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IN THE SUPREME COURT OF FLORIDA

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

SC2023-1392

AMENDED[1] 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

[1] Since the filing of the previous notice, the article has now been published in the Harvard Journal of Law and Public Policy.

I, section 9 – the due process provision of the Florida Constitution.

Dated: March 19, 2024

Respectfully Submitted,

/s/ Samuel J. Salario, Jr.

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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 19, 2024, to the following:

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EXHIBIT A

BASIC RIGHTS AND INITIATIVE PETITION 23-07: ARE THE PREBORN "NATURAL PERSONS" UNDER THE FLORIDA CONSTITUTION?

DAVID H. THOMPSON*

An initiative petition entitled "Amendment to Limit Government Interference with Abortion" has been circulating in Florida since May 2023. The proposed amendment, which would effectively ban pro-life legislation, recently garnered enough signatures to trigger review by the Florida Supreme Court. At oral argument, Florida's Chief Justice asked whether an unborn child is covered by the basic equality provision of the Florida Constitution, Article I, section 2. Neither the proponents nor the opponents of the initiative supplied a satisfying answer. A new article aims to address the Florida Chief Justice's 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.[1]

The article proceeds by examining 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 conventions and Constitution Revision Commissions, contemporaneously enacted statutes, interpretive canons, and dictionary definitions from the years surrounding the Florida Constitution's ratification.

Beginning with the plain text of Article I, section 2, the article explains that contemporaneous dictionaries from the time period when the Florida constitution was ratified define the terms "person" and "natural person" as any living human being. It next turns to context and history, which confirm that "natural persons" was understood to include every human being, including those in utero. The article traces the advent of the constitutional provision that eventually became Article I, section 2, pinpointing notable aspects of its drafting history. While "natural persons" replaced "all men" in 1968, the change was not intended or understood to affect the meaning of the section.

The article then stretches back further, grounding the provision ratified in 1968 in both the Founding and Reconstruction eras. It discusses that language's relationship to the statement of equality in the Declaration of Independence, and the influence of debates over slavery on its terms. After a detailed discussion of this evidence, the section on historical context concludes that the delegates who gathered to ratify the Florida Constitution in Tallahassee in 1868—most of

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[1] The full article is available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4753223.

whom were freed slaves or Union army veterans—rejected anything less than complete equality of the races. The cornerstone of Florida's new constitution was therefore a basic rights provision that used language that had been fully expounded over the previous half century in the courts, through the public discourse, and, ultimately, on the battlefield—language that could not have been understood but to embrace the entire human family.

The article next turns to the question left unasked by the Chief Justice of the Florida Supreme Court: whether the Due Process Provision of Article I, Section 9 also encompasses preborn children. This provision appears just a few sections after the basic rights provision of Article I, Section 2, and provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." The article finds solid grounding in text and historical context to conclude that whoever is a "natural person" in Article I, Section 2 is also a "person" for purposes of the Due Process Provision. This reading is bolstered by the fact that 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.

Because the article finds that Article I, Sections 2 and 9 of the Florida Constitution guarantee the rights to life, basic equality, and due process to all human beings, all that is left is to determine whether a preborn child is, in fact, a human being. Plenty of evidence suggests that the Floridians who drafted and ratified the basic equality and due process provisions understood that preborn children are among the "men" and "natural persons" endowed with inalienable rights. Notably, preborn life was regarded as inherently valuable under the common law's criminal provisions. This tradition became echoed in statutes passed by the same Florida legislature that ratified the Fourteenth Amendment to the United States Constitution. Following the lead of other states, that legislature rapidly moved to criminalize conduct against pregnant mothers that also affects a child in utero. The trend continued in the years leading up to and including the year when Florida ratified the current version of Article I, Sections 2 and 9. All of these laws would have presumably been known to those who ratified the Constitutional provisions referencing "natural persons" and "person."

After sifting through all these sources, the article concludes that when the Florida Constitution was ratified in 1968, the original public meaning of the words "natural person" and "person," as used in Article I, sections 2 and 9, includes preborn children. Of course, this finding leads to the inescapable conclusion that the initiative petition cannot survive the Florida Supreme Court's review. For it would be clearly invalid for failure to identify substantially affected provisions of the Constitution—i.e., Article I, sections 2 and 9. Under Florida law, ballot initiatives must disclose any "material effects" on other existing areas of the law. As such, any initiative that repeals or curtails another section of the constitution must say so in its ballot summary. More than that, though, any attempt to create a constitutional right to abortion would violate the Florida Constitution's "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.

In sum, the key issue is what the people of Florida believed when the still-controlling language of sections 2 and 9 of Article I was drafted and ratified. The historical record is

unequivocal: they believed that conception creates a legal "person" bearing an inalienable right to life and entitled to state protection from private violence. As the law stands, those wishing to write the preborn out of their charter may not do so by citizen initiative.

Working Draft – Subject to Change

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.

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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 authority under

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[2] Petition, *Advisory Op. to 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] *Oral Arguments*, *supra* at 42:08.
[6] *Id.* at 43:06.

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 conventions and Constitution Revision Commissions, contemporaneously enacted statutes, interpretive canons, and dictionary definitions. It concludes that, in 1968, the public 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 Statues, 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."[8] The Court also follows the corollary "ordinary-meaning rule," that "[t]he words 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[.]"[9] When a "contested term" is not defined in the text or by precedent,[10] the Court looks to contemporaneous dictionaries for the "best evidence of . . . ordinary meaning."[11]

A. Dictionary Definitions in 1968 Equated "Natural Persons" with Human Beings.

While the "basic equality provision" existed in various forms in previous iterations of the Florida Constitution, the words natural persons" first entered the provision in 1968, with the ratification of the current Constitution.[12] Three dictionaries appearing in *Reading Law*'s

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[8] "[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 A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 33, 56 (2012)).

[9] *Wilson v. Crews*, 160 Fla. 169, 175 (Fla. 1948); *see also Advisory Op. to Gov. 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.")).

[10] 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* 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.").

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

[12] 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, § 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/1974amen.html. In 1998, the term "physical handicap" was replaced with "physical disability," "national origin" was added, 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

"Appendix A – A Note on the Use of Dictionaries"[13] 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."[14] 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."[15] 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."[16] 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."[17] 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,"[18] and it turns

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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 citizenship may be regulated or prohibited by law*." Fla. Const. art. I, § 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, § 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.

[13] 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 law.").

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

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

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

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

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

out that history has a long story to tell about how the words "natural person" found their way into Article I, section 2.

B. Context and History Confirm That "Natural Persons" Was Understood to Include Every Member of the Human Family.

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."[19] The Commission, however, "was instructed to preserve the full meaning and effect of the Declaration of Rights."[20] "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.[21] 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."[22] 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

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[19] 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. The drafting history of the Constitution of 1968 arguably began in 1940s, when the Florida Bar Association took it upon itself to draft a "recommended constitution." However, efforts at reform were thwarted by the "Pork Chop Gang"—a group of legislators from overrepresented rural counties dead-set on maintaining the apportionment status quo. Mary E. Adkins, T*he 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, 11 (2016), available at https://scholarship.law.ufl.edu/facultypub/784/.

[20] *Handbook on Recommended Constitution*, *supra*.

[21] 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.

[22] Florida Constitution Advisory Commission, Report of Committee 1 at 3, on file with Archives, *Committee Reports on Article I through XX*, catalogue no. 001007/.S 726-00001.00006. A letter dated July 31, 1956, from committee chairman 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 & 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. No more is known about Mr. Reinstine, who was not a member of the Advisory Commission and whose name did not appear elsewhere in the records reviewed.

> 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.[23]

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."[24]

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.[25] While the "daisy-chain" joint resolutions contained numerous departures from the Advisory Commission's recommendations, Article I, section 2 was accepted as recommended.[26] A commentary prepared by the Legislature identified substantive changes to six sections of the existing bill of rights (sections 3, 5, 10, 13, 15, and 18) but saw no substantive change to the basic equality provision in section 2.[27]

The daisy-chain amendments were ultimately knocked off the 1958 ballot by *Rivera-Cruz v. Gray*,[28] but they remained in the political ether. In 1964, the Legislature proposed an amendment to Article XVII allowing either chamber to propose by joint resolution a revision of the entire Constitution, which the voters narrowly adopted in the fall.[29] The following session, the

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[23] 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.

[24] 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.

[25] *Rivera-Cruz v. Gray*, 104 So. 2d 501, 503 (Fla. 1958).

[26] 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.

[27] Florida Constitution Advisory Commission, Commentary on Revised Florida Constitution Proposed by the Legislature at 1-2, on file with Archives, *Analysis and Commentary: October 1957*, catalogue no. 001007/.S 726-00002.00001.

[28] *Rivera-Cruz*, 104 So. 2d at 505.

[29] Florida Secretary of State Tom Adams, *Tabulation of official votes cast in the general election (1964)*, https://archive.org/details/Tabulationofofficialvotescastinthegeneralelection1964.

Legislature passed a bill creating the first Constitution Revision Commission (CRC) with instructions to submit a report and recommendations at least 60 days prior to the 1967 regular session.[30]

In January 1966, CRC Chairman Chesterfield H. Smith[31] 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 or responsibilities."[32] 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.[33] The Committee on Human Rights was composed of five members: Florida Supreme Court Justice B.K. Roberts serving as chair, Representative Donald H. Reed,[34] attorneys Raymond C. Alley and Richard T. Earle, and vice-chair Charlie Harris.[35] After holding public meetings in West Palm Beach and Miami throughout the spring to "hear[] suggestions from interested 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,

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[30] Adkins, *supra* at 14.

[31] 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. Associated Press, *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.

[32] 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.

[33] *Id.* at 2-3.

[34] Representative Reed was described as the "No. 1 critic" and "leading foe" of abortion in the state legislature. Of attempts to liberalize Florida's abortion laws in the late 1960s and early 1970s, Reed said, "We'll . . . kill [them]. No abortion bill is acceptable to me." *See* The Palm Beach Post, *Death Kneel May Be Tolling for Liberalized Abortion Bill* at 4 (June 28, 1967); Orlando Evening Star, *Abortion Bill Faces House Attack* at 1 (May 8, 1970); Randy Bellows, *The law and politics of abortion*, Florida Alligator at 2 (Oct. 4, 1971).

[35] *Id.*

> disposition, or possession of real property by aliens or persons ineligible for citizenship.[36]

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."[37] The committee primarily concerned itself with homestead exemptions.[38]

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 to "set out [protections against racial discrimination] in a more affirmative way,"[39] as well as the suggestions of the Style and Drafting Committee.[40] 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.[41]

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[36] 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.").

[37] 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.

[38] *Id.*

[39] CRC (1965-1967), Letter from Chesterfield H. Smith to James W. Matthews, Esquire (Aug. 4, 1966), on file with Archives, *Correspondence : August 4 - December 29, 1966,* catalogue no. 001006/.S 720-00004.00006.

[40] 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.

[41] *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."[42]

The full CRC met in Tallahassee on November 28 for a three-week meeting.[43] 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 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."[44] 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.[45] The House Joint Resolution left the CRC's draft of Article I, section 2 untouched, with one important

[42] 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.
[43] Letter from Chesterfield H. Smith to James W. Matthews, Esquire, *supra*.
[44] 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.
[45] *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.

exception: it inserted the word "natural" between "all" and "persons." The amendment[46] was offered to avoid confusion—expressed during legislative debates—that "persons" includes corporations.[47] The amendment carried, and, despite a yearlong delay caused by a rejected apportionment map, the Legislature passed HJR 1-2X in July 1968.[48] The new constitution was adopted on November 8 with 55% of the vote.[49]

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 '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[.]"[50]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'

[46]The amendment was proposed by Representative Ellsworth Pope Bassett, a lawyer from Maitland who was a pro-life ally of Representative Reed. CRC (1965-1967), House Amendment 80 to HJR 1-2X, on file with Archives, *Amendments to Preamble and Declaration of Rights*, catalogue no. 001006/.S 727-00003.00010; The Voice, *Amended Abortion Bill Faces Debate in House* at 1 (May 22, 1970), https://www.stu.edu/digital-library/ulma/va/3005/1970/05-22-1970.pdf; Orlando Evening Star, *Abortion Bill Faces House Attack* at 1 (May 8, 1970), https://www.newspapers.com/newspage/292427328/.

[47] *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).

[48] Adkins, *supra* at 18.

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

[50] *Mr. Bos. Distiller Corp.*, 245 So. 2d at 249–50 (Drew, J., concurring). Justice Drew was something of an expert on the matter—he was the president of the Florida Bar in the 1940s when the recommended constitution that kicked off the revision process was drafted. *See* Florida Supreme Court, Justice Edward Harris Drew (last visited Mar. 4, 2024), https://supremecourt.flcourts.gov/Justices/Former-Justices/Justice-Edward-Harris-Drew.

rather than 'certain inalienable rights,' and the right to 'obtain safety' is deleted."[51] Background analyses compiled in preparation for the Commission Revision Commission of 1978 agreed that "all natural persons" was simply a "gender neutral" way of saying "all men."[52]

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,[53] including its declaration of basic 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."[54] 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 basic equality provision unchanged, save for the conversion of a comma to a semicolon.[55] When the Union military occupied Florida in May 1865, President Johnson appointed Judge William Marvin as provisional governor and directed him to

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[51] Talbot D'Alemberte, THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE at 27-28 (2d ed. 2017).

[52] Florida Attorney General Robert L. Shevin, *Constitution revision background analyses: article I, sections 1, 2, 3, 4, 5, 6, 10, 11, 18, 19, 21, articles III, VI, IX*, on file at the Florida State University College of Law Library, reference no. KFF401 1978.A28 C6.

[53] Florida Department of State, Division of Library and Information Services, State Archives of Florida, *Florida's Historic Constitutions*, Florida Memory Project (accessed Mar. 7, 2024), https://www.floridamemory.com/discover/historical_records/constitution/.

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

[55] Fla. Ord. of Secession (1861), http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1861con.html#:~:text=We%2C%20the%20People%20of%20the,States%3B%20and%20that%20all%20political.

call a convention.[56] The resulting Constitution of 1865 contained a basic equality provision 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."[57]

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.[58] 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.[59] The constitutional convention of 1868, composed almost exclusively of Republicans elected by newly-freed African Americans, produced the modern basic equality provision: "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."[60]

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).[61] 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" was retained as the subject of the basic equality provision.[62] The 1885 Constitution prevailed until 1968, when "all men" became "all natural

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[56] Florida Memory, *supra*.
[57] Fla. Const. art. I, § 1 (1865), http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1865con.html.
[58] Florida Memory, *supra*.
[59] *Id.*
[60] Fla. Const. Declaration of Rights, § 1, (1868), http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1868con.html.
[61] Fla. Const. Declaration of Rights, § 1, (1885), http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1885con.html.
[62] Fla. Const. Declaration of Rights, § 1, (1885).

persons" for the sake of gender neutrality.[63] 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.

Despite being composed of 43 Republicans to just three Conservatives (former Democrats and Whigs),[64] the Constitutional Convention of 1868 was a tumultuous affair. After much infighting between a faction of Radical Republicans and a faction of moderates, delegates elected moderate Horatio Jenkins Jr. as president and submitted a constitution that had been drafted by the moderates in Monticello to General Meade, which he accepted. However, its basic equality provision was arguably more "radical" than the draft previously composed by the radical faction.[65] 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.[66]

Recordkeeping at the two factions' "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

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[63] Fla. Const. art. I, § 2, (1968), http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1968con.html.
[64] Jerrell H. Shofner, *The Constitution of 1868*, 41 Fla. Hist. Q. 356, 359 (Apr. 1963).
[65] Journal of the Proceedings of the 1868 Constitutional Convention of the State of Florida at 19, available at https://catalog.hathitrust.org/Record/010446386 ("We do declare that all citizens, subjects and people of this State are by birthright free and equal, entitled to equal rights and privileges under the Constitution and laws of this State and under the Constitution and laws of the United States, to which paramount allegiance is due.").
[66] *Id.* at 71-72. The Monticello draft also removed the language demanding "paramount allegiance" to the United States.

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 protect the rights of all, and that shall deserve and receive the respect, love and confidence of all our citizens.[67]

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 bigotry, 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."[68]

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,"[69] with "men" defined as "[p]ersons; people; mankind; in an indefinite sense."[70] 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."[71] "Man" was defined by the first edition of the *Universal Dictionary of the*

[67] *Id.* at 6.
[68] *Id.* at 133.
[69] *Man*, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828).
[70] *Men*, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1841).
[71] *Man*, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1864).

English Language (1897) as "1. An individual of the human race; a human being; a living person."[72] 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."[73]

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 "all men are by nature free and equal." The words as used in the "social context" of the Reconstruction South conveyed a definite and more bitter meaning.[74] The declarations 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."[75] The Virginia Declaration would serve as the model for many other state constitutions, 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."[76]

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[72] *Man*, UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1897).
[73] *Man*, BLACK'S LAW DICTIONARY (1st ed. 1891).
[74] 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).
[75] Va. Const. Bill of Rights, § 1 (1776).
[76] Declaration of Independence, National Archives, available at https://www.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).

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.[77] Some historians conclude that "[w]hat [Jefferson] really meant was that the American colonists, *as a 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."[78] Others[79] 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.[80]

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."[81] Historians

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[77] *See* Melissa De Witte, *When Thomas Jefferson penned "all men are created 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-declaratnce-changed-time/#:~:text=July%201%2C%202020-,When%20Thomas%20Jefferson%20penned%20%E2%80%9Call%20men%20are%20created%20equal%2C%E2%80%9D,says%20Stanford%20historian%20Jack%20Rakove; Hillel Italie, *Centuries-long debate continues over 'all men are created equal,'* PBS News Hour (July 3, 2022), https://www.pbs.org/newshour/nation/centuries-long-debate-continues-over-all-men-are-created-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-independence-all-men-are-created-equal.

[78] De Witte, *supra*.

[79] 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).

[80] John Locke, Second Treatise on Government § 95, available at https://press-pubs.uchicago.edu/founders/documents/v1ch4s1.html.

[81] Letter from Thomas Jefferson to Henry Lee (May 8, 1825), National Archives, https://founders.archives.gov/documents/Jefferson/98-01-02-5212.

therefore conclude that "the statement of equality in the Declaration is a statement about the natural equality of all people."[82]

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 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.[83]

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 Adams's declaration that "all men are born free and equal; and that every subject is entitled to liberty."[84] 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:

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[82] *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)).

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

[84] John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts*, 5 Am. J. Leg. Hist. 118, 132-33 (1961). The court's opinion stated, "[W]ithout 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.*

> [Y]ou 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.[85]

Calls of hypocrisy intensified in the Nineteenth Century, as tension over 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."[86] 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.[87]

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 *free*men, when they form a

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[85] Letter from Benjamin Banneker to Thomas Jefferson (Aug. 19, 1791), National Archives, https://founders.archives.gov/documents/Jefferson/01-22-02-0049.

[86] 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/.

[87] Frederick Douglass, *The Meaning of July Fourth for the Negro in Rochester, New York* (July 5, 1852), available at https://masshumanities.org/wp-content/uploads/2019/10/speech_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.").

social compact."[88] Alabama followed suit in 1819,[89] Arkansas in 1836,[90] and Florida in 1838.[91] Texas used the classical "all men" in its 1836 constitution before switching to "all freemen" in 1845.[92] Missouri's constitution of the same year had no declaration of equality.[93] 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 . . . [it is] a false hood, and a most pernicious falsehood, even though I find it in the Declaration of Independence."[94] 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.[95] Indiana's John Pettit called it "a self-evident lie."[96]

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 III, section 2 of the United States Constitution giving federal courts jurisdiction over cases "between Citizens of different States." The question presented was therefore framed as, "Can a negro, whose ancestors were imported into this country, and sold as slaves, become a . . . citizen?"[97]

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[88] Miss. Const. art. I, § 1 (1817), https://www.mshistorynow.mdah.ms.gov/issue/mississippi-constitution-of-1817.
[89] Ala. Const. art. I, § 1 (1819), https://avalon.law.yale.edu/19th_century/ala1819.asp.
[90] Ark. Const. art. II, § 1 (1836), https://digitalheritage.arkansas.gov/constitutions/5/#:~:text=The%201836%20Arkansas%20Constitution%20was,the%20rights%20of%20Arkansas%20citizens.
[91] Fla. Const. art. I, § 1, http://library.law.fsu.edu/Digital-Collections/CRC/CRC-1998/conhist/1838con.html.
[92] 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. I, § 2 (1845), https://tarltonapps.law.utexas.edu/imgs/constitutions/documents/texas1845/texas1845.pdf.
[93] Mo. Const. art. XI (1845), https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1000&context=mo_constitutions_race.
[94] Maier, *supra* at 883; *see also* Letter from John Adams, *supra* ("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.").
[95] Maier, *supra* at 884.
[96] *Id.*
[97] *Dred Scott v. Sandford*, 60 U.S. 393, 403 (1857).

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 who had been subjugated by the dominant race."[98] 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."[99] 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."[100]

The delegates who gathered in Tallahassee in 1868—most of whom were freed slaves or Union army veterans[101]—rejected the "great truth" upon which the Confederacy was built—"that the negro is not equal to the white man."[102] The cornerstone of Florida's new 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— language that could not have been understood but to, in Chief Justice Taney's words, "embrace the whole human family."

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[98] *Id.* at 404-05.
[99] *Id.* at 410.
[100] *Id.*
[101] Eighteen African Americans served as delegates 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 in Florida as part of the occupying Union army. *Id.* at 13.
[102] Alexander H. Stephens, *Cornerstone Speech in Savannah, Georgia* (Mar. 21, 1861), https://www.battlefields.org/learn/primary-sources/cornerstone-speech.

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 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 beings" in 1968. Allow me now to turn to what I have called the question left unasked—Article I, section 9.

Chief Justice Muñiz's questioning at oral argument was laser-focused on Article I, section 2. 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[.]"[103] 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."[104] 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.[105]

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[103] Fla. Const. art. I, § 9.
[104] *Thompson v. DeSantis*, 301 So. 3d 180, 185 (Fla. 2020).
[105] *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).

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 "without due process of law." The location of the 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.

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.[107] 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.[108] Given their temporal proximity and textual similitude, courts have generally 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

[107] 14 Stat. 358 (1866).
[108] Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 Ala. L. Rev. 555, 574 (2002); Library of Congress, *Today in History - July 28: 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%201868.

language . . . . To interpret identical language in a virtually identical context in an identical manner is only common sense."[110]

As detailed by Professor Michael Stokes Paulsen,[111] 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."[112] 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."[113] Illinois Senator Lyman Trumbull, described 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."[114] Senator B. Gratz Brown, whose efforts had helped keep

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[110] *Silvio Membreno & Fla. Ass'n of Vendors, Inc. v. City of Hialeah*, 188 So. 3d 13, 21 (Fla. 3d DCA 2016)*; see also Simmons v. State*, 944 So. 2d 317, 324 (Fla. 2006) (noting similarity between the due process clauses in the United States Constitution and Article I, section 9 of the Florida Constitution); *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.").
[111] Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 Ohio St. L. J. 14 (2012).
[112] *Id.* at 50.
[113] *Id.* at 49.
[114] *Id.* at 50.

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?"[115] 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:

> [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.[116]

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.[117] 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."[118] The entry for "human" included all those belonging to "the race of man."[119] 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."[120] Indeed, in weighing the applicability of a criminal statute to pirates who had "feloniously set upon . . . and enter[ed] a certain ship called the

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[115] *Id.* at 49.
[116] *Id.* at 50-51.
[117] 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.").
[118] *Person*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1864).
[119] *Human*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1864).
[120] *Person*, Alexander M. Burrill, A NEW LAW DICTIONARY AND GLOSSARY (1st ed. 1851).

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."[121] 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 being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."[122]

Levy was decided in May 1968, some six months before the prohibition against depriving a "person" of any right because of race or religion was added to Article I, section 2 of the Florida Constitution.[123] 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."[124] *Levy* would have

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[121] *United States v. Palmer*, 16 U.S. 610, 631–32 (1818).

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

[123] It is unclear whether the use of the word "person" rather than "natural person" in the second sentence of Article I, section 2 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 persons (e.g., corporations) as well as natural persons since 1886. *Santa Clara Cnty. v. S. Pac. 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 terms 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. *See Advisory Op. to Att'y Gen. ex rel. Amend. to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 897 (Fla. 2000) ("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 sentence. By extension, 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.

[124] *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

put the men and women who revised Florida's bill of rights in 1968 on notice that, if they meant to limit protections to a certain segment of living humans, using the word "person" was not the way to do it.

It is time for the 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 and commentaries unanimously point to the conclusion that when 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.[125]

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

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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.").

[125] *See, e.g.*, Peter Singer, PRACTICAL ETHICS 73 (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.").

English Language."[126] 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).[127] The first chapter of the first book turns immediately to "the Rights of Persons." "Persons," Blackstone 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 government, which are called corporations or bodies politic."[128] 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."[129] 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[.]"[130]

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[126] Wilfrid Prest, *Antipodean Blackstone: The Commentaries 'Down Under' Blackstone*, 6 Flinders J. of L. Reform 151, 153 (2003).
[127] Paulsen, *supra* at 22.
[128] 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND at 121 (1765-69). Paulsen notes the parallelism between Blackstone's definition and Psalm 139:13-16: "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 . . . ." (RSV). Paulsen, *supra* at 24 n.36.
[129] *Id.* at 129–30. Professor Paulsen explains that Blackstone's reference to "stirring in the womb" was a reference to animation, not quickening. Paulsen, *supra* at 27. *Accord* Motion for Leave to File a Brief and Brief of Ferdinand Buckley as Amicus Curiae in Support of Appellees, *Doe v. Bolton*, 1971 WL 126691 at *4 (Nov. 9, 1971) ("At what point in time does an unborn child become a human being endowed with fundamental rights which are protected by our Federal and State Constitution? Logically, if men are created equal and are endowed with unalienable rights by their creator, it would seem to follow that they are endowed with these rights at the time of their initial creation.").
[130] *Id.*

Preborn life was regarded as inherently valuable under the common law's criminal provisions as well. For instance, criminal liability attached "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."[131] Blackstone listed abortion *at any stage* of pregnancy as a predicate for felony-murder: "[I]f one intends to do another felony, and undesignedly kills a man, this is murder . . . . And so, if one gives A woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it."[132]

America quickly adopted the Blackstonian view of fetal personhood. James Wilson, after signing the Declaration of Independence, representing Pennsylvania at the Constitutional Convention, and becoming one of the original justices of the United States Supreme Court, published in 1791 the treatise *Lectures on Law*, which 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.[133] 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.[134]

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[131] *Id.*

[132] 4 William Blackstone, COMMENTARIES at 200–01.

[133] John Calvin, HARMONY OF THE LAW VOL. 3, *Exodus 21:12-14,18-32* ¶ 22 (1559-1563) ("[T]he foetus, though enclosed in the womb of its mother, is already a human being, (homo,) and it is almost a monstrous crime to rob it of the life which it has not yet begun to enjoy. If it seems more horrible to kill a man in his own house than in a field, because a man's house is his place of most secure refuge, it ought surely to be deemed more atrocious to destroy a foetus in the womb before it has come to light. On these grounds I am led to conclude, without hesitation, that the words, 'if death should follow,' must be applied to the foetus as well as to the mother.").

[134] James Wilson, LECTURES ON LAW, in 2 COLLECTED WORKS OF JAMES WILSON 749, 1068 (Kermit L. Hall & Mark David Hall eds. 2007).

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 public in the generations that framed and adopted the Fifth and Fourteenth Amendments" understood the preborn to be legal "persons."[135]

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 and felony-murder contexts would make little sense),[136] 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.[137]

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[135] Paulsen, *supra* at 26.

[136] *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 247 (2022) ("The Solicitor General offers a different explanation of the basis for the quickening rule, namely, that before quickening the common law did not regard a fetus as having a 'separate and independent existence.' But the case on which the Solicitor General relies for this proposition also suggested that the criminal law's quickening rule was out of step with the treatment of prenatal life in other areas of law, noting that 'to many purposes, in reference to civil rights, an infant *in ventre sa mere* is regarded as a person in being.'").

[137] *See* John Finnis & Robert P. George, *Equal Protection and the Unborn Child: A* Dobbs *Brief*, 45 Harvard J. of L & Pub. Pol'y 927, 957 (2022); *LePage v. Ctr. for Reprod. Med., P.C.*, No. SC-2022-0515, 2024 WL 656591, at *5 (Ala. Feb. 16, 2024) ("[T]he so-called 'quickening rule' . . . ensured that there was 'evidence of life,' but did not provide a definition of life, and did not mean that unborn children were considered to be something other than living human beings.") (citing Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 Val. U. L. Rev. 563, 586 (1987)). A similar rule barring wrongful death suits unless the fetus was born alive existed at common law for the same evidentiary reasons, *id.*, and a line of Florida Supreme Court cases have held that a fetus is not a "person" for purposes of Florida's wrongful death statute unless born alive. The first case so holding, *Stern v. Miller*, was decided after 1968. 348 So. 2d 303, 307 (Fla. 1977). It did not evaluate the ordinary or contextual meaning of "person," but rather reasoned that if the Legislature wanted to allow a cause of action for a stillborn fetus, it should have been more specific in light of the Court's prior decision in *Stokes v. Liberty Mutual Insurance Company*, which held that a fetus was not a "minor child" for purposes of a previous version of the wrongful death statute. 213 So. 2d 695, 700 (Fla. 1968). *Stokes* turned on the fact that section 737.01 defined "incompetent beneficiary" to include "a minor, an unknown person, and an unborn person," whereas the wrongful death statute applied to "minor children" but said nothing of "unborn persons." *Id.* In short, these cases have little to say about the ordinary public meaning of "natural persons" and "person" in 1968.

Prudence was beginning to dictate a different rule. Abortion, which had been relatively rare and less safe for the mother before the turn of the century,[138] had become a burgeoning industry.[139] 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*."[140]

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."[141] So curious that the theory of "preformation"—that a pre-formed, miniature human or "homonculus" is planted in the female during intercourse, which then grows into a larger being as it developed during pregnancy—persisted in the mainstream through the 1820s.[142] Around 1830, British scientist Joseph Jackson Lister developed a microscope resolving problems with spherical and color aberration that had dogged the instruments theretofore.[143] The laboratory use of microscopes in science and medicine grew rapidly. In the field of embryology, Lister's microscope allowed for 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.[144] By mid-century, this new medical understanding had entered the public mind. For

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[138] Martin Olasky & Leah Savas, THE STORY OF ABORTION IN AMERICA: A STREET-LEVEL HISTORY, 1652-2022 at 15 (2022); R. Sauer, *Attitudes to Abortion in America, 1800-1973*, 28 Pop. Studies 53, 53 (Mar. 1974) (citing D. Meredith Reese, *Report on Infant Mortality in Large Cities*, 12 Transactions of the American Medical Association at 98 (1857) (observing that abortion was "scarcely known to the generation of our fathers")).

[139] Ryan Johnson, *A Movement for Change: Horatio Robinson Storer and Physicians' Crusade Against Abortion*, 4 James Madison Undergraduate Research J. 14, 16 (2017).

[140] Letter from Dr. Thomas W. Blatchford to Dr. Horatio Robinson Storer (March 23, 1857) (emphasis in original).

[141] Gasser et al., *Rebirth of Human Embryology*, 243 Developmental Dynamics 621, 621 (2013).

[142] Fatma El-Bawab, *Preformationism*, Invertebrate Embryology and Reproduction (2020), https://www.sciencedirect.com/topics/agricultural-and-biological-sciences/preformationism.

[143] Boris Jardin, *The Problems with Lenses, and the 19th-century Solution*, Whipple Museum of the History of Science at University of Cambridge (2008), https://www.whipplemuseum.cam.ac.uk/explore-whipple-collections/microscopes/problems-lenses-and-19th-century-solution. Lister's son would become known as the "father of modern surgery" due to his innovative use of antiseptics. Spyros N Michaleas, et al., *Joseph Lister (1827-1912): A Pioneer of Antiseptic Surgery*, 14 Cureus 12 (2022).

[144] Olasky & Savas, *supra* at 137 (also discussing Karl Ernst von Baer's discovery of mammal eggs in 1827); Surgeons' Hall Museums, *Ziegler Waxes: Visualising the Embryo* (June 5, 2020), https://surgeonshallmuseums.wordpress.com/2020/06/05/ziegler-waxes-visualising-the-embryo/.

instance, Dr. Stephen Tracy's *The Mother and Her Offspring*, published in 1853, explained that, "[i]f examined at three to four weeks from the commencement of pregnancy, the embryo will be found to have about the size of a grain of wheat . . . . It is a Human Being. It is one of the human family as really and truly as if it had lived six months or six years; consequently, its life should be as carefully and tenderly cherished." [145] Textbooks on medical ethics were rewritten to emphasize 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."[146]

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 preeminent gynecology and obstetrics specialists of the day and becoming an early pioneer of Cesarean section delivery.[147] 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.[148] Storer's view prevailed when the American Medical Association threw its weight behind him in 1959. Journals that had previously criticized Storer soon recanted, and the "physicians' crusade" was born.[149]

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:

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[145] Stephen Tracy, THE MOTHER AND HER OFFSPRING at 108 (1853).
[146] Thomas Percival, MEDICAL ETHICS 135–36 (1827) (Chauncey D. Leake ed. 1975).
[147] Richa Venkatraman, *Horatio Robinson Storer (1830–1922)*, Arizona State Embryo Project Encyclopedia (Sept. 21, 2020), https://embryo.asu.edu/pages/horatio-robinson-storer-1830-1922.
[148] Johnson, *supra* at 19.
[149] *Id.*

> 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."[150]

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,[151] 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.'"[152]

Protestant, Catholic, and Jewish clergy had also "awaken[ed] to the importance of taking very active and positive means to calling the attention of their folds to the extent, general practice, and enormity of the vice, and of imparting to them such psychological, moral, and religious instruction as the great necessities for the prevention of the commission of the crime demand."[153] The bishop of Diocese of Boston, John Bernard Fitzpatrick, wrote to Dr. Storer commending his

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[150] Horatio Robinson Storer, ON CRIMINAL ABORTION IN AMERICA 7-13 (1860), available at https://babel.hathitrust.org/cgi/pt?id=mdp.39015005990588&seq=21.

[151] Johnson, *supra* at 21.

[152] J. Berrien Oliver, *Progression*, Tallahassee Sentinel (Aug. 26, 1867), available at https://newspapers.uflib.ufl.edu/UF00048626/00327/zoom/0. Such journalistic condemnation of abortion was common. The New York Times waged "a vigorous campaign" against the city's abortionists in the 1860s and 1870s, and other outlets compared abortion with "Herod's massacre of the innocents." Sauer, *supra* at 56.

[153] Dr. Andrew Nebinger, *Criminal Abortion: Its Extent and Prevention* at 4, 9 (1870), https://collections.nlm.nih.gov/bookviewer?PID=nlm:nlmuid-9601285-bk.

movement as consistent with "[t]he doctrine of the Catholic Church, her canons, her pontifical constitutions, [and] her theologians" which "without exception, teach, and constantly have taught, that the destruction of the human foetus in the womb of the mother, *at any period from the first instant of conception*, is a heinous crime, equal at least in guilt, to that of murder."[154] The philosophical link between the abolitionist and antiabortion movements was not lost on the crusaders. Minister John Todd, speaking to a reporter after General Lee's surrender, said: "We have rid ourselves of the blight of Negro slavery, affirming that no man may be considered less than any other man. Now let us apply that holy reason to the present scandal." [155]

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 child-murder a trade."[156] 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."[157]

Ohio's proclamation to the world was heard in Florida; the Legislature passed a pair of statutes criminalizing abortion at any point in pregnancy the following year. The first statute was later codified at section 782.10, Florida Statutes: "Every 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

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[154] *Id.* at 28 (emphasis in original).
[155] Olasky & Savas, *supra* at 159.
[156] Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 Harvard J. of L. & Pub. Pol'y 539, 557-58 (2017), available at https://ssrn.com/abstract=2970761 (quoting 1867 OHIO SENATE J. APP'X 233).
[157] *Id.*

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."[158] Under the other statute, codified at section 797.01, Florida Statutes, "[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" was punished by imprisonment.[159]

These statutes were enacted in 1868 by the same 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 committee that drafted what we know as the basic equality provision of Article I, section 2 and the due process provision of Article I, section 9.[160] The Legislature placed the new abortion crimes in Chapter III of that

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[158] As originally enacted, the statute read, "The willful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree." THE ACTS AND RESOLUTIONS OF THE FLORIDA LEGISLATURE *in* ch. 1,637 [No. 13], CHAPTER III sec. 10 (Tallahassee, 1868), available at https://ufdcimages.uflib.ufl.edu/AA/00/07/87/12/00043/99893-1868-010.pdf; *codified at* Fla. Stat. § 782.10. "Quick child" was not a reference to quickening; the term unambiguously referred to any living child from conception to birth. *See Eggart v. State*, 25 So. 144, 149 (1898) ("We have seen before that under the statute violated in this case it is not necessary to a commission of the offense thereby prohibited that the woman should be alleged or proven to have been actually quick with child."); *Walsingham v. State*, 250 So. 2d 857, 864 (Fla. 1971) (Ervin, J., concurring) ("Section 797.01 condemns the procurement of any miscarriage regardless of whether the pregnant mother is Quick with child."); *State v. Barquet*, 262 So. 2d 431, 437 (Fla. 1972) ("'Quick' means 'living; alive.'") (citing 1 F.L.P., Abortion, s 2; *Eggart*, 25 So. at 144; Black's Law Dictionary (4th Ed. 1957)); *accord* Finnis & George, *supra* at 953.

[159] As originally enacted, the statute read, "Every person who shall administer to any woman pregnant with a quick child any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent to destroy such child, unless the same shall have necessary to preserve the life of such mother, or 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 in the second degree." THE ACTS AND RESOLUTIONS OF THE FLORIDA LEGISLATURE *in* ch. 1,637 [No. 13], CHAPTER III sec. 11 (Tallahassee, 1868); *codified at* Fla. Stat. § 797.01.

[160] *Compare* Hume, *supra* at 19-21, *with* Florida House of Representatives, *supra*.

session's "Act to provide for the Punishments of Crime," thereby classifying them as "OFFENSES AGAINST THE PERSON."[161] It is surely probative, if not conclusive under the presumption of consistent usage and the related provisions canon,[162] that the same men who designed the constitutional provisions guaranteeing the rights to life, basic equality, and due process 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."[163] 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.[164]

While some legislators viewed themselves as eliminating the common law's "ridiculous distinction in the punishment of abortion before and after quickening,"[165] 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

[161] Legislature of Florida, *The Acts and Resolutions Adopted by the Florida Legislature at its First Session (1868)* at 63-64, https://ufdcimages.uflib.ufl.edu/AA/00/07/87/12/00043/99893-1868-010.pdf.
[162] Under the presumption of consistent usage, "[a] word or phrase is presumed to bear the same meaning throughout a text." *Lab'y Corp.*, 339 So. 3d at 324. The Court must also "consider the plain language of the statute, give effect to all statutory provisions, and construe related provisions in harmony with one another." *Hechtman v. Nations Title Ins. of New York*, 840 So.2d 993, 996 (Fla. 2003). A state's criminal homicide statutes and constitutional guarantees of life are related provisions; without the former, the latter would be a dead letter.
[163] Finnis & George, *supra* at 969-70 (citing Act of Jan. 19, 1872, 1872 D.C. Acts 26–29; Act of Mar. 3, 1899, ch. 429, tit. 1, ch. 2, § 8, 30 Stat. 1253–54 (1899)).
[164] James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L. J. 29, 34, 48 (Jan. 1985).
[165] Craddock, *supra* at 558.

[of abortion] may be perpetrated."[166] Indeed, this tidal wave of statutes reflected the common law principle, noticed in *Hall v. Hancock* by abolitionist chief justice of the Massachusetts Supreme Judicial Court Lemuel Shaw, that "a child will be considered in being, from conception to the time of its birth in all cases where it will be for the benefit of such child to be so considered."[167] 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."[168] 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."[169]

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 enforced by state attorneys and the Attorney General, including Attorney General Ervin,[170] who served on "Committee 1" of the Advisory Commission in 1957. These prosecutors discussed "the constitutional right of a quick child to stay alive" at trial,[171] and even into the 1970s the Florida Supreme Court acknowledged that sections 782.10 and 797.01 "recognize[d] the legal personality of an unborn child."[172]

The Florida Legislature was also continuing to pass new legislation referring to the preborn as persons. For example, section 737.01, Florida Statutes, defined an "incompetent beneficiary" to include "an unknown person and an unborn person."[173] It was passed in 1965. Also on the books in 1968 was section 1.01(3), Florida Statutes, which said, "The word 'person' includes individuals,

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[166] *Mills v. Com.*, 13 Pa. 631, 633 (1850).
[167] *Hall v. Hancock*, 32 Mass. 255, 258 (1834).
[168] *Shone v. Bellmore*, 75 Fla. 515, 522 (1918).
[169] *Id.*
[170] *See, e.g., Noeling v. State*, 40 So. 2d 120 (Fla. 1949); *Grimes v. State*, 64 So. 2d 920 (Fla. 1953); *Johnson v. State*, 91 So. 2d 185 (Fla. 1956); *Sinnefia v. State*, 100 So. 2d 837 (3d DCA 1958); *Carr v. State*, 136 So. 2d 28 (Fla. 3d DCA 1962); *Nations v. State*, 145 So. 2d 259, 260 (Fla. 2d DCA 1962); *Urga v. State*, 155 So. 2d 719, 719 (Fla. 2d DCA 1963); *Carter v. State*, 155 So. 2d 787 (Fla. 1963).
[171] Marian Jedrusiak, *Court says leave state or wed*, Florida Alligator at 1 (Oct. 18, 1971), https://newspapers.uflib.ufl.edu/UF00028291/03393/images/0.
[172] *Stern v. Miller*, 348 So. 2d 303, 306 (Fla. 1977).
[173] Fla. Stat. § 737.01 (1965); *see also Stokes v. Liberty Mut. Ins. Co.*, 213 So. 2d 695, 700 (Fla. 1968).

children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations."[174] 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." The first definition for "child" given in *Webster's Third New International Dictionary* (1961) is "an unborn or recently born human being."[176] And according to the first edition of the *American Heritage Dictionary of the English Language* (1969), the word "person" applies to "an unborn infant; fetus."[177] 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."[178]

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 1968 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."[179] 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.

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[174] Fla. Stat. § 1.01(3) (1941).
[176] *Child*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961).
[177] *Child*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1969).
[178] *Foetus*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).
[179] John D. Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment Personhood, and the Supreme Court's Birth Requirement*, 4 S. Ill. U. L. J. 1, 23 (1979).

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."[180]

Section 101.161, Florida Statutes

Section 101.161, Florida Statutes, requires initiative petition sponsors to prepare a ballot summary providing "an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure" and a ballot title of not more than 15 words "consist[ing] of a caption by which the measure is commonly referred to or spoken of."[181] In determining compliance with section 101.161, the Court asks two questions: (1) "whether the ballot title and summary fairly inform the voter of the chief purpose of the amendment," and (2) "whether the language of the title and the summary, as written, misleads the public."[182]

A ballot summary that adequately explains its "chief purpose" but fails to disclose its "material effects" is considered misleading in the negative sense. Here, the Court is "most concerned with relationships and impact on other areas of law."[183] Specifically, any initiative that repeals or curtails another section of the constitution must say so in its ballot summary.[184] One of

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[180] 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 Article IV, render and advisory opinion of the justices, addressing issues as provided by general law."); Fla. Const. art. IV, § 10, ("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.")

[181] Ch. 80-305, § 2, Laws of Fla.

[182] *Advisory Op. to Att'y Gen. re Prohibits Possession of Defined Assault Weapons*, 296 So. 3d 376, 381 (Fla. 2020).

[183] *Advisory Op. to Att'y Gen. re Protect People from the Health Hazards of Second-Hand Smoke*, 814 So. 2d 415, 419 (Fla. 2002).

[184] *Advisory Op. to Att'y Gen. re Loc. Trustees and Statewide Governing Bd. to Manage Florida's Uni. Sys.*, 819 So. 2d 725, 731 (Fla. 2002) ("If a petition substantially modifies a constitutional provision, then this consequence must be mentioned in the ballot summary."); *see also Advisory Op. to Att'y Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 976 (Fla. 2009) ("Lastly, we find the ballot summary misleading because it does not inform

many examples is an initiative from 1994 would have added a new section to Article I prohibiting the state from "treat[ing] persons differently based on race, color, ethnicity, or national origin in the operation of public education."[185] The Court struck it down for "not identify[ing] the constitutional and statutory provisions that the proposed amendments will affect"—in that case, sections 2 and 23 of Article I.[186]

If the preborn enjoy rights under sections 2 or 9 of Article I, then 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"[187]—the "constitutional baseline," as Chief Justice Muñiz called it at oral argument.[188] Because Initiative Petition 23-07's ballot summary does not announce to the voters that the amendment would substantially affect Article I, sections 2 and 9, it is 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."[189]

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the voter of the repeal of an existing Florida constitutional provision, specifically article VII, section 9(b) . . . . There is nothing in the summary, or indeed the amendment itself, which would put a voter on notice that this constitutional provision is being repealed."); *Stop Early Release of Prisoners*, 642 So.2d at 726 (invalidating a petition because it "substantially modified another constitutional provision but did not mention this consequence in the ballot summary"); *Fla. Dep't of State v. Fla. State Conf. of NAACP Branches*, 43 So. 3d 662, 669 (Fla. 2010) ("Nowhere does the ballot language inform the voter that there is currently a mandatory contiguity requirement in article III, and nowhere does the language inform the voter that the contiguity requirement could be diluted by Amendment 7.").

[185] *Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d at 898.

[186] *Id.* The amendment would have affected Article I, section 2 for two reasons: (1) the prohibition against deprivation had not previously been construed as prohibiting preferential treatment, and (2) the amendment would have created new distinctions between discrimination based on the enumerated classifications (race, color, ethnicity, or national origin) and discrimination based on religion and physical disability. *Id.* at 894. Article I, section 21, provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The provision in the amendment invalidating court orders and consent decrees issued after the effective date would have affected Floridians' right to obtain redress for injuries emanating from discriminatory practices. *Id.*

[187] *1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d at 976 (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).

[188] *Oral Arguments*, *supra* at 17:28.

[189] *See 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).

Article XI, section 3 of the Florida Constitution

The problem under Article XI, section 3 is not so easily solved. The single-subject rule was designed to prevent two forms of mischief: "precipitous change" outside "a filtering legislative process,"[190] and "logrolling"—that is, "combin[ing] subjects in such a manner as to force voters to accept one proposition they might not support in order to vote for one they favor."[191] Accordingly, initiative proposals must have "a logical and natural oneness of purpose."[192] The Court considers whether the proposal "alters or performs the functions of multiple branches of government" and "how the proposal affects other provisions of the constitution."[193]

On the latter consideration, an initiative does not violate the single-subject rule solely by virtue of its interaction with multiple sections of the Constitution. However, a proposal's effect on multiple sections may indicate that it encompasses multiple subjects, especially when the affected sections are in the bill of rights. Most important for our purposes, proposed amendments that would have abridged multiple rights guaranteed by different sections of Article I have been found *de facto* multi-subject and inherently "cataclysmic."

Take, for instance, the initiative that sought to add a subsection to Article I, section 10 preventing the state or any political subdivision thereof from "enact[ing] or adopt[ing] any law

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[190] "The legislative, revision commission, and constitutional convention processes of sections 1, 2 and 4 all afford an opportunity for public hearing and debate not only on the proposal itself but also in the drafting of any constitutional proposal. That opportunity for input in the drafting of a proposal is not present under the initiative process and this is one of the reasons the initiative process is restricted to single-subject changes in the state constitution." *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984).

[191] *Id.*; *Advisory Op. to Att'y Gen. re Referenda Required for Adoption & Amend. of Loc. Gov't Comprehensive Land Use Plans*, 902 So. 2d 763, 766 (Fla. 2005); *see also Advisory Op. to Att'y Gen. re Fee on Everglades Sugar Prod.*, 681 So. 2d 1124, 1127 (Fla. 1996) ("The single-subject limitation is a rule of restraint designed to guard against unbridled cataclysmic changes in Florida's organic law, and 'logrolling[.]"); *Advisory Op. to Att'y Gen. re Right to Treatment & Rehab.*, 818 So. 2d 491, 494–95 (Fla. 2002) ("The purpose of the single-subject rule is twofold: to prevent 'logrolling' and to prevent . . . 'precipitous' and 'cataclysmic' changes in state government.").

[192] *Fine*, 448 So. 2d at 990-91.

[193] *Advisory Op. to Att'y Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Cong. Districts Which Replaces Apportionment by Legislature*, 926 So. 2d 1218, 1226 (Fla. 2006) ("[T]he Court must consider whether the proposal affects separate functions of government and how the proposal affects other provisions of the constitution."); *see also Advisory Op. to Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 490 (Fla. 1994).

regarding discrimination against persons which creates, establishes or recognizes any right, privilege or protection for any person based upon any characteristic, trait, status, or condition other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, or familial status."[194] The Court struck the amendment. It "modifie[d] article I, section 2 of the Florida Constitution, dealing with the basic rights of all natural persons, and also affect[ed] article I, section 6 of the Florida Constitution, dealing with the right of employees to bargain collectively," and therefore lacked the "necessary oneness of purpose."[195]

Also illustrative is the "Right of Citizens to Choose Health Care Providers" initiative, which would have added a new section to Article I providing, in relevant part, that "[t]he right of every natural person to the free, full and absolute choice in the selection of health care providers, licensed in accordance with state law, shall not be denied or limited by law or contract."[196] The Court determined that the proposed amendment did not "embrace but one subject" because it "would impact the constitutional rights of privacy and to bargain collectively."[197]

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[194] *Advisory Op. to Att'y Gen. re Restricts L. Related to Discrimination*, 632 So. 2d 1018, 1019 (Fla. 1994).

[195] *Id.* at 1019. Opponents alleged that the initiative was intended to preempt any state or local laws prohibiting discrimination based on sexual orientation. They pointed out the amendment would both add to and subtract from Article I, section 2. On one hand, it would add to the number of expressly protected statuses (article I, section 2 included only race, religion, and physical handicap at the time); on the other, groups like the "economically disadvantaged" and the "medically challenged" would no longer enjoy laws discriminating in their favor. Initial Brief of Broward County Hispanic Bar Association, Inc., et al. in Opposition to the Proposed Amendments, *Advisory Op. to Att'y Gen. re Restricts L. Related to Discrimination*, No. 82674, 1993 WL 13012103, at *23 (Fla. Mar. 3, 1994). Amici labor and teachers unions pointed out that the amendment would also strip collective bargaining rights under Article I, section 6, which prohibits discrimination on the basis of "membership or non-membership in any labor union or labor organization."

[196] *Advisory Op. to Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 565 (Fla. 1998).

[197] *Id.* at 566 n.1. Insurance companies and other opponents argued that "[t]he proposal . . . affects more than one existing constitutional provision. It narrows the right of collective bargaining granted by Article I, § 6, Florida Constitution, eliminating managed health care as a legitimate subject of bargaining, at least as to public employees. It narrows the privacy rights of natural persons now granted by Article I, § 23, Florida Constitution. It eliminates a choice individuals now have: the right to select managed care as a means of providing themselves with affordable, quality health care." Brief in Opposition to the Proposed Constitutional Amendment on Behalf of Floridians for Quality Patient Care, et al., *Advisory Op. to Att'y Gen. re Right of Citizens to Choose Health Care Providers*, No. 90160, 1997 WL 33491220, at *3 (Fla. Apr. 14, 1997).

Bar the Government from Treating People Differently Based on Race in Public Education is another example. As discussed above, the Court found that initiative out of compliance with section 101.161 for failing to identify its substantial effects on Article I, sections 2 (basic equality) and 23 (access to courts).[198] However, the Court went on to explain that the initiative would have violated the single-subject rule either way. The Court reasoned that, because each right is "included in the constitution for a distinct and specific purpose," an amendment curtailing multiple rights necessarily embraces more than one purpose.[199] "It is precisely this sort of 'cataclysmic change' that the drafters of the single-subject rule labored to prevent."[200]

Like the initiatives in *Restricts Laws 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*, Initiative Petition 23-07 would curtail multiple rights guaranteed by different sections of Article I.[201] No amount of disclosure can save such an amendment—the problem is not too little disclosure, but rather too many subjects. This reflects the understanding of the "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.[204]

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[198] *Id.* The amendment would have affected Article I, section 2 for two reasons: (1) the prohibition against depriving rights based on race, religion, etc. had not previously been construed as prohibiting *preferential* treatment on those bases, and (2) the amendment would have created new distinctions between discrimination based on race, color, ethnicity, or national origin on the one hand, and religion and physical disability on the other. *Id.* at 894. Article I, section 21, provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The provision in the amendment invalidating court orders and consent decrees issued after the effective date would have burdened Floridians' ability to obtain redress for injuries emanating from discriminatory practices. *Id.*

[199] *Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d at 893.

[200] *Id.* at 896.

[201] 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 Article I, section 2 and collective bargaining rights under Article I, section 6, but only public employees would have felt both effects. *See* Brief on Behalf of Floridians for Quality Patient Care, et al., 1997 WL 33491220, at *4.

[204] *Id.* at 896.

To highlight this rule's important role in the section 16.061 analysis, 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 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.[205] 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 law. [206] Misleading in the negative sense? No; the ballot summary clearly identifies the sections of the

[205] *Oral Arguments*, *supra* at 26:27.

[206] *Advisory Op. to Att'y Gen. re Adult Use of Marijuana*, 315 So. 3d 1176, 1179 (Fla. 2021) (striking a petition, the ballot summary for which stated that the amendment would "[p]ermit[] adults 21 years or older to possess, use, purchase, display, and transport up to 2.5 ounces of marijuana and marijuana accessories for personal use for any reason," even though possession of marijuana remained illegal under federal law).

Constitution that would be substantially affected.[207] 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."[208] 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]."[209]

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 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.'"[210] Indeed, the amendment would "leave the prime function of the branches intact."[211]

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[207] 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 by the ballot summary.

[208] Answer Brief of Floridians Protecting Freedom, Inc., *Advisory Op. to Att'y Gen. re Limiting Gov. Interference with Abortion*, No. 23-1392 at 15 (Nov. 10, 2023) (quoting *Advisory Op. to Att'y Gen. re Rts. of Elec. Consumers Regarding Solar Energy Choice*, 188 So. 3d 822, 827–28 (Fla. 2016)).

[209] *See id.* at 19.

[210] *Id.* at 20 (quoting *Rts. of Elec. Consumers Regarding Solar Energy Choice*, 188 So. 3d at 830).

[211] *Id.* at 20-21 (quoting *Right to Treatment & Rehab*, 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 Constitution. The executive would continue to execute '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

The only consideration left is how the proposal affects other provisions of the Constitution, and this is where the purge amendment clearly fails. Legalizing murder for a 12-hour period would eliminate, albeit temporally, 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.

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 is unequivocal: they believed that conception creates a legal "person" bearing an inalienable right to life and entitled to state protection from private violence. As the law stands, those who would wish to write the preborn out of their charter may not do so by citizen initiative.

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propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws.").