its contextual meaning is clear. Since corporations do not have 'race, color, or ethnicity,' FCRI contends that the plain meaning of the amendments is that they apply to natural persons. However, the amendments' proscriptions could extend to corporations based on the race of their ownership or racially-oriented purpose."). Either way, the presumption of consistent usage indicates that whoever qualifies as a "natural person" in the first sentence also qualifies as a "person" in the second. Additionally, that canon suggests that whoever qualifies a "natural person" for purposes of Article I, section 2 also qualifies as a "person" for purposes of Article I, section 9.

[114] *Cox*, 627 So. 2d at 1217-18; *see also Mitchell v. State*, 160 So. 3d 902, 907 (Fla. 2d DCA 2009) ("[W]e are entirely convinced that the language of these two constitutional provisions [Article I, section 9 and the Due Process Clause of the Fourteenth Amendment] are identical for all practical purposes and that no reason specific to Florida would justify an outcome under the Florida Constitution at odds with the outcome under the U.S. Constitution.").

Article I, sections 2 and 9 were ratified in 1968, the terms "natural person" and "person" were commonly understood to encompass every living member of the human race.

D. Floridians regarded the preborn as legal persons when the basic equality and due process provisions were ratified in 1868.

If satisfied with the premise that Article I guarantees the rights to life, basic equality, and due process to all human beings, all that is left for the originalist to determine is whether a fetus is a human being—which, of course, is a biological fact not seriously disputed by even the most fervent of abortion proponents.[115]

There is plenty of evidence that the Floridians who drafted and ratified the basic equality and due process provisions—like the legislators of earlier generations—were well aware that preborn children are among the "men" and "natural persons" endowed with inalienable rights.

Sir William Blackstone's four-volume *Commentaries on the Laws of England* has been called "the most celebrated, widely circulated, and influential law book ever published in the English Language." The measurability of that claim aside, the *Commentaries* no doubt served as the authoritative legal primer for the Founding and Reconstruction generations. "If one were looking for a technical, specifically *legal* gloss on the meaning of 'person,' as used in the eighteenth and nineteenth centuries, one would read Blackstone. And it turns out that Blackstone has a good bit to say" (emphasis in original).[116] The first chapter of the first book turns immediately to "the Rights of Persons." "Persons," he says, "are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and

[115] See, e.g., PETER SINGER, PRACTICAL ETHICS 138 (3d ed. 2011) (observing that whether an organism is a member of a particular species can "be determined scientifically by an examination of the nature of the chromosomes in the cells of living organisms . . . . [T]here is no doubt that from the first moments of its existence, an embryo conceived from human sperm and eggs is a human being.").
[116] Michael Stokes Paulsen, T*he Plausibility of Personhood*, 74 OHIO ST. L. J. 14, 22 (2012).

government, which are called corporations or bodies politic."[117] Within this framework, Blackstone addresses the legal status of the preborn. "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." As such, "[a]n infant in *ventre sa mere*, or 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, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees[.]" Preborn life was regarded as inherently valuable under the criminal law as well, which imposed liability "if a woman [was] 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 [was] delivered of a dead child."

America quickly adopted the Blackstonian view of fetal personhood. James Wilson published in 1791 the treatise *Lectures on Law*, that served as the "nearest American equivalent" to Blackstone's *Commentaries*. As a Presbyterian, Wilson would have been well-acquainted not only with Blackstone but also with Calvin's writings on the legal status of the preborn. Borrowing elements from both, *Lectures on Law* explained:

> With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger.[118]

Paulsen concludes, after far greater analysis, that these treatises create "a very strong presumption," if they are not "outright conclusive," that "informed members of the general

---

[117] One of the religious background or familiarity might hear in Blackstone's formulation faint echoes of the famous Psalm 139: "For thou didst form my inward parts, thou didst knit me together in my mother's womb. . . . [M]y frame was not hidden from thee, when I was being made in secret, intricately wrought in the depths of the earth. Thy eyes beheld my unformed substance . . . ."

[118] 2 THE WORK OF JAMES WILSON 596–97 (Robert G. McCloskey ed., 1896) Wilson was originally a Presbyterian. Presbyterian stats.

public in the generations that framed and adopted the Fifth and Fourteenth Amendments" understood the preborn to be natural rights-bearing "persons."

By the early-Nineteenth Century, the country was beginning to question whether the common law was adequately protecting preborn persons, particularly with respect to the quickening standard. That standard—that an abortionist could be charged with a crime only if fetal movement was detectable—had arisen not as a statement about when personhood begins (otherwise the common law's treatment of the preborn in the civil context would make little sense),[119] but rather as a prudential rule of evidence in light of the difficulty of proving, prior to quickening, that the woman was pregnant, that the fetus was alive when the abortion was committed, and that the abortion caused his or her death.[120]

Prudence was beginning to dictate a different rule. Abortion, which had been relatively rare and much less safe before the turn of the century,[121] had become a burgeoning industry.[122] As one doctor lamented in 1857, "[C]riminal abortion—a crime which 40 years ago, when I was a young practitioner, was of rare and secret occurrence has become frequent and *bold.*[123][OBJ][124]

At the same time, technical advances in microscopy were leading to breakthrough discoveries in human embryonic development, which had previously been "little more than a curiosity."[125] So curious that the theory of "preformation"—that a pre-formed, miniature human or "homunculus" is planted in the female during intercourse, which then grows into a

---

[119] *Dobbs v. Jackson Women's Health Org.,* 597 U.S. 215, 242 (2022)
[120] Joshua J. Craddock, "Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?" 40 Harv. J.L. & Pub. Pol'y 539, 554 (2017), Available at SSRN: https://ssrn.com/abstract=2970761
[121] LEAH SAVAS & MARVIN OLASKY, THE STORY OF ABORTION IN AMERICA: A STREET-LEVEL HISTORY, 1652-2022 (2022)
[122] Kristin S. Mackert, "To Bear or Not To Bear: Abortion in Victorian America" at 6, MSS.049 - Gender and Legal History in America Papers (1990).
[123] Thomas W. Blatchford, "Letter to Horatio Robinson Storer," Letters to Horatio Storer (March 23, 1857) (emphasis in original).
[124] Richard Harrison Shyrock, Medicine and Society in America 151 (1660-1860)
[125] Gasser

larger being as it developed during pregnancy—persisted in the mainstream through the 1820s.[126] Around 1830, British surgeon-scientist Joseph Jackson Lister developed a microscope resolving problems with spherical and color aberration that had dogged the instruments theretofore.[127] The laboratory use of microscopes in science and medicine grew rapidly. In the field of embryology, Lister's microscope allowed of the study of life from the point of conception, confirming the theory of epigenesis, that is, the continuous unfolding development of a fertilized egg through cell division.[128] By mid-century, textbooks on medical ethics had concluded 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."[129]

The emergence of the abortion industry in the face of this new science was deeply troubling to the nation's leading OBGYN, Dr. Horatio Storer. The son of a well-respected physician, Storer had attended Harvard Medical School before training in Paris, London, and Edinburgh under the great specialists in gynecology and obstetrics of the day and becoming an early pioneer of Cesarean section delivery.[130] In 1857, his focus shifted to abortion. The first act of his public campaign, a presentation to the Suffolk District Medical Society in Boston, triggered a flurry of debate among the country's medical journals that nationalized the issue. Storer's view prevailed when the American Medical Association threw its weigh behind him

---

[126] https://www.sciencedirect.com/topics/agricultural-and-biological-sciences/preformationism.
[127] https://www.microscopeworld.com/t-history-of-the-microsope.aspx. Lister's son of the same name would become known as the "father of modern surgery" due to his innovative use of antiseptics. CITE.
[128] https://surgeonshallmuseums.wordpress.com/2020/06/05/ziegler-waxes-visualising-the-embryo/.
[129] Thomas Percival, MEDICAL ETHICS 135-6 (Chauncey D. Leake ed., 1975) (1827).
[130]https://www.google.com/search?q=%22horatio+storer%22+Caesarean+section+when&sca_esv=7fdb6e941e77120&rlz=1C1GCEB_enUS1024US1024&biw=1920&bih=919&sxsrf=ACQVn09tek5YBAeTexRO_K9Z1H6OItMiNQ%3A1709211027303&ei=k33gZa2LEozNkPIPovyDkAc&ved=0ahUKEwjtoIOhy9CEAxWMJkQ1HSLAHIQ4dUDCBE&uact=5&oq=%22horatio+storer%22+Caesarean+section+when&gs_lp=Egxnd3Mtd216LXNlcnAiJyJob3JhdGlvIHN0b3JlcilgQ2Flc2FyZWFuIHNIY3Rpb24gd2hlbjIIEAAYgAQYogQyCBAAGLAEGKIEMggQABiABBiiBDIIEAAYgAQYogRI6iJQpwdY9iFwAXgBkAEAmAGMAaABmAiqAQMxLji4AQPLAQD4AQGYAgigAuAGwgIKEAAYRxjWBBiwA8ICCBAAGIkFGKIEmAMAiAYBkAYIkgcDMS43&sclient=gws-wiz-serp

in 1859. Journals that had previously criticized Storer soon recanted, and the "physician's crusade" was born.

With the financial backing of the AMA, Storer began writing directly to the public. In 1860, he published *On Criminal Abortion in America*, dedicated "To Those Whom It May Concern Physician, Attorney, Juror, Judge—And Parent." The first chapter was devoted solely to dispelling the medical relevance of quickening:

> It is undoubtedly a common experience, as has certainly been that of the writer, for a physician to be assured by his patients, often no doubt falsely, but frequently with sincerity, that their abortions have been induced in utter ignorance of the commission of wrong; in belief that the contents of the womb, so long as manifesting no perceptible sign of life, were but lifeless and inert matter; in other words, that being, previously to quickening, a mere ovarian excretion, they might be thrown off and expelled from the system as coolly and as guiltlessly as those from the bladder and rectum.[131]

After the interruption of a civil war, Storer returned to the presses. His books *Why Not? A Book for Every Woman* in 1866 and *Is It I? A Book for Every Man* in 1867 were widely read, including in Florida. In 1867, *The Tallahassee Sentinel* even attempted to use Storer's work as a cudgel against the condescension of northern states: "Massachusetts progression, according to one Boston man, is even worse than Mormonism. If he is right, God forbid its spread beyond her own limits. We refer to Dr. H. G. Storer, who has recently published a book on the subject of abortion in the villages and cities of Massachusetts, in which he shows statistics that the people of that State 'are nearly twice as corrupt as the people of France, and eight-fold more depraved than those in the city of New York.'"[132]

The crusade worked. In 1867, after ratifying the Fourteenth Amendment in January, the Ohio Legislature passed an anti-abortion statute alongside a report attributing the law to the "alarming and increasing frequency" of abortion brought on by "a class of quacks who make

[131] https://www.gutenberg.org/cache/epub/65244/pg65244-images.html
[132] J. Berrien Oliver The Tallahassee Sentinel, August 26, 1867. *Progression.*

child-murder a trade."[133] The legislators quoted Storer's declaration that "[p]hysicians have now arrived at the unanimous opinion that the foetus in utero is alive from the very moment of conception" and ended with a salvo of their own: "Let it be proclaimed to the world … that the willful killing of a human being, at any stage of its existence, is murder."[134]

Ohio's proclamation to the world was heard in Florida; the Legislature passed sections 782.10 and 797.01 the following year. The former provided that "[e]very person who shall administer to any woman pregnant with child, whether such child be quick or not, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child,…unless the same shall have been done as necessary to preserve the life of mother, shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter."[135] Under the latter, "[w]homever with intent to procure miscarriage of any woman unlawfully administer[ed] to her, or advise[d] or prescribe[d] for her, or cause[d] to be taken by her, any poison, drug, medicine or other noxious thing, or unlawfully use[d] any instrument or other means whatever with the like intent, or with like intent aid[ed] or assist[ed] therein, [was], if the woman [did] not die in consequence thereof, . . . punished by imprisonment in the state prison not exceeding seven years, or by fine not exceeding one thousand dollars."[136]

These statutes were enacted in 1868 by the same Florida Legislature that ratified the Fourteenth Amendment. That Legislature included 22 of the 49 men who served as delegates at the constitutional convention that year, including L.C. Armistead and Thomas Urquhart—two of the four delegates of the second standing committee on the bill of rights that drafted

---

[133] 1867 OHIO SENATE J. APP'X 233.
[134] *Id.*
[135] THE ACTS AND RESOLUTIONS OF THE FLORIDA LEGISLATURE *in* ch. 3, sec. 11 (Tallahassee, 1868).
[136] *Id in* ch. 8, sec. 9 (Tallahassee, 1868).

what we know as the basic equality provision of Article I, section 2 and the due process provision of Article I, section 9.[137] The Legislature placed the new abortion crimes in Chapter III of that session's "Act to provide for the Punishments of Crime," thereby classifying them as "OFFENSES AGAINST THE PERSON."[138] It is surely probative, to say the least, that the same men who designed the constitutional provisions guaranteeing the right to life to "all men" and any "person" enacted abortion crimes referring to the fetus as a "child" and a "person."

The statutes were the culmination of a yearslong, international effort to harmonize the common law with advances in the field of embryology. Congress acted too, prohibiting pre-quickening abortion in the District of Columbia and the territories with legislation that referred to the fetus as a "person."[139] In fact, counting Florida, 23 states specifically referred to the fetus as a "child," and at least 28 labeled abortion as an "offense[] against the person" or an equivalent criminal classification.[140]

While some legislators viewed themselves as eliminating the common law's "ridiculous distinction in the punishment of abortion before and after quickening,"[141] judges saw the new statutes as the fulfilment of the common law based on new medical knowledge about human development. For instance, in Pennsylvania, where the quickening distinction had been eliminated before the Civil War, the state supreme Court observed that the "crime at common law" existed because "the moment the womb is instinct with embryo life, and gestation has begun, the crime [of abortion] may be perpetrated." Indeed, this tidal wave of statutes reflected the common law principle, noticed in *Hall v. Hancock* by abolitionist-turned-chief-justice of the Massachusetts Supreme Judicial Court Lemuel Shaw, that "a child will be considered in

---

[137] https://www.floridamemory.com/fmp/territorial-legislative/PeopleOfLawmaking.pdf
[138] *Id in* ch. 3 (Tallahasee 1868)
[139] John Finnis & Robert George, "Equal Protection and the Unborn Child: A Dobbs Brief", 45 Harv. J.L. & Pub. Pol'y, 928, 969-70 (2022).
[140] James S. Witherspoon, Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment., 17, 48 St. Mary's L.J. (1985)
[141] 1867 OHIO SENATE J. APP'X 233.

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."[142] The Florida Supreme Court cited *Hall* in 1918's *Shone v. Bellmore*, which reaffirmed "the capacity of a posthumous child to inherit from its father."[143] The Court recognized that "a child in *ventre sa mere*, both by the rules of the common and the civil law, is to all intents and purposes a child."[144]

Sections 782.10 and 797.01 were in full effect when Florida's bill of rights was revised in the 1950s and 1960s, and they were not collecting dust. Offenses against preborn persons continued to be strictly prosecuted by state attorneys and the Attorney General, including Attorney General Ervin, who served on "Committee 1" of the Advisory Commission in 1957.[145] The Florida Legislature was also continuing to pass new legislation referring to the preborn as persons. For example, Section 737.01 defined an "incompetent beneficiary" to include "an unknown person and an unborn person."[146] It was passed in 1965. Also on the books in 1969 was the definitional section 1.01(3), which said, "The word 'person' includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations."[147] Section 1.01 did not define "child," but both dictionaries of common usage published in the 1960s that are recommended by the appendix to *Reading Law* include the preborn in their definitions of "child."[148] The first definition for "child" given in Webster's Third New International Dictionary (1961) is "an unborn or recently born human being."[149] And according

[142] *Hall v. Hancock,* 32 Mass. (15 Pick.) 257-8 (1834)
[143] *Shone v. Bellmore,* 75 Fla. 515, 522, 78 So. 605, 607 (1918).
[144] *Id.*
[145] *See, e.g* . Justice Richard William Ervin, FLA. SUP. CT., https://supremecourt.flcourts.gov/Justices/Former-Justices/Justice-Richard-William-Ervin
[146] *Stokes v. Liberty Mut. Ins. Co.,* 213 So. 2d 695, 700 (Fla. 1968).
[147] "The word 'person' includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations."
[148] AL case
[149] *Webster's Third New International Dictionary*

to the first edition of the American Heritage Dictionary of the English Language (1969), the word "person" applies to "an unborn infant; fetus."[150] Additionally, the only legal dictionary on Scalia and Garner's list from that decade, the third edition of Ballentine's Law Dictionary (1969), defines "foetus" as "[a]n unborn child."[151]

While the statutory definition of "person" in section 1.01 does not bind a court's interpretation of constitutional provisions, it would have been known to the lawyers and lawmakers who used the word twice in the revised basic equality provision of Article I, section 2 and carried the word over into the due process clause of Article I, section 9. In any event, the stylistic revisions to those sections in the Constitution of 1969 were neither intended nor understood to alter their original 1868 meanings, and no dictionary of the late Nineteenth Century referenced birth in its definition of "person," "man," or "human being." It stands to reason that the reasonable person voting in Florida's general election of 1968 would have understood that any entity that was a "person" as a matter of everyday language and for purposes of sections 1.01, 737.01, 782.10, and 797.01, Florida Statutes, was also a "person" for purposes of Article I, sections 2 and 9.

II. Implications for Initiative Petition 23-07 and Future Pro-Choice Amendments

When reviewing ballot initiatives, the Florida Supreme Court reviews for three criteria: (1) "the compliance of the proposed ballot title and substance with s.101.161," (2) "the compliance of the text of the proposed amendment or revision with s.3, Art. XI of the State Constitution," and (3) "whether the proposed amendment is facially invalid under the United States Constitution."[152]

---

[150] *American Heritage Dictionary of the English Language*
[151] *Ballentine's* In fairness, Black's Law
[152] Fla. Stat. § 16.061(1) (2023); *see also* Fla. Const. art. V, § 3(b)(10) ("The supreme court … [s]hall, when requested by the attorney general pursuant to the provisions of Section 10 of

A. Section 101.161, Florida Statutes

If the preborn enjoy rights under sections 2 or 9 of Article I, Initiative Petition 23-07 fails to comply with section 101.161. Identifying substantially affected articles and sections "is necessary for the public to be able to comprehend the contemplated changes in the constitution"[153]—the "constitutional baseline," as Chief Justice Muñiz called it at oral argument.[154] An initiative that substantially affects a provision of the Constitution without telling the voters is therefore misleading in the negative sense. A future initiative could cure this defect by including a simple disclosure: "This amendment affects sections 2 and 9 of Article I."[155]

B. Article XI, section 3 of the Florida Constitution

The problem under Article XI, section 3 is not so easily solved. The advisory opinions in *Restricts Related to Discrimination, Right of Citizens to Choose Health Care Providers*, and *Bar the Government from Treating People Differently Based on Race in Public Education* hold that no amount of disclosure can save an initiative that curtails multiple rights guaranteed by different sections of Article I from the single-subject rule. This is true even when multiple rights are stripped only from a discrete class. For instance, the initiative in *Right of Citizens to Choose Health Care Providers* would have curbed basic equality rights under section 2 and collective bargaining rights under section 6, but only public employees would have felt both effects. The rationale is intuitive: because each right serves "a distinct and specific purpose," any

---

Article IV, render and advisory opinion of the justices, addressing issues as provided by general law."); art. IV, § 10, Fla. Const. ("The attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI.")

[153] *Advisory Op. to Att'y Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 976 (Fla. 2009) (finding ballot summary "misleading because it does not inform the voter of the repeal of an existing Florida constitutional provision, specifically article VII, section 9(b)" and striking the initiative).

[154] *Oral Arguments, supra* n. 2 at 17:44.

[155] *Compare Advisory Op. to Att'y Gen. Re: Voter Control of Gambling,* No. SC16-778, 2017 WL 1409673 (Fla. Apr. 20, 2017) ("[a]ffects articles X and XI"), *with Cnty. Of Volusia v. Detzner,* 253 So. 3d 507, 511 (Fla. 2018) (indicating that the initiatives must identify all substantially affected sections but need identify which subsections).

amendment that abridges multiple rights must have more than one purpose.[156] This reflects the understanding of the "drafters of the single-subject rule" that some proposals are simply too "cataclysmic" to be effectuated outside the filtering process provided by a legislative session, revision commission, or convention.[157]

To highlight the prudence of this rule, consider the following thought experiment. You may have heard of a film series called *The Purge*. Its first installment, one of the biggest box office surprises of 2013, spawned four more movies and a television show. The premise of the franchise is that, in the near future, following an economic collapse and rising social unrest, Americans have ratified a Twenty-Eighth Amendment to the United States Constitution decriminalizing all crime, including murder, for a 12-hour period each year from the evening of March 21 to the morning of March 22. R-rated violence and ticket sales ensue.

Thankfully, the less-bloodthirsty people of real-life Florida are unlikely to sign an initiative petition proposing such an amendment. But say they did, and suppose that the ballot summary looked something like this:

> Eliminating government interference with the purge.—No state law shall prohibit, penalize, delay, or restrict murder, as defined by s. 782.04, Fla. Stat., committed between March 21 at 7PM EST and March 22 at 7AM EST. This law will substantially affect sections 2 and 9 of Article I of the Florida Constitution.

Would the initiative pass section 16.061 review?

Ballot summary less than 75 words in length? Check. Title is less than 15 words? Check. Voters fairly informed of the chief purpose? Check; as the justices discussed at oral argument this wolf comes as a wolf.[158] Affirmatively misleading? No; unlike Initiative Petition 23-07 and the initiative from *Adult Use of Marijuana*, the hypothetical ballot summary makes clear that the amendment controls only *state* law, leaving open the possibility of superseding federal

---

[156] *Bar Gov't from Treating People Differently Based on Race in Pub. Educ.,* 778 So. 2d at 893.
[157] *Id.* at 896.
[158] *Oral Arguments, supra* n. 2.

law. Misleading in the negative sense? No; the ballot summary clearly identifies the sections of the Constitution that would be substantially affected.[159] Thus, the "purge amendment" could very well comply with the ballot language requirements of section 101.161.

As for Article XI, section 3, it is unclear what the logrolling problem would be. Opponents could argue that some Floridians might support temporarily decriminalizing some species of murder but not others. According to Floridians Protecting Freedom, Inc., though, "that is not the inquiry under the single-subject rule. Instead, the prohibition on logrolling refers to a practice whereby an amendment is proposed which contains *unrelated* provisions, some of which electors might wish to support, in order to get an otherwise disfavored provision passed."[160] By this standard, the purge amendment, which contains just one provision, cannot be charged with logrolling. "[T]he Proposed Amendment encompasses a single plan—limiting government interference with [murder between the hours of 7PM and 7AM EST from March 21-March 22]."[161]

Neither would the purge amendment alter or perform the functions of multiple branches of government under the sponsor's theory. While the proposal would no doubt affect several branches of government, it would "'maintain[] the regulatory authority of [the] State . . . but limited such that it does not violate the constitutional right that the proposed amendment seeks to establish.' All the [Purge] Amendment would do is require 'the government to comply with a provision of the Florida Constitution.'"[162] Indeed, the amendment would "leave the prime function of the branches intact."[163]

---

[159] Of course, a "purge amendment" would likely affect more provisions than Article I, sections 2 and 9. Imagine for the sake of argument that these are also identified.
[160] Initial Brief at 15 (quoting Advisory Op. to Att'y Gen. re Rts. Of Elec. Consumers Regarding Solar Energy Choice (Solar Energy Choice), 188 So. 3d 822, 827-28 (Fla. 2016)).
[161] Initial Brief at 19.
[162] Initial Brief at 20 (quoting Solar Energy Choice, 188 So. 3d at 830).
[163] Initial Brief at 20-21 (quoting Right to Treatment, 818 So. 2d at 496), *id.* at 21 ("The Legislature would continue to enact 'policies and programs' on any topic, so long as those laws did not violate the Florida

The only consideration left is how the proposal affects other provisions of the Constitution, and this is where the purge amendment fails. Legalizing murder for a 12-hour period would eliminate, albeit temporarily, the basic right to life guaranteed by Article I, section 2, as well as the right not to be deprived of life without due process guaranteed by Article I, section 9. Under the single-subject rule, such "cataclysmic change" cannot be accomplished by citizen initiative. In a constitutional sense, Initiative Petition 23-07 is arguably more cataclysmic. Whereas the purge amendment would allow life to be taken with impunity for a 12-hour span, Initiative Petition 23-07 would allow life to be taken with impunity all year round. And while Initiative Petition 23-07 is more limited in terms of which lives may be taken with impunity, that makes it *more* egregious in terms of equal protection. As terrible a thing as it would be, the hypothetical purge amendment would at least be facially non-discriminatory. The same cannot be said of Initiative Petition 23-07, under which the criminality of homicide would turn on an immutable characteristic of the victim—physical disability to maintain life functions outside the womb.[164]

CONCLUSION

The key issue is what the people of Florida believed in 1868, when the still-controlling language of sections 2 and 9 of Article I was drafted and ratified. The historical record shows what they believed: that conception creates a human "person" bearing an inalienable right to life and entitled to state protection from private violence. As the law stands, those who would like to write the preborn out of that charter may not do so by citizen initiative.

Constitution. The executive would continue to executive 'the programs and policies adopted by the Legislature,' and require an enabling statute from the Legislature to exercise rulemaking. The judiciary would continue 'determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws.").

[164] Bans, https://initiativepetitions.elections.myflorida.com/InitiativeForms/Volunteer/DSDE155A_999_2307_EN.PDF