State Discretion Is Not Enough: The Case for a Constitutional Right to Fetal Personhood

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I. INTRODUCTION 632
II. HISTORICAL TREATMENT OF PERSONHOOD 635
A. Personhood as It Relates to Slavery 636
B. Personhood as it Relates to the Unborn 640
1. Eugenics as Early Impetus for Legalized Abortion .. 641
2. The Notion That Life Begins After "Quickening" 644
3. Modern Scientific Evidence That Life Begins at Conception 645
4. The Abortion Procedures 650
i. The Abortion Pill 651
ii. Dilation and Curettage Abortions 653
iii. Dilation and Evacuation Abortions 654
iv. Late-Term (Induced) Abortions 657
v. Ectopic Pregnancy and Miscarriage Treatment Distinguished 658
III. ANALYSIS 660

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A. The Unborn as Natural Persons Under the Law *661*
B. Inconsistency in State Treatment of the Unborn *665*
1. Anticipating *Dobbs* 666
2. States Protecting Abortion 668
3. Comparison of Historical and Current Treatment of Personhood 671
C. Personhood and Arbitrary Characteristics *675*
1. The Intrinsic Value of Human Beings 676
2. Thomson's Foundational Argument for Bodily Rights 677
3. Viability 680
4. Birth 682
IV. PROPOSED SOLUTION 683
V. CONCLUSION 688

I. INTRODUCTION

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[1] was a step in the right direction in confirming there is no constitutional right to an abortion. By framing the issue through the lens of abortion, however, the Court abdicated its duty to adjudicate whether the Constitution protects the life of an unborn child. Because states have enacted laws varying in their protection of unborn children, their lives are not uniformly protected nationwide.[2] Abortion

1. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 292 (2022).

2. For states that have passed laws protecting the lives of the unborn, see ALA. CODE § 26-23H-1 (2019); ARIZ. REV. STAT. § 13-3603; § 36-2151 (LexisNexis 2021); ARK. CODE ANN. § 5-61-301 (2013); FLA. STAT. § 390.0111 (2022); GA. CODE ANN. § 16-12-141 (2019); IDAHO CODE § 18-622 (2020); IND. CODE § 16-34-2-1 (2013); IOWA CODE § 146C.1 (2018); KY. REV. STAT. ANN. § 311.772 (West 2019); LA. STAT. ANN. § 40:1061 (2015); MISS. CODE ANN. § 41-41-45 (2022); MO. REV. STAT. §188.017 (2019); N.D. CENT. CODE § 14-02.1-05 (2023); OHIO REV. CODE ANN. § 2919.192 (LexisNexis 2019); OKLA. STAT. tit. 21, § 861 (2023); S.C. CODE ANN. § 44-41-650 (2021); S.D. CODIFIED LAWS § 22-17-5.1 (2005); TENN. CODE ANN. § 39-15-213 (2019); TEX. HEALTH & SAFETY CODE ANN. § 245.002 (West 2017); UTAH CODE ANN. § 76-7a-201 (LexisNexis 2020); W. VA. CODE § 16-2R-3 (2022); WIS. STAT. § 940.15 (2011); WYO. STAT. ANN. § 35-6-102 (2022).

For states that have protected abortion, see ALASKA STAT. § 18.16.010 (1970); CAL. HEALTH & SAFETY CODE § 123466 (Deering 2002); COLO. REV. STAT. §

proponents believe "life" is more than just human existence or is most relevant when an unborn child can survive outside of the womb,[3] but human life is intrinsically valuable at all stages.[4] When the protection of constitutional rights is determined by a definition, that definition should not be left up to the states' discretion. Unborn children should be considered persons under the law instead of having their inalienable right to life determined arbitrarily by the states. Because the *Dobbs* Court did not affirm the right to life for unborn children, the federal Constitution should be amended to reaffirm an unborn child's right to life from the moment of conception to natural death.

The United States does not have a pristine history in defending inalienable rights of certain groups; unborn children are not the first to be denied legal personhood based upon arbitrary determinations.[5] African Americans were denied both legal personhood status and their inalienable rights by both the states in which they were enslaved and by racial manipulation of the Constitution.[6] Slaves were defined as property or chattel, not persons worthy of constitutional rights,

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25-6-403 (LexisNexis 2022); CONN. AGENCIES REGS. § 19-13-D54 (2005); DEL. CODE ANN. tit. 24, § 1790 (2017); HAW. REV. STAT. § 453-16 (1970); 775 ILL. COMP. STAT. ANN. 55/1-15 (LexisNexis 2019); KAN. STAT. ANN. § 65-6703 (1992); ME. STAT. tit. 22, § 1598 (1978); MD. CODE ANN., HEALTH–GEN. § 20-209 (LexisNexis 1991); MASS. ANN. LAWS ch. 112, § 12N (LexisNexis 1974); MICH. CONST. art. 1, § 28; MINN. STAT. § 145-409 (2023); MONT. CODE ANN. § 50-20-109 (1974); NEB. REV. STAT. § 28-327 (1977); NEV. REV. STAT. § 442.250 (1973); N.H. REV. STAT. ANN. § 329:44 (LexisNexis 2021); N.J. REV. STAT. § 10:7-2 (2021); N.M. STAT. ANN. § 24-34-3 (LexisNexis 1973); N.Y. PUB. HEALTH LAW§ 2599-aa (LexisNexis 2019); N.C. GEN. STAT. § 14-45-1 (1967); OR. REV. STAT. § 2919.12 (1974); 18 PA. CONS. STAT. § 3211 (1982); 23 R.I. GEN. LAWS § 23-4.13-1 (2019); VT. STAT. ANN. tit. 18, § 9497 (2019); VA. CODE ANN. § 18.2-72–18.2-73 (1975); WASH. REV. CODE § 9.02.100 (1992).

3. *See infra* Section III.B.3.

4. *See infra* Section III.B.1.

5. In a disturbing turn of events, in February 2023, a judge in Fairfax County, Virginia resurrected an old slave law to support his ruling that cryo-frozen human embryos could be deemed chattel in a couple's divorce proceedings. *See infra* notes 255–60 and accompanying text.

6. *See* Dred Scott v. Sandford, 60 U.S. 393, 421–22 (1857) ("Here the line of distinction is drawn in express words. Persons of color, in the judgment of Congress, were not included in the word citizens, and they are described as another and different class of persons . . . .").

resulting in the dehumanization of African Americans as a whole.[7] Prior to the Civil War, states were free to statutorily define human beings as their legislatures saw fit, and many purposefully excluded African Americans from being considered persons under the law.[8] After the war, the states ratified the 13th, 14th, and 15th Amendments to the Constitution, forcing southern states to amend their laws and constitutions to outlaw slavery.[9] This was an important first step in acknowledging the innate human dignity of African Americans worthy of constitutional protection.[10]

The troublesome history of denying personhood status to groups of human beings can serve as a guide moving forward in a post-*Dobbs* America.[11] Based on incontrovertible facts, a unique human being, separate from but dependent on its mother, comes into existence at

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7. *See* Orville Vernon Burton, *The Creation and Destruction of the Fourteenth Amendment During the Long Civil War*, 79 LA. L. REV. 189, 204 (2018) (discussing how the *Dred Scott* decision reverberated throughout the states).

8. *See* David Thomas Konig, *The Long Road to* Dred Scott*: Personhood and the Rule of Law in the Trial Court Records of St. Louis Slave Freedom Suits*, 75 UMKC L. REV. 53, 59 (2006) ("Yet common to the 'law' of slavery in its many forms was the second clash of mutually incompatible legal principles—that of the slave as person and that of the slave as property.").

9. *See generally* David R. Upham, *The Understanding of "Neither Slavery nor Involuntary Servitude Shall Exist" Before the Thirteenth Amendment*, 15 GEO. J. L. & PUB. POL'Y 137, 140 (2017) ("[B]y the time of the Amendment's ratification process at the end of 1865, [neither slavery nor involuntary servitude shall exist] already appeared in the state constitutions of twenty-three of the thirty-six states.").

10. This Note is not a wholesale comparison of abortion and slavery; rather, it looks at the treatment of personhood for African Americans as slaves and the unborn based on arbitrary characteristics by the legislature and the courts. African Americans were denied almost every right simply for the color of their skin and their status as slaves, but this Note addresses the foundational right upon which all others depended for African Americans: the right to liberty. Regarding the unborn, this Note addresses their foundational right upon which all rights, including the right to liberty, depend: the right to life. Justice Brennan once described the right to life as the "right to have rights." Furman v. Georgia, 408 U.S. 238, 289–92 (1972). This Note, therefore, limits the scope of discussion to the denial of these two inherent rights.

11. African Americans are not the only group historically denigrated as partial or subjective persons under the law. This Note, however, without minimizing what other groups have suffered, deals only with the plight of African American personhood regarding slavery and the unborn's personhood regarding abortion.

fertilization.[12] Denying this human being, now in existence, the right to live in favor of its mother's right to autonomy means a group of human beings is systematically denied the threshold constitutional right that begets all other rights—the right to live. To be sure, most states assign personhood status to the unborn at some stage of gestation.[13] But assigning personhood status to the unborn based on arbitrary characteristics or properties that make human life subjectively valuable should not be the foundation for constitutional protection.[14] Until a uniform solution is enacted, the differing state laws will allow for discrimination based on those unborn children that are valued and those that are not.

This Note proposes that a constitutional amendment is necessary to ensure that the sanctity of human life is recognized as an inalienable right from conception to natural death. Part II examines the legal history of personhood within the United States, focusing on slavery's denial of personhood to African Americans based on the color of their skin. Part II also discusses the gradual dehumanization of the unborn through calculated policy and the history of personhood within the Fourteenth Amendment. Part III asserts that the extreme variations in current state abortion laws fail to give uniform constitutional protection to the unborn, causing the unborn child's constitutional right to life to depend on where the mother resides rather than guaranteeing that right to life regardless of the mother's residence. Part III also compares the states' legal treatment of personhood for African Americans to their varied treatment of unborn children. Part IV proposes a constitutional amendment as the best means of providing uniform constitutional protection to the unborn by classifying them as legal persons with the right to life from conception to natural death. Part V briefly concludes.

II. HISTORICAL TREATMENT OF PERSONHOOD

The United States has at times failed to live up to its own promise of equality, the most extreme example being the legal denial of equality and personhood status to African Americans on the basis of

12. *See infra* Section II.B.3 (detailing fetal gestation timeline from fertilization to birth).

13. *See infra* Section III.A.

14. *See infra* Sections III.B.

race.[15] Just as race cannot be used as a legal basis for denying personhood status, arbitrary characteristics about human development in the womb should not be used as a legal basis for establishing personhood. Currently, there is no set constitutional definition for personhood status regarding the unborn. *Roe v. Wade* specifically excluded the unborn from the meaning of "person" within the 14th Amendment.[16] Continuing the trend, *Dobbs* also refused to include the unborn within the 14th Amendment's protections, demonstrating an unwillingness to impose one "theory of life" onto the states.[17] As a result, the states enacted laws that range from vilifying the unborn, even well after birth, to protecting the unborn from conception.[18]

A. Personhood as It Relates to Slavery

The states' inability to uniformly decide who is granted personhood status, however, dates back to the founding of the country.[19] While the abolition of slavery in northern states did not put

15. Thanks in large part to the *Dred Scott* decision, the line drawn by the Founding Fathers affording rights based on one's status as free or slave was erased and redrawn based on color. *See* Dred Scott v. Sandford, 60 U.S. 393, 412(1857); Burton, *supra* note 7, at 191–95, 236.

16. 410 U.S. 113, 158 (1973).

17. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263 (2022).

18. *See, e.g.*, CAL. HEALTH & SAFETY CODE §123467 (Deering 2023) (including perinatal death as a pregnancy-related death outcome that cannot be investigated). The bill itself fails to define perinatal death, but it is defined elsewhere in California's code as "the period from the establishment of pregnancy to one month following delivery." CAL. WELFARE & INST. CODE § 14134.5 (Deering 2020). The bill also fails to define "pregnancy-related cause," in connection with perinatal death and shields the mother and anyone who assists her from civil and criminal charges for any 'actions or omissions' related to her pregnancy. Greg Burt, *Pastors Bringing Over 1500 People to CA Capitol Tomorrow to Oppose Infanticide Bill*, CAL. FAM. COUNCIL (Apr. 18, 2022), https://www.californiafamily.org/2022/04/pastors-bringing-over-1500-people-to-ca-capitol-tomorrow-to-oppose-infanticide-bill/. Thus, in California, even a one-month-old baby's life is not protected and his or her death cannot be investigated.

19. Vermont was the first state to abolish slavery by way of a state constitution in 1777. *See* VT. CONST. ch. 1, art.1, § 2. By 1804, the rest of the northern states had abolished slavery by either court order or legislation, but the southern states refused to give up their right to slavery and continued deny African Americans personhood status. *See* James Oakes, *Making Freedom National: Salmon P. Chase and the*

African Americans on equal footing with white Americans, it set them on a slow and tedious path to full citizenship by allowing them to be their own person with at least some rights.[20] It took a war to force the southern states to recognize African Americans as persons under the law.[21] African Americans, enslaved or freed, were uniquely discriminated against because of their skin, a characteristic beyond their control and a fundamentally unfair foundation for denying rights.[22] They had no civil or political rights and suffered horrific abuse at the hands of slaveowners.[23] Designation as chattel property further dehumanized African Americans.[24]

Before the Civil War, the institution of slavery was a state issue; even the most radical abolitionists initially argued that the federal government had no ability to abolish slavery.[25] The slave colonies in the South refused to adopt the Constitution unless African Americans were counted to boost their population numbers and representation in Congress, resulting in the Three-Fifths Clause.[26] The Clause[27] left the

Abolition of Slavery, 13 GEO. J. L. & PUB. POL'Y 407, 409 (2016) (explaining the "first emancipation" concept of northern African Americans in the aftermath of the Revolutionary War abolishing slavery). *See also* An Act for the Gradual Abolition of Slavery, 5th Gen. Assemb. (Pa. 1780) (abolishing slavery from the date of enactment onward).

20. Burton, *supra* note 7, at 197; *see also* Fran Lisa Buntman, *Race, Reputation, and the Supreme Court: Valuing Blackness and Whiteness*, 56 U. MIAMI L. REV. 1, 4–5 (2001) (discussing the path to obtaining full legal rights in the United States). Freed Black men could vote in northern states, but the main advantage freed African Americans received in northern states was their liberty that should have been guaranteed by the Declaration of Independence and defended by the Constitution.

21. Upham, *supra* note 9, at 139–40, 146

22. *See* Sandra L. Rierson, *Tracing the Roots of the Thirteenth Amendment*, 91 UMKC L. REV. 57, 72 (2022) (analyzing the treatment of African Americans before and after the passage of the Thirteenth Amendment).

23. *Id.* at 77.

24. *Id.* at 79.

25. *See* Oakes, *supra* note 19, at 417 (discussing the gradual abolition of slavery in northern states and the eventual fight for a constitutional amendment ending slavery).

26. U.S. CONST. art. I, § 2, cl. 3 (Three-Fifths Clause).

27. U.S. CONST. art. IV § 2, cl. 3 (Fugitive Slave Clause).

reclaiming of runaway slaves to the states to enforce.[28] By 1804, existing states had taken their stance on slavery, either for it or against it, and new states admitted into the Union were divided up to keep the balance of free states and slave states relatively equal.[29] African Americans were discounted as full legal persons under the law, despite being inherently deserving of personhood status as human beings. Constitutional protections for African Americans, therefore, depended upon whether they resided in a state that had abolished slavery.

Inconsistent protections for African Americans meant that, at times, they were treated as persons under the law when convenient; in the South, African Americans were counted as "persons" for the purpose of white representation in the House of Representatives but had no real rights or freedoms.[30] Moreover, statutory law protected African Americans from homicide, recognizing their humanity in this instance, while still retaining their *status* as slaves and therefore not holding the civil rights white men possessed.[31] The idea that all human beings are innately created equal and deserving of life and liberty did not apply to them because of the color of their skin.[32] Two Supreme Court cases stand out as examples of the legal system denying African Americans the inalienable right to liberty: *Prigg v. Pennsylvania*[33] and *Dred Scott v. Sandford*.[34]

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28. *See* H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 LAW & HIST. REV. 1133, 1137 (2012) (discussing the repercussions of the Fugitive Slave Clause in southern states).

29. MO. REV. STAT. § 3.545 (Missouri Compromise of 1820); *see also* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 100–03 (1978) (discussing the impact of slave state compromises on *Dred Scott*).

30. Rierson, *supra* note 22, at 75–77.

31. *See, e.g.*, Neal v. Farmer, 9 Ga. 555, 582 (1851); *see also* Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047, 1061 (2007) ("The Courts across several decades and many jurisdictions formulated the problem as one of drawing a line between personhood and property. 'In expounding [the] law,' Chief Justice Taney wrote while riding circuit in Virginia in 1859, 'we must not lose sight of the twofold character which belongs to the slave. He is a person, and also property.'").

32. Dred Scott v. Sandford, 60 U.S. 393, 421–22 (1857).

33. 41 U.S. 539 (1842).

34. 60 U.S. 393 (1857).

Prigg v. Pennsylvania concerned the constitutionality of Pennsylvania's abolition act, which stated that anyone who forcibly removed any person with the intent of selling him or her as a slave would be guilty of a felony.[35] The Court spoke of Margaret Morgan, the escaped African American in question, in cold terms as property, depriving her of the dignity she deserved as a human being.[36] She, along with other African Americans, was labeled as "goods" that a "master may lawfully claim and retake." Margaret Morgan deserved to be treated as a person with her liberty guaranteed by the Constitution, and not as property subject to another, because she was a human being.

Dred Scott went further, establishing the concept that one's race and not status as a slave determined participation in American life and protection of natural rights by the Constitution.[37] *Dred Scott* allowed states to "unquestionably determine his status or condition," and further allowed the state to place African Americans among those "not recognized as citizens," thereby denying "privileges and immunities enjoyed by other citizens."[38] The Court made skin color the "line of distinction" for those deserving of the right to liberty regardless of the state in which they resided.[39] While not the sole catalyst for the Civil War, *Dred Scott* ignited abolitionists' passions in northern states, pushing the country towards the inevitable.[40]

Outlining his plan for reunification of the country in his Gettysburg Address, Lincoln called for "a new birth of freedom" and for a nation "conceived in liberty and dedicated to the proposition that all men are created equal."[41] Frederick Douglass agreed with Lincoln, reminding people that the Declaration of Independence, America's founding document, was "broad enough . . . for the freedom and

35. *Prigg*, 41 U.S. at 613. Morgan escaped to Pennsylvania but was forcibly removed by Prigg, an agent of her master. *Id.* at 609. The Pennsylvania Supreme Court affirmed Prigg's conviction for unlawfully removing Morgan, but the Supreme Court reversed his conviction. *Id.* at 625–26.

36. *Id.* at 568.

37. *Scott*, 60 U.S. at 412.

38. *Id.* at 422.

39. *Id.* at 421.

40. *See* Oakes, *supra* note 19, at 408–09.

41. President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

elevation of all people of this country."[42] The Reconstruction Amendments banning slavery, ensuring the right to life, liberty, and property, and protecting a man's right to vote regardless of race were Lincoln's attempts at enshrining the ideals of the Declaration of Independence into the Constitution.[43] While not perfect solutions,[44] the Amendments secured the constitutional protection of liberty for four million freed African Americans by expanding personhood to include all people, regardless of race, and unified the definition of personhood across the nation.[45]

The understanding that human nature should be the foundation for constitutional rights guided radical Republicans in their fight for the abolition of slavery. In the first Republican national convention, Republican party leaders explicitly connected the ideals laid out in the Declaration of Independence to the idea that liberty is an inalienable right afforded to all men, regardless of race.[46] It was the party's "duty" to protect the Constitution "against all attempts to violate it for the purpose of establishing slavery."[47] This goal would be accomplished by prohibiting the existence of "positive legislation" or the "extension" of such legislation that would deny liberty to persons discriminately.[48] Thus, the foundation for a constitutional amendment protecting the liberty of all persons was established.

B. Personhood as it Relates to the Unborn

Whether the Constitution protects the right to life for unborn children, however, is still an ongoing dispute. Before the Court decreed abortion as a constitutional right in 1973, activists had been pushing for a cultural change on abortion since the previous decade.[49] When the

42. Frederick Douglass, West India Emancipation Speech in Canandaigua, N.Y. (Aug. 3, 1857).

43. Burton, *supra* note 7, at 196–98.

44. *Id.*

45. *Id.* at 197.

46. Upham, *supra* note 9, at 145.

47. *Id.* (quoting Republican National Platform of 1856, *reprinted in* GEORGE WASHINGTON PLATT, A HISTORY OF THE REPUBLICAN PARTY 90, 90-91 (1904)).

48. *Id.*

49. National Abortion Rights Action League ("NARAL") was founded in 1969 with the express goal of overturning abortion laws in America, and the National

Court issued its opinion in *Roe v. Wade*, thirty states still prohibited abortion at all stages while about a third had liberalized abortion laws to varying degrees.[50]

1. Eugenics as Early Impetus for Legalized Abortion

Modern abortion as we know it was born out of the birth control movement started by Planned Parenthood founder Margaret Sanger, a well-known eugenicist.[51] While Sanger's eugenicist goals were focused on birth control, others saw the opportunity to inextricably link abortion to eugenics.[52] Alan Guttmacher, former Planned Parenthood

Organization for Women ("NOW"), while originally against abortion rights, soon changed to support the repeal of abortion laws. *See The Fight for Our Lives*, NARAL https://www.prochoiceamerica.org/timeline/ [https://web.archive.org/web/20230715171012/https://www.prochoiceamerica.org/timeline/] (last visited Dec. 28, 2022). *Compare* Betty Friedan, *The National Organization for Women 1966 Statement of Purpose*, NOW (Oct. 29, 1966), https://now.org/about/history/statement-of-purpose/ (making no reference to a need for abortion to gain equality for women), *with Our Issues*, NOW, https://now.org/about/our-issues/ (last visited Dec. 28, 2022) (explicitly naming "Reproductive Rights and Justice" as a core issue central to women's equality. *But see* Erica Bachiochi, *A Putative Right in Search of a Constitutional Justification: Understanding* Planned Parenthood v. Casey*'s Equality Rationale and How It Undermines Women's Equality*, 35 QUINNIPIAC L. REV. 593, 632-33 (2017) (making the argument that abortion is not necessary for women's equality).

50. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 228 (2022). Similarly, free states outnumbered slave states at the start of the Civil War. *See American Slavery and the Conflict of Laws*, 71 COLUM. L. REV. 74, 92 (1971) [hereinafter *American Slavery*] (discussing the uneven congressional representation as part of the breakdown between communications between states).

51. Margaret Sanger, *Birth Control and Racial Betterment*, BIRTH CONTROL REV., Feb. 1919, at 12 [hereinafter *Racial Betterment*]. While Planned Parenthood did not begin as an abortion facility due to Sanger's opposition to abortion practice, over time it, along with its affiliates, quickly morphed into the largest abortion provider in the United States. *See* PLANNED PARENTHOOD, HERE FOR A REASON: 2020–2021 ANNUAL REPORT 26–31 (2021). Sanger focused most of her efforts on controlling the population of the black community throughout the country, even recruiting black ministers to soften her message. *Birth Control or Race Control? Sanger and the Negro Project*, N.Y. Univ.: MARGARET SANGER PAPERS PROJECT (Fall 2001), https://sanger.hosting.nyu.edu/articles/bc_or_race_control/.

52. *See* Box v. Planned Parenthood of Indiana & Kentucky, 139 S. Ct. 1780, 1784-87 (2019) (Thomas, J., concurring) (tracing the abortions-eugenics history).

president, endorsed the use of abortion for eugenics, believing the practice "must be separated from emotional, moral, and religious concepts" and focus only on qualities society deems worthy.[53] This goal of ensuring only "worthy" people were born was effectuated through the use of abortion.[54] By dehumanizing the unborn to a series of qualities felt to be helpful to society, the idea that abortion killed an innocent human being worthy of life and protection began to fade.[55] Organizations like NOW and NARAL, aided by pro-choice doctors, launched national campaigns based on concerns for the safety of women who were undergoing illegal abortions[56] and, thus, the culture slowly started to change in favor of an abortion right, ultimately leading to *Roe v. Wade*.[57]

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53. *Id.* at 1789 (Thomas, J., concurring) (quoting A. GUTTMACHER, BABIES BY CHOICE OR BY CHANCE 186-88 (1959)).

54. *Id*. at 1784–87 (Thomas, J., concurring). Race was a relevant factor for eugenics advocates, as most were concerned about the high birth rates of third-world countries and nonwhite races, but was not the only factor considered for society's "fitness." *Id.* Other qualities that determined "fitness" were "feeble-mindedness," insanity, "deformed," and "dependent," to name just a few. *Id.* Dependent used here meant orphans. *Id.* Regarding race and eugenics via abortion, black women obtain abortions nearly 3.5 times the amount for white women—the abortion ratio being the number of abortions per 1,000 live births. *Id.* In New York City, black children are up to eight times more likely to be aborted than white children. *Id.* This would seem to indicate eugenics is well on its way to achieving its goal.

55. *Id.* (Thomas, J., concurring).

56. Pro-abortion advocates claimed the number of women who died from illegal abortions prior to Roe was 5,000 to 10,000 a year, but this has been proven false by Bernard Nathanson, medical provider and cofounder of NARAL, who originally came up with the estimate. FRANCIS J. BECKWITH, DEFENDING LIFE: A MORAL AND LEGAL CASE AGAINST ABORTION CHOICE 121 (2007). As expected, in 1972, pro-abortion advocates and pro-life advocates differed on the number of women who have died from illegal abortion: pro-abortion advocates put the number at around 1,000; pro-life advocates put it around thirty-nine; and some moderates say the number is likely around 500 per year. *Id.* Every death related to abortion is tragic and should be mourned, not used for political purposes to further an agenda. At the same time, it is impossible to discount the 63 million unborn children lost to abortion. *See* NAT'L RIGHT TO LIFE COMM., ABORTION STATISTICS (2022), https://www.nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf.

57. This is not offered to discount real concerns for women who were obtaining illegal abortions before *Roe v. Wade*, but instead, as evidence that there was more than one motive for legalizing abortion, some of those being eugenics and population control.

With *Roe*, abortion became a recognized constitutional right and states were prohibited from protecting prenatal life from fertilization through at least the first trimester.[58] In reality, abortion on demand was legalized throughout all nine months of pregnancy.[59] In 1992, the Court modified *Roe*'s holding in *Planned Parenthood v. Casey*[60] by doing away with *Roe*'s trimester scheme and largely ignoring the historical reasoning Justice Blackmun used in *Roe*.[61] *Casey* instead introduced an undue burden test, which denied States the ability to protect prenatal life until viability if such protection of the unborn constituted an "undue burden" on the woman seeking an abortion.[62] The undue-burden test, however, created problems in the lower federal and circuit courts because "determining whether a burden is 'due' or 'undue' is 'inherently standardless.'"[63] With *Casey*'s undue-burden test, the line between permissible and impermissible restrictions was "impossible to draw with precision."[64]

Abortion essentially enjoyed legal free reign until 2007,[65] when the Court declared the Partial-Birth Abortion Ban passed by Congress

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58. Roe v. Wade, 410 U.S. 113, 164 (1973).

59. Every state has an exception to abortion for the health of the mother, and in *Doe v. Bolton*, *Roe*'s companion case, the Supreme Court ruled that health must be taken in the broadest possible context, defined "in light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." Doe v. Bolton, 410 U.S. 179, 192 (1973). Thus, if a woman convinced her physician she needed an abortion for any health-related reason, she could get an elective abortion.

60. 505 U.S. 833 (1992).

61. *Id.* at 872.

62. *Id.* at 878. The majority opinion, however, struggled to define exactly what constituted an "undue burden." *Id.* at 985 (Scalia, J., concurring in part and dissenting in part).

63. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 281 (2022) (quoting *Casey*, 505 U.S. at 992 (Scalia, J., concurring in part and dissenting in part)).

64. *See id.* at 284 n.53–59 (comparing contradicting circuit court cases).

65. *See, e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 433–39 (1983) (holding that second-trimester abortions do not have to be performed only in hospitals); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) (holding that minors do not have to obtain parental consent to undergo an abortion); Colautti v. Franklin, 439 U.S. 379, 390–97 (1979) (holding that physicians do not have to determine viability in a particular manner). *Akron* also held that women do not have to give written consent after being informed of their child's age and development and risks of abortion, nor that women have to wait twenty-four

outlawing Dilation and Extraction ("D&X") procedures, also called partial-birth abortions, was constitutional.[66] Justice Kennedy, writing for the Court, gave an explicit description of the procedure at issue, focusing on how inhumane the procedure was to the unborn child and how it was not medically necessary for the mother.[67] States rushed to pass laws banning partial-birth abortions once the mechanics of the procedure received public attention and called for Congress to ban the procedure at the federal level.[68] Such is the power of the public having an intimate knowledge that abortion destroys an actual life, not a "potential life."[69]

2. The Notion That Life Begins After "Quickening"

Historically, states criminalized abortion after "quickening," a time when a woman knew with certainty that she was pregnant. Abortions prior to quickening were not criminalized because the medical knowledge of pregnancy and embryology had not evolved enough to know whether the fetus was alive or not.[70] Additionally, many induced miscarriages before quickening were seen as re-regulating a woman's body because a missed menstrual cycle was a health concern.[71] Abortifacients taken prior to quickening were likely

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hours to have an abortion. 462 U.S. at 442–45, 449–51. *Akron* further held that an aborted child's remains do not have to be treated in a humane and sanitary way. *Id.* at 451–52. *Colautti* also had an additional holding: a medical provider performing a post-viability abortion did not have to use the technique or procedure most likely to preserve the life of the unborn child. 439 U.S. at 397–401.

66. Gonzales v. Carhart, 550 U.S. 124, 132–33 (2007).

67. *Id.* at 137–41 (explaining the procedure in depth and citing congressional findings that determined a D&X procedure is "gruesome and inhumane" and "is never medically necessary and should be prohibited").

68. *Id.* at 140.

69. Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992) (describing abortion as a "unique act" because it terminates "life or potential life").

70. Steven A. Jacobs, *The Future of* Roe v. Wade*: Do Abortion Rights End When a Human's Life Begins?*, 87 TENN. L. REV. 769, 790–91 (2020).

71. *Id.* at 790–91. Jacobs draws from Leslie Reagan's book, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973 (1997), which extensively covered the history of abortion in America.

not recognized as an act to intentionally end a pregnancy or an unborn child's life but to improve a woman's health.[72]

Quickening, therefore, was the defining moment of human life and the beginning moment of obligation by the woman to carry her child to term without the right to abort.[73] This archaic understanding of the beginning of life was disproven by scientific discoveries in the early 1800s by Karl Ernst von Baer who discovered fertilization, a view soon adopted by the American Medical Association ("AMA").[74] In lockstep with science, American courts then discarded quickening as the basis for the beginning of human life, instead adopting fertilization.[75]

3. Modern Scientific Evidence That Life Begins at Conception

Justice Blackmun, author of the majority opinion in *Roe v. Wade*, complicated the scientific history of life when he wrote "when those trained in the respective disciplines of medicine" cannot agree when life begins, it is not for the courts to decide.[76] But he seemingly answered the question anyway when he stated that a fetus has "the capability of meaningful life" when viable outside the mother's womb, thus judicially determining when life begins.[77] According to Justice Blackmun, prior to viability, an unborn child was not a human life but a "potential life."[78] By declaring pre-viability fetuses as merely potential lives, the Court decided that human nature is not a sufficient basis for the value of human beings.[79] To defend against further attacks on the abortion right, pro-choice advocates launched an earnest defense

72. Jacobs, *supra* note 70, at 790–91.

73. *Id.* at 791–92.

74. *See* 12 AM. MED. ASS'N, THE TRANSACTIONS OF THE AMERICAN MECIAL ASSOCIATION 75–77 (1859) (adopting conception as official medical stance for when life begins); Jacobs, *supra* note 70, at 791–92.

75. Jacobs, *supra* note 70, at 791–92. The judicial decisions from this time period conclusively show these laws were passed with a "sincere belief that abortion kills a human being." Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 254 (2022) (citing cases).

76. 410 U.S. 113, 159 (1973).

77. *Id.* at 163.

78. *Id.* at 154.

79. *See infra* Sections III.C.1–3.

of abortion by promoting various subjective views on when life begins.[80]

Although there was a scientific consensus for when life began in 1973, pro-choice advocates obscured, sometimes intentionally, the facts on human development,[81] perhaps out of fear that if the country knew that life began at conception support for the right to life for the unborn would increase. The *Roe* Court's refusal to acknowledge the biological standard of when life begins in 1973 prompted a group of biologists to submit a brief to the Supreme Court when deciding *Dobbs* to correct the erroneous scientific basis from *Roe*; the biologists took no position on the legality or constitutionality of abortion, hoping only to educate the Court on the general consensus of when life begins: fertilization.[82] A comprehensive timeline of fetal gestation shows that human life begins at fertilization.

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80. *See infra* Sections III.C.1–3.

81. For a recent example of a major media outlet purposefully distorting the truth about abortions, see Poppy Noor, *What a Pregnancy Actually Looks Like Before 10 Weeks – in Pictures*, THE GUARDIAN (Oct. 19, 2022, 1:00 PM), https://www.theguardian.com/world/2022/oct/18/pregnancy-weeks-abortion-tissue. The Guardian received backlash for this article from both sides of the abortion debate for intentionally refusing to photograph the embryo in an effort to sanitize abortion and further dehumanize unborn babies. For a pro-choice response, see Greer Donley & Jill Weiber Lens, *Those Pregnancy Tissue Photos Were Destined to Backfire on Abortion Rights Supporters*, SLATE (Oct. 27, 2022), https://slate.com/news-and-politics/2022/10/guardian-pregnancy-tissue-photos-abortion-rights-misfire.html); for a pro-life response, see Edie Heipel, *The Guardian Is Wrong: This Is What a 9-Week Old Unborn Baby Looks Like*, CATHOLIC NEWS AGENCY (Oct. 21, 2022, 4:00 PM), https://www.catholicnewsagency.com/news/252619/the-guardian-is-wrong-this-is-what-a-9-week-old-unborn-baby-looks-like. The Guardian itself even published an article in 2009 about Lennart Nilsson's book of photographs of unborn children from fertilization through the third trimester. While Nilsson himself did not take part in the abortion debate, the 2009 article highlighted how his photos have been used "by demonstrating how early physical human characteristics can be seen, raising questions of when life starts." Homa Khaleeli, *The Story of Life*, THE GUARDIAN (Sept. 30, 2009), https://www.theguardian.com/society/2009/oct/01/lennart-nilsson-unborn-children.

82. Brief of Biologists as Amici Curiae in Support of Neither Party, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392). The brief attributed the Court's confusion to Texas's attorney general, in *Roe*, conceding in oral arguments that there were "still questions" in the study of embryology, nor could Texas affirmatively point to a case that established life beginning at fertilization. *Id.* at 3. But the brief went on to say that the idea that life begins at fertilization, first

When determining when a new human life begins, the key question to be answered is when a new cell, separate from the sperm and the egg, comes into existence as a "life."[83] The overwhelming majority of biologists understand this to be fertilization, so much so that many scientific journals believe there is no need to cite the statement that life begins at fertilization.[84] The time from fertilization to implantation to the first six weeks is crucial to show that an unborn child is actually alive, growing and developing, and that an abortion, no matter when performed, ends the life of that unborn child.

Fertilization, or conception, occurs when an egg is released from a woman's ovary and is penetrated by a sperm cell.[85] Conception can occur as soon as three minutes after sexual intercourse and as late as up to five days.[86] At conception, a genetically distinct human being is formed in a single-cell embryo, or zygote, including sex and other genetic features such as eye color, hair color, height, and all other

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discovered in the 1800s, "was such a self-evident fact that little work was done to study or communicate that consensus since it was difficult for scientists to imagine that it could ever be challenged or if there would ever be a time the view would not be common knowledge." *Id.* at 4.

83. Maureen Condic, *A Scientific View of When Life Begins*, CHARLOTTE LOZIER INST.: ON POINT SERIES (June 11, 2014), https://lozierinstitute.org/a-scientific-view-of-when-life-begins.

84. A study on the question of "when life begins" was conducted in 2018, asking two main questions: who do Americans believe is best suited to answer the question of when life begins, and who do biologists believe is best suited to answer the same question. Steven A. Jacobs, *The Scientific Consensus on When a Human's Life Begins*, 36 ISSUES IN L. & MED. 2, 221 (2021). 2,899 participants answered the question of who was best suited to determine when life begins, with the sample being predominantly pro-choice. *Id.* at 8. Eighty-one percent of participants selected biologists over religious leaders, philosophers, voters, and Supreme Court justices; this list was taken directly from *Roe*. *Id.*; Roe v. Wade, 410 U.S. 113, 159 (1973). The study then recruited biologists around the world, predominantly non-religious and pro-choice, and asked a six-question survey on when they believe life begins. Jacobs, *supra*, at 11. Ninety-five percent of the biologists surveyed "affirmed the biological view that 'a human's life begins at fertilizations.'" *Id.* at 17. *See also* Brief of Biologists as Amici Curiae in Support of Neither Party at 4, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

85. Patricio Ventura-Juncá & Manuel J. Santos, *The Beginning of Life of a New Human Being from the Scientific Biological Perspective and Its Bioethical Implications*, 44 Biological Rsch. 201, 204 (2011).

86. *Id.* at 204–05.

physical traits of its body.[87] The zygote then divides into two, then four, then eight cells;[88] after about three days of intense cell division, the zygote begins to form into the blastocyst.[89] By the sixth day following conception, the blastocyst "contain[s] cells which are totipotent, that is, . . . capable of becoming any of the specialized cells in the human body."[90]

The blastocyst moves through the fallopian tube into the mother's uterus to begin the process of implantation by the ninth or tenth day, and by the fourteenth day, differentiated cells form as well as the potential for the embryo to experience sensation.[91] Gastrulation, "the splitting of the embryonic mass of cells into three well-defined layers of cells from which all structures, organs, appendages, and assorted other anatomical phenomena derive," begins around the thirteenth or fourteenth day.[92]

After implantation, fetal development is measured in weeks instead of days. In the early weeks of the first trimester, the brain begins to develop as well as muscles that form the beginnings of the heart.[93] The heartbeat can be detected at six weeks and eyes are beginning to develop.[94] Limbs are slowly forming, and while the mother cannot feel any movement, the embryo is twisting its torso in

87. *Id.*

88. *Id.*

89. *Id.*

90. Vera Lúcia Raposo et al., *Human Rights in Today's Ethics: Human Rights of the Unborn (Embryos and Feotus)?*, 62 Cuadernos Constitucionales de la Cátedra Fadrique Furio Ceriol 95, 95 (2008).

91. *See* Ventura-Juncá & Santos, *supra* note 85, at 201–207.

92. BERNARD NATHANSON, THE HAND OF GOD: A JOURNEY FROM DEATH TO LIFE BY THE ABORTION DOCTOR WHO CHANGED HIS MIND 140 (2d. ed. 2013).

93. *Interactive Prenatal Development Timeline*, THE ENDOWMENT FOR HUM. DEV., https://www.ehd.org/science_main.php?level=i (last visited May. 20, 2024). During the fourth and fifth weeks, cells migrate to the gonads, and lungs start to form along with the spinal cord. *Id.* Joints and teeth start to form in the fifth week as well, and all spinal nerves are present by the end of five weeks. *Id.*

94. *Id.* The Endowment for Human Development has a policy for bioethical neutrality, which prohibits the organization from taking public policy positions on controversial bioethical issues. *Id.* The organization strongly believes that a thorough and honest understanding of human development should transcend all controversy. *Id.*

the womb and withdrawing its face from light touches to the mouth.[95] By the seventh week, the heart is nearly finished developing and beats at 165 to 170 beats per minute, the head can rotate, and reproductive organs are beginning to form.[96] All major organs are rapidly developing: the stomach, kidneys, liver, lungs, and intestines.[97] The embryo is officially classified as a fetus at eight weeks gestation.[98]

By the end of the first trimester at twelve weeks, the fetus looks like a fully formed person, and the organs produce their own hormones.[99] Rapid fetal development occurs in the second trimester, which spans thirteen to twenty-seven weeks.[100] The fetus can feel pain

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95. *Id.* (photographing the development of the embryo).

96. *Id.*

97. *Id.*

98. *Id.* The fetus's face begins to form into distinct features, and the body can stretch out and move. *Id.* By nine weeks, the fetus can sigh, stretch, move its head, open its mouth, and move its tongue. *Id.* The mother can take a blood test at ten weeks to know if she is carrying a boy or a girl, and the fetus's unique fingerprints are formed. *Id.*

99. *Id.* These hormones include thyroid-stimulating hormones, follicular hormones, and prolactin to name a few. *Id.*

100. Starting at twenty-two weeks, a fetus can be viable outside the mother's womb with extraordinary medical support. Edward F. Bell et. al., *Mortality, In-Hospital Morbidity, Care Practices, and 2-Year Outcomes for Extremely Preterm Infants in the US, 2013-2018*, J. AM. MED. ASS'N 248, 250–54 (2022). This study found that babies born at twenty-two weeks had a 30% survival rate with extraordinary medical care. *Id.* at 250–61. The survival rate jumped to 55% for infants born at twenty-three weeks. *Id.*

Viability can be determined by the medical professional overseeing the abortion, using the medical facts before him, that "there is a reasonable likelihood of the fetus's sustained survival outside the womb, with or without artificial support." Colautti v. Franklin, 439 U.S. 379, 388 (1979). The current survival rate for babies born at twenty-four weeks is 65%. Barbara J. Stoll et. al., *Trends in Care Practices, Morbidity, and Mortality of Extremely Preterm Neonates, 1993-2012*, J. AM. MED. ASS'N 1039, 1039 (2015).

This is a dramatic increase from *Roe v. Wade* in 1973, which put viability at twenty-eight weeks, and *Casey*, which put viability at twenty-five weeks. Justice Alito emphasized in *Dobbs* that survival and viability also depended on "the quality of the available medical facilities." Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 276 (2022) (quoting *Colautti*, 439 U.S. at 396 (1979). Thus, viability relies not totally on the actual age of the unborn child but on a number of factors, and using viability as a constitutional standard for personhood would therefore depend on where the mother resides, creating the possibility that an unborn child in a rural area would

beginning in the second trimester due to nerves developing all over the body.[101] The fetus is thus sensitive to touch and to disturbances to her environment in the womb.[102] Fingernails and teeth, as well as visible reproductive organs, are all present. The fetus can swallow, suck its thumb, and kick, which can be felt by the mother.[103] She has visible eyelashes and eyebrows, can open and close her eyelids, is covered with soft, downy hair, and grows in size and weight.[104]

The third trimester starts at twenty-eight weeks.[105] The fetus's senses of touch and hearing are improving, and the fetus responds to her mother's voice and other external stimuli.[106] The fetus continues to develop until about forty weeks, at which time the mother is ready to give birth.[107] Because constant, self-directed growth and development begins from the moment of conception, there can be no question when new human life comes into existence.

4. The Abortion Procedures

An induced abortion is the "use of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant with intent other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus."[108] Roughly 930,000 abortions were performed in 2020[109] whereas the CDC recorded roughly 3.6 million births for the same year.[110] Using this

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not be constitutionally protected depending on the medical equipment, but an unborn child in an urban environment would be protected.

101. *Interactive Prenatal Development Timeline*, *supra* note 93.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* Fetuses respond to different types of music during the third trimester and develop food preferences based on the mother's eating habits. *Id.*

107. *Id.*

108. TENN. CODE ANN. § 39-15-213(a)(1) (West 2022).

109. Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, PEW RSCH. CTR. (June 24, 2022), https://www.pewresearch.org/fact-tank/2022/06/24/what-the-data-says-about-abortion-in-the-u-s-2/.

110. BRADY E. HAMILTON ET. AL., NAT'L CTR. FOR HEALTH STAT. BIRTHS: PROVISIONAL DATA FOR 2020, 1 (2021).

data, abortion ends the life of around 21% of unborn children.[111] Because so many pregnancies end via induced abortion, it is important to explain how each abortion procedure dehumanizes unborn children.

i. The Abortion Pill

Medical, or chemical, abortions are performed during the first trimester of a woman's pregnancy.[112] The pills are ingested twenty-four to forty-eight hours apart and are approved by the FDA for use up to ten weeks from the first day of a woman's last menstrual period ("LMP").[113] There is very limited medical supervision for a woman during a medical abortion.[114] She goes to the abortion clinic to take Mifepristone (RU-486), and should receive an exam to confirm the pregnancy is within the approved time limits or a diagnosis of any complications, such as an ectopic pregnancy.[115] Mifepristone blocks the production of progesterone, a hormone that enables the mother's body to nourish and sustain the embryo's growth and development.[116] With the production of progesterone blocked, the embryo starves to

111. This estimation does not include miscarriages or ectopic pregnancies, as those are not considered to be abortions. Further, this does not take into account the number of embryos created for IVF purposes; the implications of a constitutional right to life on embryos created for IVF patients are beyond the scope of this Note.

The CDC and the Guttmacher Institute publish different numbers of abortions performed because the CDC does not collect data from California, New Hampshire, and at least one other state; additionally, Maryland, California, and New Hampshire do not collect data on late-term abortions, indicating the total numbers may be higher than reported. *See* NAT'L RIGHT TO LIFE COMM., *supra* note 56; *Questions and Answers on Late-Term Abortions*, CHARLOTTE LOZIER INST. (May 16, 2022), https://lozierinstitute.org/questions-and-answers-on-late-term-abortion/; Rachel K. Jones et al., *Long-Term Decline in US Abortions Reverses, Showing Rising Need for Abortion as Supreme Court is Poised to Overturn* Roe v. Wade, GUTTMACHER INST. (June 15, 2022), https://www.guttmacher.org/article/2022/06/long-term-decline-us-abortions-reverses-showing-rising-need-abortion-supreme-court.

112. *What Is Abortion?*, LIVE ACTION, https://www.abortionprocedures.com/abortion-pill/ (last visited May 20, 2024).

113. *Id.*

114. *Id.*

115. *Id.* Treatment for ectopic pregnancies, discussed *infra*, is not an induced abortion; further, treatment for ectopic pregnancies is not implicated by any law passed that restricts abortion.

116. *Id.*

death from lack of nutrition and dies in the womb.[117] After a woman takes Mifepristone in the abortion clinic office, she goes home with instructions to monitor her body's reaction to Mifepristone and take the second pill, Misoprostol, twenty-four to forty-eight hours later.[118] Misoprostol "causes contractions and bleeding to expel the baby from the womb."[119] Because the second pill is administered at home and without the supervision of a licensed medical professional, the woman bears the heavy burden of disposing of her child's remains.[120] The closer to ten weeks a woman undergoes a medical abortion, however, the higher the failure rate.[121] In addition to the failure rates of the abortion pills, many women who undergo medical abortions experience a myriad of adverse symptoms, both during the chemical abortion and from long-term complications such as excessive bleeding

117. *Id. But see How Does the Abortion Pill Work?*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/abortion/the-abortion-pill/how-does-the-abortion-pill-work (last visited May 20, 2024) (failing to mention what exactly the pills do to the woman's unborn child).

118. *What is Abortion?*, *supra* note 112. A common, but medically abnormal, reaction is a dangerous amount of blood loss after taking Misoprostol; this could be life threatening, should it occur. *Id.*

119. *Id.*; *see also How Does the Abortion Pill Work?*, *supra* note 117 (couching the description of the unborn child being expelled as "large blood clots"). Planned Parenthood's pervasive failure to accurately describe the "pregnancy tissue" has caused a spike in panicked calls to an abortion hotline, with women traumatized because they have "passed a tiny but recognizable fetus." Marin Cogan & Victoria Chamberlin, *What an Abortion Hotline Reveals About Reproductive Care After* Roe, VOX (Feb. 6, 2023, 6:00 AM), https://www.vox.com/the-goods/23580117/linda-prine-abortion-pills-medication-dobbs-roe.

120. *What is Abortion?*, *supra* note 112. Planned Parenthood fails to mention this in their explanation of how the pills work on their website. *How Does the Abortion Pill Work?*, *supra* note 117.

121. The FDA has listed the failure rate for the abortion pills at 7.3% when the pills are administered in the 10th week, three times higher than the FDA rate for medical abortions performed in the 7th week. U.S. FOOD & DRUG ADMIN., MIFEPREX FULL PRESCRIBING INFORMATION (2016), https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/020687s020lbl.pdf. Other studies, however, have recorded higher failure rates for medical abortions. One study, for example, found a failure rate of 5% at seven weeks and under, 8% at eight weeks, and 10% at nine weeks, significantly higher than the FDA's findings. H. Von Hertzen, et al., *Misoprostol Dose and Route after Mifepristone for Early Medical Abortion: A Randomised Controlled Noninferiority Trial*, 117 BRIT. J. OBSTETRICS & GYNAECOLOGY 1186, 1192 (2010).

during the abortion and for weeks after, vomiting, diarrhea, abdominal pain, and headaches.[122] Maternal deaths can also occur, especially when the pregnancy is misdiagnosed.[123]

ii. Dilation and Curettage Abortions

Dilation and Curettage ("D&C") suction, or aspiration, abortions are performed during the first trimester, usually during weeks five through thirteen after LMP.[124] A woman goes into an abortion clinic for this procedure and should receive an exam to diagnose any complicating factors.[125] During a D&C abortion, a medical provider uses a metal rod or medication to dilate the woman's cervix to gain access to the uterus.[126] Once the cervix is dilated, the provider inserts a suction catheter to vacuum the child out of the womb.[127] This suction vacuum has the "force approximately 10 to 20 times the force" of an average household vacuum.[128] The provider then inserts an instrument called a curette—a long, thin, sharp device—into the womb and scrapes her uterus to ensure that no fetal tissue remains.[129]

While routine, D&C abortions carry the risk of short-term and long-term complications.[130] A woman's cervix, uterus, intestines,

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122. *What is Abortion?*, *supra* note 112. Planned Parenthood advises women that bleeding and spotting is normal for several weeks but fail to mention any other physical symptoms women commonly experience. *How Does the Abortion Pill Work?*, *supra* note 117.

123. *See* WORLD HEALTH ORG., SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS (2d ed. 2012).

124. *Id.* at 38.

125. *Id*. at 41.

126. *Id.* at 38.

127. *What is Abortion?*, *supra* note 112. *But see How Does the Abortion Pill Work?*, *supra* note 117 (depicting the procedure as the simple removal of "pregnancy tissue").

128. *What is Abortion?*, *supra* note 112. *But see How Does the Abortion Pill Work?*, *supra* note 117 (couching the medical instrument used as "a small, hand-held device").

129. WORLD HEALTH ORG., *supra* note 123; *see also What is Abortion?*, *supra* note 112. Planned Parenthood blithely informs women who undergo a D&C that they will "hang out" in a recovery room once the procedure is completed, as if that a D&C is no big deal. *How Does the Abortion Pill Work?*, *supra* note 117.

130. In addition to medical injuries, many women experience negative mental health consequences of D&C abortions. A woman who undergoes an abortion is at a

bladder, or nearby blood vessels may be injured.[131] She may also experience hemorrhage or infection as a result of a D&C.[132] Infections can scar the uterus, fallopian tubes, or ovaries, which may make it difficult or impossible for a woman to conceive in the future.[133] D&C abortions can increase the potential for preterm births in future pregnancies if there is damage to the mother's uterus or cervix, and this uterine damage may also cause additional problems during birth such as an increase in hemorrhaging during delivery.[134] According to a study in Finland,[135] approximately one out of sixty-three D&C abortions is classified as an incomplete abortion, which occurs when "parts of the aborted baby are left in the uterus following the abortion," requiring additional medical treatment.[136]

iii. Dilation and Evacuation Abortions

Dilation and Evacuation ("D&E") abortions are typically performed between weeks thirteen and twenty-four LMP[137] and are the most common abortion procedure during the second trimester.[138] To

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significantly higher risk of depression, anxiety, and suicide compared with a woman who keeps an unwanted pregnancy. David M. Fergusson et al., *Does Abortion Reduce the Mental Health Risks of Unwanted or Unintended Pregnancy? A Re-appraisal of the Evidence*, 47 AUSTL. & N.Z. J. PSYCHIATRY 819, 819–27 (2013).

131. *See* Maarit Niinimäki et al., *Immediate Complications After Medical Compared with Surgical Termination of Pregnancy*, 114 OBSTETRICS & GYNECOLOGY 795, 796 (2009) (discussing the various injuries that could result from D&C abortions).

132. *Id.* 10% of women who undergo a D&C abortion get an infection within a week of the procedure. *Dilation and Curettage (D&C)*, AM. SOC'Y FOR REPROD. MED., https://www.reproductivefacts.org/globalassets/_rf/news-and-publications/bookletsfact-sheets/english-pdf/dilation_and_curettage_factsheet.pdf (last visited May 20, 2024).

133. Niinimäki et al., *supra* note 131, at 795.

134. *What is Abortion?*, *supra* note 112.

135. Niinimäki et al., *supra* note 131, at 796–97.

136. *What is Abortion?*, *supra* note 112.

137. *Id.*

138. Gonzalez v. Carhart, 550 U.S. 124, 147 (2007). Prior to the Partial-Birth Abortion Ban passed in 2003, another second- and third-trimester procedure was used. A Dilation and Extraction, commonly called an intact D&E or D&X, occurs when the medical provider, instead of tearing the fetus apart limb from limb, repositions the fetus so the head is lodged in the opening of the cervix. The medical provider then

prepare for a D&E abortion, the medical provider inserts laminaria, a form of sterilized seaweed, into the woman's vagina to dilate her cervix twenty-four to forty-eight hours before the actual procedure.[139] The laminaria soaks up fluid in the body and expands, dilating the cervix.[140] When it's time for the procedure, the provider usually administers anesthesia and further opens the cervix using metal dilators and a speculum.[141] The provider then inserts a large suction catheter into the uterus to remove the amniotic fluid.[142] Once the amniotic fluid is suctioned out of the uterus, the provider uses a sopher clamp—"a grasping instrument with rows of sharp 'teeth'"[143] — to reach in and grab a limb, tearing it from the fetus's body.[144] The provider will do this until he has ripped off all the limbs and pulled out the intestines, heart, spine, lungs, and any other body parts.[145] The most difficult part of the procedure is when the medical provider deals with the child's skull: the medical provider must find and crush the child's skull.[146]

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thrusts scissors into the nape of the neck to the skull, inserts a suction catheter to suction the brain out. The child is subsequently fully removed from its mother. *Id.* at 138. The *Gonzalez* Court ultimately held the Partial-Birth Abortion Ban was constitutional and did not present an undue burden on a woman seeking an abortion under *Casey* because of the availability of the D&E procedure. *Id.* at 167–68.

139. *What is Abortion?*, *supra* note 112; *see also* Nat'l Abortion Fed'n v. Ashcroft, 330 F.Supp. 2d 436, 465 (S.D.N.Y. 2004) (describing a typical D&E procedure).

140. *What is Abortion?*, *supra* note 112; *see also Ashcroft*, 330 F. Supp. 2d at 465 ("Laminaria sticks are made of seaweed, and when they are placed in the cervix they absorb moisture from the woman's body and slowly expand, gradually opening the cervix.").

141. *What is Abortion?*, *supra* note 112; *see also Ashcroft*, 330 F. Supp. 2d at 465 (noting that the woman receiving an abortion is given general anesthesia or consciously sedated).

142. *What is Abortion?*, *supra* note 112.

143. *Id.*

144. *What is Abortion?*, *supra* note 112; *see also* Gonzales v. Carhart, 550 U.S. 124, 135–36 (2007) (describing a D&E procedure in exacting detail).

145. *What is Abortion?*, *supra* note 112. Planned Parenthood describes this as "a combination of medical tools to remove the pregnancy tissue out of [the woman's] uterus." *How Does the Abortion Pill Work?*, *supra* note 117. The WHO obscures the details of a D&E by using much more technical language and the term "evacuation" to describe a D&E. WORLD HEALTH ORG., *supra* note 123.

146. *What is Abortion?*, *supra* note 112; *but see* Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 962 (N.D. Cal. 2004) (couching the D&E

The provider knows the skull is crushed when white brain matter leaks out of the woman's vagina.[147] Once all the body parts are removed from the uterus, the provider "uses a curette to scrape the uterus and remove the placenta and any remaining parts."[148] All the body parts must be assembled on a tray to ensure that nothing remains in the uterus and the abortion is complete.[149]

procedure in clouding language such as "disarticulation"). The unborn child is still living when the dismemberment begins: "the fetus may not die immediately, [and] it may show signs of life such as a heartbeat until another limb is torn-off or some other act causes death." *Ashcroft*, 330 F. Supp. 2d at 465.

147. *What is Abortion?*, *supra* note 112.

148. *Id.*

149. *Id.*; *see also Ashcroft*, 330 F. Supp. 2d at 465 (explaining that the physician must count the "fetal parts" after the child is removed). Internal organs are at risk for being injured by fragments of fetal bones or the instruments used to ensure no body parts remain in the woman's womb. *Ashcroft*, 330 F. Supp. 2d at 465. There is also a risk of uterine or cervical perforation, as well as extreme blood loss. *Id.* While dilation of the cervix does not present an increased danger for future pregnancies, as with D&C abortions, uterine injuries lead to a higher risk of future miscarriage or preterm birth. *Id.*; *see also* Patricia A. Lohr, *Surgical Abortion in Second Trimester*, 16 REPROD. HEALTH MATTERS 31, 151, 156–67 (2008) (discussing health risks).

iv. Late-Term (Induced) Abortions[150]

Late-term abortions are performed after twenty-five weeks LMP;[151] the unborn child is almost fully developed and considered viable outside of the womb.[152] This procedure typically takes three to four days to complete.[153] With a late-term abortion, the medical provider injects either digoxin or potassium chloride into the womb, targeting the unborn child's head to ensure that the child dies by cardiac arrest in the womb before the procedure begins.[154] The provider also

150. "Late-term" abortion is an imprecise term to describe this type of abortion, and medical experts disagree on what week of pregnancy this abortion should be used. David Prentice, et. al., *Fact Sheet: Questions and Answers on Late-Term Abortions*, CHARLOTTE LOZIER INST. (May 16, 2022), https://lozierinstitute.org/questions-and-answers-on-late-term-abortion/. Generally, the public considers late-term abortions to be performed in the second trimester when the unborn child can feel pain. *Id.* Some medical professionals root late-term abortions in viability but depending on the medical care available that could be anywhere from twenty-two weeks to twenty-eight weeks. *Id.* Other professionals deem abortions performed in only the third trimester to be late-term abortions. *Id.* The CDC categorizes abortions performed twenty-one weeks and beyond as the highest gestational age category, which would mean any abortion performed after twenty-one weeks would be a late-term abortion. *Id.* This Note categorizes late-term abortions at around twenty-five weeks because D&E procedures, though also classified as a type of late-term abortion, usually are not performed past twenty-four weeks. *What is Abortion?*, *supra* note 112.

According to both the Guttmacher Institute and the CDC, data suggests that approximately 1.1–1.3% of abortions are carried out at twenty-one weeks or later. David Prentice, et. al., *supra.* However, the true number of late-term abortions performed may be higher because the estimates do not include many states where late-term abortions take place, including California and Maryland. *Id.* Late-term abortions made up almost 12% of all abortions performed in New Mexico, for example. *Id.*

According to a study of late-term abortions in 2013, "data suggests that most women seeking later terminations are not doing so for reasons of fetal anomaly or life endangerment" of the mother, and in the study's survey of women who obtained an abortion before and after twenty weeks, the rationales cited by both groups were the same—"stressful circumstances of unprepared pregnancy, single-motherhood, financial pressure, and relationship discord." Diana Greene Foster & Katrina Kimport, *Who Seeks Abortions at or After 20 Weeks?*, 45 PERSP. ON SEXUAL AND REPROD. HEALTH 210, 210 (2013).

151. *What is Abortion?*, *supra* note 112.

152. *Id.*

153. *Id.*

154. WORLD HEALTH ORG., *supra* note 123. While digoxin has a higher failure rate than potassium chloride, meaning the unborn child is more likely to survive the

inserts multiple sticks of laminaria to absorb amniotic fluid and dilate the woman's cervix.[155] The woman will return to the provider's office the next day to get the laminaria replaced and the medical provider may perform a second ultrasound to make sure the child died from the digoxin.[156] If the child survived the first injection, the provider would administer a second dose to ensure the child dies before the mother goes into labor.[157] The provider may give the woman labor-inducing drugs during this visit as well.[158] The woman will wait for two to four days for her cervix to dilate enough for delivery.[159] Once her contractions start, she will try to make it to the abortion clinic in time to be assisted in delivery of her dead unborn child; however, if the woman cannot make it to the clinic in time because her contractions are too intense and heavy, she will be advised to wait in the bathroom until the medical provider arrives to assist with delivery at her location.[160]

v. Ectopic Pregnancy and Miscarriage Treatment Distinguished

After *Dobbs* was announced, a discussion ensued about whether miscarriage treatment and ectopic pregnancy treatment would be affected by any pro-life laws passed by the states.[161] Natural pregnancy

injection and be born alive during the attempted abortion, potassium chloride requires more expertise in targeting the umbilical cord or child's heart to protect the mother. *Id.* Digoxin, however, is still effective if the medical provider misses the child with the needle and the injection is absorbed by the amniotic sac fluid. Digoxin takes more time to absorb and usually is administered a day or two before the actual procedure. *What is Abortion?*, *supra* note 112.

155. David Prentice, et. al., *supra* note 150.

156. *What is Abortion?*, *supra* note 112.

157. David Prentice, et. al., *supra* note 150.

158. *What is Abortion?*, *supra* note 112.

159. *Id.*

160. *Id.* If the child does not come out whole, the medical provider will use clamps and forceps to dismember and remove the child, becoming a D&E procedure. *Id.* There are greater risks involved in late-term abortions such as hemorrhage, lacerations, uterine perforations, and maternal death. *Id.* Injury to the cervix will also endanger future pregnancies. *Id.*

161. *See* Jessica Winter, *The* Dobbs *Decision Has Unleashed Legal Chaos for Doctors and Patients*, NEW YORKER (July 2, 2022), https://www.newyorker.com/news/news-desk/the-dobbs-decision-has-unleashed-legal-chaos-for-doctors-and-patients (explaining the confusion some medical professionals felt after the *Dobbs* decision); Robert Baldwin III, *Losing a Pregnancy*

loss, here meaning miscarriages and ectopic pregnancies, are not abortions because the goal of natural pregnancy loss treatment is not to end the life of the unborn child, but to remove a child that died naturally in utero or did not implant in the woman's uterus.[162] With miscarriage, OB/GYNs will "watch and wait" to see if the miscarriage occurs naturally, perform a D&C to remove any remaining tissue that would cause harm to the mother if left in her uterus, or give her medications, often Misoprostol, to cause contractions to ensure things move quicker.[163] While these techniques are similar to early-induced abortion procedures, the goal of miscarriage treatment is not to produce a dead child, as is the case of induced abortion.[164] It is instead a life-saving treatment for the mother.[165] With ectopic pregnancies, the embryo is implanted outside of the uterus, and if left untreated, will create a life-threatening crisis for the mother.[166] There are a number of treatments for removing an ectopic pregnancy involving the removal of the embryo and part of the fallopian tube where it is implanted or an injection of methotrexate.[167] To emphasize, no enacted pro-life laws

Could Land You in Jail in Post-Roe *America*, NPR (July 3, 2022, 5:27 AM), https://www.npr.org/2022/07/03/1109015302/abortion-prosecuting-pregnancy-loss (hypothesizing incorrectly about the impact of pro-life laws). *But see* Elizabeth R. Kirk & Ingrid Skop, *Why the* Dobbs *Decision Won't Imperil Pregnancy-Related Medical Care*, SCOTUSBLOG (July 7, 2022, 3:21 PM), https://www.scotusblog.com/2022/07/why-the-dobbs-decision-wont-imperil-pregnancy-related-medical-care/ (clearing up confusion about what pro-life laws do).

162. Ingrid Skop, *Fact Sheet: Medical Indications for Separating Mother and Her Unborn Child*, CHARLOTTE LOZIER INST. (May 17, 2022), https://lozierinstitute.org/fact-sheet-medical-indications-for-separating-a-mother-and-her-unborn-child/.

163. *Id.* To call miscarriage treatment that involves a D&C an abortion is akin to saying, for example, that cremation of a dead body is the same as burning a body alive.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* Surgical removal of an ectopic pregnancy is not controversial among pro-life advocates or doctors because it is so life-threatening to the mother. *Id.* Further, current technology does not allow for reimplantation of the embryo into the uterus, so survival is not possible. *Id.* Ectopic pregnancies are almost always treated by OB/GYNs and the unborn child is treated with respect as a second patient. *Id.*

prevent or limit in *any way* treatment for miscarriages and ectopic pregnancies because they are not elective abortions.[168]

III. ANALYSIS

The problem with *Dobbs* returning abortion regulation to the states is that the unborn still are denied uniform protection of their constitutional right to life. Giving the states the ability to deny threshold constitutional rights—life and liberty—to unborn children by refusing to consider them persons under the law repeats historical

168. The following is a list of statutes enacted in pro-life states that either specifically exempt miscarriage and ectopic treatment or have life-saving treatment for the mother exemptions. *See* ALA. CODE § 26-23H-1 (2019) (defining "abortion" to exclude "activities if done with the intent to . . . remove a dead unborn child, to deliver the unborn child prematurely to avoid a serious health risk to the unborn child's mother," nor does it include "a procedure or act to terminate the pregnancy of a woman with an ectopic pregnancy"); ARIZ. REV. STAT. § 13-3603; § 36-2151 (LEXISNEXIS 2021) (same); ARK. CODE ANN. § 5-61-301 (2019) (same); FLA. STAT. § 390.0111 (2022) (same); GA. CODE ANN. § 16-12-141 (2019) (same); IDAHO CODE § 18-622 (2020) (same); IND. CODE § 16-34-2-1 (2013) (same); IOWA CODE § 146C.1 (2018) (same); KY. REV. STAT. ANN. § 311.772 (West 2019) (excepting miscarriages and ectopic pregnancies under life-threatening circumstances); LA. STAT. ANN. § 40:1061 (2015) (same); MISS. CODE ANN. § 41-41-45 (2022) (same); MO. REV. STAT. §188.017 (2019) (same); N.D. CENT. CODE § 21.1-31-12 (2019) (excepting miscarriage specifically and classifying ectopic pregnancies as life-threatening conditions); OHIO REV. CODE ANN. § 2919.192 (LexisNexis 2019) (excepting any medical treatment if there is no detectable heartbeat); OKLA. STAT. tit. 12, § 861 (2023) (excepting treatment necessary to save the mother's life); S.C. CODE ANN. § 44-41-650 (2021) (excepting any medical treatment if there is no detectable heartbeat); S.D. CODIFIED LAWS § 22-17-5.1 (2005) (excepting life-saving treatment for the mother); TENN. CODE ANN. § 39-15-213 (2019) (same); TEX. HEALTH & SAFETY CODE ANN. §245.002 (West 2017) (defining abortion to exclude miscarriages and ectopic pregnancies); UTAH CODE ANN. §76-7a-201 (LexisNexis 2020) (excepting life-saving treatment for the mother); W. VA. CODE § 16-2R-3 (2022) (excepting ectopic pregnancies and life-saving medical treatment); WIS. STAT. §940.15 (2011) (excepting life-saving treatment for the mother); WYO. STAT. ANN. §35-6-102 (2022) (excepting life-saving treatment for the mother). Further, American College of Obstetricians and Gynecologists ("ACOG") have published pamphlets for decades categorizing these treatments under life-saving exceptions to abortion regulation laws. *See* AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (ACOG), PRACTICE BULLETIN 193: TUBAL ECTOPIC PREGNANCY (2018); AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS (ACOG) PRACTICE BULLETIN 200: EARLY PREGNANCY LOSS (2018).

error.[169] This is evidenced by the laws states are passing in response to *Dobbs*, where an unborn child in Tennessee is protected from conception as a person with the inalienable right to life,[170] but a child in Montana who survives a late-term abortion can be denied life-saving medical care.[171] Thus, in states that protect abortion at all costs, once an unborn child is destined for abortion, almost nothing can save him or her. Like the denial of liberty that slavery imposed on African Americans, abortion denies the unborn their right to life.

A. The Unborn as Natural Persons Under the Law

In his majority opinion in *Roe v. Wade*, Justice Blackmun stated unequivocally that the protections of life within the Fourteenth Amendment do not apply to the unborn.[172] Unfortunately, when presented with the opportunity to correct this mistake, the *Dobbs* Court failed to afford constitutional protections to the unborn by viewing the issue only through the lens of an abortion right.[173] If the unborn are granted personhood status and their right to life is protected from conception, however, then any argument for abortion collapses.

The *Roe* Court found that the Constitution did not intend for its defense of life in the Fifth and Fourteenth Amendments to apply prenatally because all mentions of the word "person" throughout the document only referred to a postnatal application.[174] The Court made this determination through a cursory look at other uses in the text.[175]

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169. *See* discussion *supra* Section II.A (describing historical state treatment of personhood status for African Americans) It also has the potential to set new, worrisome precedent for states dealing with any vulnerable population, a concept beyond the scope of this Note.

170. TENN. CODE ANN. § 39-15-213 (2019).

171. LR-131, H.B. 167, 67th Leg. (Mont. 2022) (rejected).

172. 410 U.S. 113, 156–57 (1973). Neither *Casey* nor *Dobbs* had any substantive discussion on fetal personhood, so for the sake of clarity, this Section discusses only *Roe*'s errant reasoning for why the unborn are excluded as persons.

173. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 230 (2022).

174. *Roe*, 410 U.S. at 156–58.

175. *Id.* Justice Blackmun specifically looked at the text of the Fourteenth Amendment, qualifications for Congress, the Apportionment Clause, the Migration and Importation Clause, the Emolument Clause, qualifications for President, the Extradition Clause, the Twelfth Amendment, and the Twenty-Second Amendment. *Id.*

The reality is that the Constitution does not actually define the word "person," but simply because the unborn are not mentioned by name does not mean they are automatically precluded from the word entirely. Robert Destro, former Assistant Secretary of State for Democracy, Human Rights, and Labor, observed that historical use of the word "person" within the protections of the Fourteenth Amendment is expansive and not just applicable postnatally.[176] For instance, under the Apportionment Clause, corporations are not counted in the census but are still considered persons under the law.[177] If, as Justice Blackmun seemed to suggest, being counted via the Apportionment Clause was a requisite for personhood, then corporate personhood should be reexamined and potentially eliminated.[178] If the Fourteenth Amendment usage of person is flexible enough to include a corporation, why then should it exclude unborn children, clear human persons?[179]

The short answer, at least historically speaking, is that the Fourteenth Amendment does not exclude the unborn, but in fact, was intended to protect them.[180] A person is "the legal subject or substance of which rights and duties are attributes," and an individual human being, in possession of those attributes, is a natural person.[181] Natural persons are protected by the Fourteenth Amendment.[182] An unborn child is a human being whose life in the womb should therefore be protected. The Fourteenth Amendment makes no provisions on the type of life required to gain protection;[183] there is no prerequisite for

176. Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1283–85 (1975).

177. *Id.* at 1284. The Apportionment Clause was used as a justification to exclude the unborn from the definition of person in the Constitution. *Id.*

178. *Id.*

179. *See id.* at 1284–85 (citing Santa Clara Cnty. v. So. Pac. R.R. Co., 118 U.S. 394, 396 (1886) (considering corporations to be persons as to the protections of the Fourteenth Amendment and deserving of equal protection)).

180. *See id.* at 1286–87 (citing Boyd v. United States, 116 U.S. 616, 635 (1886) ("[C]onstitutional provisions for the security of person and property should be liberally construed," so as to avoid a "gradual depreciation of rights as if it were more in sound than in substance.")).

181. *Id.* at 1286 (quoting F. POLLOCK, A FIRST BOOK OF JURISPRUDENCE 111 (3d ed. 1911)).

182. U.S. CONST. amend. XIV, cl. 1; *see also* U.S. CONST. amend. V, cl. 1.

183. *See* U.S. CONST. amend. XIV.

life to be meaningful. A meaningfulness requirement, or something similar, for life to be protected is a slippery slope rife with the potential to be applied to any vulnerable group society deems unworthy of protection or care.[184]

Further, all evidence points to the writers of the Fourteenth Amendment intending the word "person" to be as inclusive as possible.[185] Congressman John Bingham, author of the first section of the Fourteenth Amendment, stated that "no state ever had the power, by law or otherwise, to abridge constitutionally protected rights."[186] The fact that such a right had not previously been protected is not determinative of the existence of the right, for it is expressly protected in the Constitution.[187] Thus, although an inalienable right might need to be specifically protected, that lack of protection does not negate the *existence* of the right itself.[188] With the inalienable right to liberty, African Americans possessed the right to liberty regardless of whether the Constitution itself recognized that right; so too, the unborn possess the inalienable right to life regardless of the Constitution's explicit recognition of that right. Congressman Bingham went on to describe the Fourteenth Amendment:

> The amendment proposes hereafter that the great wrong [slavery] shall be remedied by putting a limitation expressly in the Constitution, coupled with a grant of power to enforce it by law, so that when either Ohio or South Carolina, or any other State shall in its madness or its folly refuse to the gentleman, or his children or to me or to mine, any of the rights which pertain to American

184. Developmental requirements for personhood that can be applied to born and unborn persons are discussed *infra* in Sections III.B.2–4.

185. *See, e.g.*, CONG. GLOBE, 40th Cong., 1st Sess. 514 (1868) (discussing the need to include all human beings in the Fourteenth Amendment).

186. *See* Destro, *supra* note 178, at 1288 (quoting Bingham's speech during the debate over the Fourteenth Amendment, CONG. GLOBE, 39th Cong., 1st Sess. 1034, 2542–43 (1865)).

187. *Id.* (quoting another Bingham speech, CONG. GLOBE, 39th Cong., 1st. Sess. 429 (1865)).

188. *Id.* For example, African Americans had the inalienable right to liberty even though it was not expressly protected in the Constitution and had to be specifically delineated. The lack of protection did not negate the existence of the right itself.

> citizenship or to common humanity, there will be redress for the wrong through the power and majesty of American law.[189]

The writers intended the amendment to protect rights pertaining to "common humanity," or basic constitutional rights, as well as civil rights. Further, at the time the Fourteenth Amendment was written and passed, the public was hostile to abortion practice due to the understanding that abortion ends a human life.[190] As such, the scope of the Fourteenth Amendment includes the unborn within its protection.

The Fourteenth Amendment also distinguishes "person" and "citizen" as separate classes, with citizens afforded more specific civil rights and persons broad, basic constitutional rights to life, liberty, and property, lending further credence to the idea that the unborn were included as persons but birth was required to obtain citizenship.[191] This distinction indicates that the rights of life, liberty, and property are inherent and not subject to a birth requirement.[192] Making the distinction between "person" and "citizen" includes those individuals who might not meet the qualifications for citizens but still deserve inherent rights.[193] Further, there is no evidence that the authors of the Fourteenth Amendment intended to exclude the unborn from "person" as used, and the Court failed to find such evidence of intent in *Roe v. Wade*.[194] The *Roe* Court separated, as the *Dred Scott* case had done previously,[195] a class of human beings from legally recognized

189. CONG. GLOBE, 40th Cong., 1st Sess. 514 (1868).

190. *See* Dobbs v. Jackson's Women's Health Org., 597 U.S. 215, 253 (2022).

191. HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 63–64 (1908).

192. The birth requirement for personhood is discussed *infra* Section III.B.4, but the concept is immediately challenged by the question of what about the child changes in the birth canal that confers any right, not just the right to life.

193. Destro, *supra* note 176, at 1288.

194. 410 U.S. 113, 158 (1973). The Court did not attempt to show that the Fourteenth Amendment excluded the unborn, only that it was unpersuaded the unborn were included. *Id.*

195. Dred Scott v. Sandford, 60 U.S. 393, 421 (1857).

persons.[196] Today, it is up to the states to determine at what age life is worthy of constitutional protection.[197] In the face of an undisputed biological reality of the beginnings of human life,[198] it is difficult to understand why some states use arbitrary characteristics,[199] instead of the existence of human life itself, to determine whether to provide personhood to the unborn.[200]

B. Inconsistency in State Treatment of the Unborn

The post-*Dobbs* treatment of the unborn swings from one end of the spectrum to the other; there is little, if any, semblance of uniformity in their protection.[201] Returning abortion to the states means that, in large parts of the country, the unborn are classified as lesser human beings and denied the inherent right to life.[202] As was the case with slavery, states are now emphasizing "both the territorial limitations of

196. *Roe*, 410 U.S. at 158. The time of viability, instead of race, served as the dividing line between human beings who could receive personhood status and those who could not.

197. *See* statutes cited *supra* note 2 (identifying state statutes that protect the lives of the unborn and state statutes that protect access to abortion).

198. *See supra* Section II.B.3.

199. *See infra* Sections III.B.2–4.

200. Two cases from 1968 stand out in regard to personhood requirements. Levy v. Louisiana, 391 U.S. 68 (1968), in which the Court summarized "personhood" for equal protection purposes: "They are humans, live, and have their being. They are clearly persons within the meaning of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 70. How are the unborn any different? Glona v. American Guarantee Company, 391 U.S. 73 (1986), where the Court found that "to say that the test of Equal Protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." *Id.* at 75–76. Gestational age is a legal line; thus, the State's power to draw such a line concerning constitutional protections is arguably limited by the Constitution itself.

201. *See* Alice Miranda Ollstein, *Walgreens Won't Distribute Abortion Pills in States Where GOP AGs Object*, POLITICO (Mar. 2, 2023, 7:17 PM), https://www.politico.com/news/2023/03/02/walgreens-abortion-pills-00085325 (discussing Walgreen's reasoning for its refusal to distribute abortion pills where the procedure is banned and the corporation's concern for the constantly shifting political landscape).

202. *See, e.g.*, CAL. HEALTH & SAFETY CODE §123467 (Deering 2023) (mandating no investigations for perinatal deaths up to one month post-birth).

laws and the power of each state to limit the effect and implementation of a sister state's laws."[203]

1. Anticipating *Dobbs*

Traditionally conservative states led the charge for guaranteeing the right to life, even before the *Dobbs* decision was announced.[204] Thirteen states have enacted laws with total protection of the unborn from conception to natural death.[205] Five states signed bills protecting the unborn from conception into law that are currently being litigated;[206] three states passed laws protecting the unborn starting at six weeks gestation,[207] two of which are currently being litigated.[208] In total, twenty-one states are actively trying to protect the unborn and their inherent right to life.[209]

Tennessee's pro-life law, passed in 2019, is a good example of a state protecting the right to life; the Human Life Protection Act protects "the rights of all human beings, including the fundamental and absolute right of unborn human beings to *life* . . . ."[210] Tennessee

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203. *American Slavery*, *supra* note 50, at 76.

204. Although these laws were passed years before *Dobbs* was taken up by the Court, none took effect until *Roe v. Wade* was overturned. States anticipated the time when *Roe* would eventually be overturned by the Supreme Court and prepared as best they could to protect unborn children within their state.

205. *Tracking Abortion Bans Across the Country*, N.Y. TIMES (updated May 1, 2024, 11:05 PM), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html. Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wyoming have total protection laws on the books currently enforce. *Id.*

206. *Id.* According to *The New York Times*, Arizona, Indiana, Utah, North Dakota, and Wyoming enacted pro-life laws protecting the unborn from the moment of conception. *Id.* All these laws are currently in litigation but will be considered alongside the pro-life laws currently enforced for the purposes of this Note.

207. *Id.* Ohio, South Carolina, and Georgia passed laws protecting the unborn starting at six weeks gestation, popularly known as Heartbeat Bills. *Id.* The laws will be discussed with the total protection laws.

208. *Id.*

209. *Id.*

210. Tenn. Code Ann. § 39-15-214 (a)(6) (2021) (emphasis added). The law was blocked within minutes of passage by a federal judge, citing *Roe* and *Casey* as the basis for unconstitutionality. The law contained a provision, however, that would "trigger" it into existence should *Roe* ever be overturned. *Id.* § 39-15-213 (2021).

defines an unborn child as "an individual living member of the species, homo sapiens, throughout the entire embryonic and fetal stages of the unborn child from fertilization until birth."[211] Tennessee therefore affirmatively binds the scientific understanding of when human life begins to protections born persons receive and refuses to put arbitrary qualifications on the right to life.[212] The states enacting laws providing total protection for the unborn and classifying them as persons with an inherent right to life structured their laws in a similar fashion—declaring that the right to life is inherent beginning at conception until natural death and an unborn child is a legal person starting at conception.[213]

A few states passed laws that protect the unborn beginning at six weeks gestation when the fetal heartbeat can be detected.[214] Georgia, for example, created two classes of persons under the law: artificial and natural.[215] The unborn are specifically included in the class of natural persons; there is no separation of human being from person.[216] But because only those with detectable heartbeats are counted, personhood status in Georgia is contingent on a heartbeat, an arbitrary characteristic not based on medically accurate embryology.[217]

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211. *Id.* § 39-15-213 (2021).

212. *See id.* §§ 39-15-213 to 214 (2021).

213. *See* ALA. CODE § 26-23H-1 (2019); ARK. CODE ANN. § 5-61-301 (2013); IDAHO CODE § 18-622 (2020); KY. REV. STAT. ANN. § 311.772 (West 2019); LA. STAT. ANN. § 40:1061 (2015); MISS. CODE ANN. § 41-41-45 (2022); MO. REV. STAT. §188.017 (2019); OKLA. STAT. tit. 21, § 861(2023); S.D. CODIFIED LAWS § 22-17-5.1 (2005); TENN. CODE ANN. § 39-15-213 (2019); TEX. HEALTH & SAFETY CODE ANN. §245.002 (West 2017); W. VA. CODE § 16-2R-3 (2022); WYO. STAT. ANN. §35-6-102 (2022).

214. GA. CODE ANN. § 16-12-141 (2019); OHIO REV. CODE ANN. § 2919.192 (LexisNexis 2019); S.C. CODE ANN. § 44-41-650 (2021). Critics of "heartbeat bills" say this effectively bans all abortions in the state because a woman typically does not know she is pregnant before six weeks. *Tracking Abortion Bans Across the Country*, *supra* note 205. The six-weeks laws will be grouped in this section for clarity, even though a requirement of a heartbeat for personhood falls under arbitrary characteristics.

215. Ga. Code Ann. § 16-12-141 (2019).

216. *Id.*

217. *See supra* Section II.B.3 (explaining that human life begins before the heart develops). Likewise, Ohio and South Carolina found that a heartbeat is a "key medical indicator" of survival in utero to birth and that the heartbeat is a "biologically

While it is correct that the heartbeat is *a* biologically identifiable moment, science shows that fertilization is *the* biologically identifiable moment at which new human life is formed, and thus the logical solution to the personpersonhood question.[218]

2. States Protecting Abortion

States outside of the South and parts of the Midwest look at fetal personhood quite differently. Currently, seven states have no protections for the unborn from abortion, allowing a woman to legally obtain an abortion throughout all nine months of pregnancy.[219] Michigan and California passed constitutional amendments in 2022 that protect abortion through all nine months.[220] The rest of the states protect the unborn beginning at viability, when a child can survive outside of the womb with or without medical support.[221] This is not to say that an unborn child gains personhood status at viability,[222] or twenty-two weeks,[223] or twenty-four weeks.[224] Rather, these are points

identifiable moment" in pregnancy. Ohio Rev. Code Ann. § 2919.192(A) (LexisNexis 2019); S.C. Code Ann. § 44-41-650 (5)–(6) (2021).

218. *See supra* Section II.B.3 (explaining that human life begins at conception).

219. *Tracking Abortion Bans Across the Country*, *supra* note 205.

220. *See* Cal. Const. art. I, §1.1; Mich. Const. art. 1, § 28 (West)

221. *Tracking Abortion Bans Across the Country*, *supra* note 205. *See* ALASKA STAT. § 18.16.010 (1970); COLO. REV. STAT. § 25-6-403 (LexisNexis 2022); N.J. REV. STAT. § 10:7-2 (2021); N.M. STAT. ANN. § 42-8-3 (LexisNexis 1973); OR. REV. STAT. § 2919.12 (1974); VT. STAT. ANN. TIT. 18, § 9497 (2019). Washington, D.C. recently repealed all abortion laws on the books; it is currently not regulated or limited by any gestational limit.

222. *See* CONN. AGENCIES REGS. §19-13-D54 (2005); DEL. CODE ANN. tit. 24, § 1790 (2017); HAW. REV. STAT. § 452-16 (1970); 775 ILL. COMP. STAT. ANN. 55/1-15 (LexisNexis 2019); ME. REV. STAT. ANN. tit. 22, § 1598 (1978); MD. CODE ANN., HEALTH–GEN. § 20-209 (LexisNexis 1991); MINN. STAT. § 142.412 (1974); MONT. CODE ANN. § 50-20-109 (1974); N.Y. PUB. HEALTH LAW § 2599-aa (LexisNexis 2019); 23 R.I. GEN. LAWS § 23-4.13-1 (2019); VA. CODE ANN. § 18.2-72–18.2-73 (1975); WASH. REV. CODE § 9.02.100 (1992).

223. *See* MASS. ANN. LAWS ch. 112, § 12N (LexisNexis 1974); KAN. STAT. ANN. § 65-6703 (1992); NEB. REV. STAT. § 28-327 (1977).

224. *See* N.H. REV. STAT. ANN. § 329:44 (LexisNexis 2021); NEV. REV. STAT. §442.250 (1973); 18 PA. CONS. STAT. § 3211 (1982).

in time when states have chosen to assert a compelling interest in the unborn child's life, despite being under no obligation to do so.[225]

Overwhelmingly, the states denying personhood to the unborn do so by framing the issue as protecting a woman's right to choose how to deal with pregnancy, severely limiting the state's ability to assert a protective interest in her unborn child's life.[226] Framing the issue around the mother's right to an abortion, though, instead of an unborn child's right to life and determination of personhood, allows the state to avoid the implications of denying a class of human beings the inherent right to life.[227]

Michigan, for example, enshrined a woman's right to an abortion in its constitution.[228] Unless a compelling interest can be asserted by the state, restrictions will be deemed unconstitutional.[229] Minnesota and Montana voters recently rejected a bill that would require providers to give medical care to children who survive abortions.[230] California goes further and prohibits any investigations into "pregnancy-related outcome" deaths up to a month post-birth.[231]

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225. Even in *Roe v. Wade*, Justice Blackmun only spoke of an unborn child's potentiality for life, not constitutional personhood, therefore indicating personhood attaches at birth. 410 U.S. 113, 154 (1973). By overturning *Roe*, *Dobbs* gave the states an ability to assert a compelling interest in prenatal life from fertilization but nothing really changed. There is no obligation for the states to acknowledge the personhood of the unborn at any particular time.

226. MICH. CONST. art. 1, § 28.

227. *See, e.g.*, Wash. Rev. Code § 9.02.100 (1992) (speaking only of a woman's right to choose to have an abortion before viability).

228. MICH. CONST. art. 1, § 28.

229. *Id.*

230. Minn. Stat. § 145-409 (2023); LR-131, H.B. 167, 67th Leg. (Mont. 2022) (rejected). Arizona, however, recently passed a bill requiring "medically appropriate and reasonable care and treatment" given to any infant born alive, "including those born during the course of an abortion." S.B. 1600, 56th Leg., 1st Reg. Sess. (Az. 2023). In a statement to LifeNews, Cathi Herrod, president of the Center for Arizona Policy, said the bill seeks to end "slow code," an inhumane medical practice "in which healthcare professionals withhold medical care to babies not expected to live long in order to hasten their death." Steven Ertelt, *Arizona Senate Passes Bill to Ban Infanticide, Protect Babies Who Survive Abortions*, LIFENEWS (Feb. 22, 2023, 8:18 PM), https://www.lifenews.com/2023/02/22/arizona-senate-passes-bill-to-ban-infanticide-protect-babies-who-survive-abortions/.

231. CAL. HEALTH & SAFETY CODE § 123467 (Deering 2023) (including perinatal death as a pregnancy-related outcome that cannot be investigated). Perinatal

Thus, even a child taking an independent breath is not guaranteed life.[232] These laws, passed in states that already codified *Roe v. Wade*, are attempts to preempt any federal laws that might be passed.[233]

Another example is Illinois's reproductive law, which conclusively states in its law that a child in the womb, no matter the stage of development, does not have independent rights.[234] The statute recognizes the basic developmental milestones of a child in utero—a fertilized egg, embryo, and fetus—but then goes on to deny explicitly "independent rights" to the unborn at any developmental stage under the laws of the State.[235] Thus, the unborn are excluded and denied legal

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is defined as "the period from the establishment of pregnancy to one month following delivery." CAL. WELF. & INST. CODE § 14134.5 (Deering 2020). The phrase "pregnancy-related outcome" is not defined in the bill or elsewhere in the California Code; therefore, any pregnancy-related infant deaths within the first twenty-eight days after birth cannot be investigated. *See* Burt, *supra* note 18.

232. Consider the following example: A slave attempts to escape the South during a time when the Fugitive Slave Act was heavily enforced. He makes the dangerous and deadly trek through the South, hunted by his slaveowner and friends. Miraculously, he makes it across the Mason Dixon line and steps into a free state. He should have the ability to breathe freely, reveling in his newfound freedom. And yet, despite being in a free state, he cannot. He is not completely free, even when he is in a non-slave state. The Fugitive Slave Act means that if his master wants him back, he can get him. Being in the free state should guarantee freedom, but it doesn't. The same is for a child who survives an abortion, at least in California and Montana. The first breath of life for a child who survives an abortion should guarantee that child safety and care. By being born, the child's life should be constitutionally protected. But because the mother underwent the procedure, life is not guaranteed. Birth does not always protect a child destined for abortion, just as crossing the border out of the South did not always protect a slave.

233. Minnesota, for example, already protected abortion regardless of the *Dobbs* decision. *Minnesota Governor Signs Bill Protecting "Fundamental Right" to Abortion Under State Law*, CBS NEWS (Jan. 31, 2023, 4:14 PM), https://www.cbsnews.com/news/minnesota-abortion-law-tim-walz-governor-pro-act/. The PRO Act was framed as a "second line of defense" because the makeup of the state supreme court could change. *Id.* It also protects medical providers from any out-of-state action. *Id.* Louisiana did the same with emancipation before the Civil War when the state passed a law declaring any federal emancipation would not be enforced. *See infra* note 252 and accompanying text.

234. 775 Ill. Comp. Stat. Ann. 55/1-15(c) (LexisNexis 2019) ("A fertilized egg, embryo, or fetus does not have independent rights under the laws of this State.").

235. *Id.*

protections.[236] Birth, it can be inferred, is the event at which personhood attaches. Birth being the event at which constitutional personhood attaches means that a child born early at twenty-five weeks is considered a person, but a forty-week unborn child is not, despite the fact that both are human beings.[237]

3. Comparison of Historical and Current Treatment of Personhood

In post-*Dobbs* America, somewhat ironically, it is now predominantly southern states that have an expansive definition of a person with inherent rights,[238] and other states that are assigning personhood arbitrarily, not by race anymore but by age or being wanted.[239] An enslaved person's status under the law was fully

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236. *Id.*

237. *See infra* Section III.B.4.

238. *See* ALA. CODE § 26-23H-1 (2019); ARK. CODE ANN. § 5-61-301 (2013); IDAHO CODE § 18-622 (2020); KY. REV. STAT. ANN. § 311.772 (West 2019); LA. STAT. ANN. § 40:1061 (2015); MISS. CODE ANN. § 41-41-45 (2022); MO. REV. STAT. §188.017 (2019); OKLA. STAT. tit. 12, § 861 (2023); S.D. CODIFIED LAWS § 22-17-5.1 (2005); TENN. CODE ANN. § 39-15-213 (2019); TEX. HEALTH & SAFETY CODE ANN. §245.002 (West 2017); W. VA. CODE § 16-2R-3 (2022); WYO. STAT. ANN. §35-6-102 (2022).

The Arkansas legislature, when passing the Arkansas Human Life Protection Act, specifically called out the injustices African Americans experienced when they were denied personhood simply for being of African descent in *Dred Scott*. ARK. CODE ANN. § 5-61-301 (2019). The legislature defined a crime against humanity as an occurrence where "the government withdraws legal protection from a class of human beings resulting in severe deprivation of their rights, up to and including death," citing both *Dred Scott* and *Roe* as crimes against humanity. *Id.* § 5-61-301(a)(1)–(a)(4) (2019). Given Arkansas's former participation in slavery and secession from the Union to protect its right to slavery, the expansion of personhood to include unborn children is exemplary.

239. *See* ALASKA STAT. § 18.16.010 (1970); CAL. HEALTH & SAFETY CODE § 123466 (Deering 2002); COLO. REV. STAT. § 25-6-403 (LexisNexis 2022); CONN. AGENCIES REGS. §19-13-D54 (2005); DEL. CODE ANN. tit. 24, § 1790 (2017); HAW. REV. STAT. § 452-16 (1970); 775 ILL. COMP. STAT. ANN. 55/1-15 (LexisNexis 2019); ME. REV. STAT. ANN. tit. 22, § 1598 (1978); MD. CODE ANN., HEALTH–GEN. § 20-209 (LexisNexis 1991); MASS. ANN. LAWS ch. 112, § 12N (LexisNexis 1974); MICH. CONST. art. 1, § 28; MONT. CODE ANN. § 50-20-109 (1974); NEB. REV. STAT. § 28-327 (1977); NEV. REV. STAT. §442.250 (1973); N.H. REV. STAT. ANN. § 329:44 (LexisNexis 2021); N.J. REV. STAT. § 10:7-2 (2021); N.M. STAT. ANN. § 42-8-3 (LexisNexis 1973); N.Y. PUB. HEALTH LAW § 2599-aa (LexisNexis 2019); N.C. GEN.

dependent upon his or her location, and even then, on whether the free state enforced any version of the Fugitive Slave Act.[240] The idea that each state could "deal with slaves and slavery as it wished" wrought chaos on both an individual and political level, and failed to bring about any desired uniformity between the states.[241]

As anticipated, *Dobbs* triggered the pro-life laws into enforcement and the southern states became leaders in advocating for an expansive and inclusive definition of person.[242] Likewise, in the decades leading up to the Civil War, courts in northern states began enacting changes that attempted to free African Americans in the South.[243] Sectional antagonism arose due to differing philosophical outlooks between northern states and southern states.[244] Courts in northern states started granting freedom to slaves traveling with their masters' consent as soon as they entered the state, acknowledging the reality that slaves were human beings, not property.[245]

As the sectional division became more intense as the Civil War loomed closer, northern states refused to recognize the enslaved status of anyone within their borders, "even of those slaves merely passing through . . . or fleeing in violation of Federal law."[246] Illinois, for example, changed its view on the rights of slaveholders and proclaimed the state "could not recognize any property right over a slave," even if he escaped from his owner in Missouri.[247] The Missourian could not

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STAT. § 14-45-1 (1967); OR. REV. STAT. § 2919.12 (1974); 18 PA. CONS. STAT. § 3211 (1982); 23 R.I. GEN. LAWS § 23-4.13-1 (2019); VT. STAT. ANN. tit. 18, § 9497 (2019); VA. CODE ANN. § 18.2-72–18.2-73 (1975); WASH. REV. CODE § 9.02.100 (1992).

240. *American Slavery*, *supra* note 50, at 96. In *Strader v. Graham*, 51 U.S. 82, 100 (1850), Chief Justice Taney held that "[e]very state has an undoubted right to determine the *status* . . . of the persons domiciled within its territory."

241. *American Slavery*, *supra* note 50, at 94.

242. *See supra* Section III.B.1.

243. *American Slavery*, *supra* note 50, at 95.

244. *Id.* at 75–76.

245. *Id.* at 95.

246. *Id.* at 96.

247. *Id.* (citing Rodney v. Illinois Cent. R.R. Co., 19 Ill. 42, 45 (1843)). This was a distinct turnaround from an earlier case that affirmed the right of slaveholders to pass through the state without affecting the status of their slaves. *See, e.g.*, Willard v. People, 5 Ill. 461 (1843). Ironically in *Rodney*, the court used dicta from *Prigg v. Pennsylvania* as grounds for disallowing use of Illinois governmental functions to enforce an alleged slave-related property right. *Rodney*, 19 Ill. at 44.

bring suit in neighboring Illinois to recover slave property.[248] Massachusetts similarly changed course, as well, when the Supreme Judicial Court held that "those who brought slaves into the state must accept the legal consequences."[249] Any slave owner who traveled with his slaves, therefore, ran the risk of freeing his slaves by stepping foot in Massachusetts.[250]

In response to northern courts expanding and enforcing the right to liberty to include non-domiciled African Americans, southern states refused to recognize permanent freedom of African Americans born in free states or any emancipating effects of an African American's prolonged residence in a free state.[251] Louisiana, for example, passed a law that said emancipation "could not be effected by a slave's residence in another state."[252] The Missouri Supreme Court declared that a "slave was not rendered free" after spending four years in free territory, ignoring a fair amount of precedent in doing so.[253] Kentucky courts made similar reversals, and a Mississippi court went so far as to accuse Ohio of being "so forgetful of her 'constitutional obligations to the whole [white] race,'" that retaliation was vindicated.[254]

Digging in their heels, southern courts no longer considered slavery a necessary evil at the expense of human beings.[255] It was instead defended as a "positive good which was a necessary aspect of

248. *American Slavery*, *supra* note 50, at 96.

249. *Id.* (citing Commonwealth v. Aves, 35 Mass. 193, 219 (1836). The *Aves* decision was one of the first to declare slaves free upon stepping foot in the state.

250. *Id.*

251. *Id.* Before the 1830s, states worked in relative harmony. *Id.* at 92. A slave, with his master, could live in a free state for a number of years, intending to reside there permanently, and the laws of the new domicile would free the slave. *Id.* at 90. Slave states also recognized the free status of a former slave, and the status of slavery would not reattach upon return to the slave state. *Id.* The courts of neighboring free and slave states showed a "willingness to search for solutions" where everyone (except the slave, presumably) could agree to the solution. *Id.* at 91. This harmony was abolished when the northern states changed their outlook on slavery itself as a positive evil, instead of a societal blip. *Id.* at 92.

252. *Id.* at 96.

253. *American Slavery*, *supra* note 50, at 96–97.

254. *Id.* at 97–98 (citing Mitchell v. Wells, 37 Miss. 235, 262 (1859)) (emphasis in the original). As the Civil War drew closer, southern states used these cases as an excuse for vitriolic language in defense of slavery. *Id.* at 97.

255. *American Slavery*, *supra* note 50, at 97–98.

a valid and wholly defensible way of life." [256] The North, on the other hand, denounced slavery as "an absolute and intolerable evil" and, if sanctioned by any doctrine or document, a "compromise with the devil."[257] This chaos of conflicting laws in slave states versus free states exemplifies why the denial of inalienable rights to a class of human beings only fosters discord. Likewise, *Roe v. Wade* promised that abortion would be "safe, legal, and rare."[258] Now, ignoring the destruction of innocent human life, abortion advocates defend the industry as central to women's equality in the workplace, and states are enshrining the right to abortion within their constitutions as a fundamental right.[259] Ambivalence and tolerance of differing state laws concerning the inalienable right to life cannot continue.[260]

Even before *Dobbs*, however, the unborn were considered persons under the law when public outcry demanded it or when convenient to another person's legal interest.[261] There can be recovery under fetal homicide laws or wrongful death statutes, and an unborn child can inherit property.[262] Prior to the Civil War, African Americans were also treated differently when their value to *someone else* was diminished or eliminated.[263] An African American was considered a person under the law if he was murdered so that a slaveowner could

256. *Id.*

257. *Id.* (citing W. PHILLIPS, THE CONSTITUTION, A PRO-SLAVERY COMPACT (1844)).

258. President Bill Clinton, Abortion Rights and Medical Research Orders (Jan. 22, 1993), https://www.c-span.org/video/?c4823633/user-clip-bill-clinton-january-22-1993-safe-legal-rare.

259. *See, e.g.*, CAL. CONST. art. 1, § 1.1; VT. CONST. art. 1, § 22; MICH. CONST. art. 1, § 28. *See generally* Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889, 893 (2011) (challenging the Equal Protection Clause arguments by pro-choice advocates that pregnancy undermines women's equality).

260. *American Slavery*, *supra* note 50, at 92. Abolitionists appealed to a higher law that could never recognize a legitimacy of the institution of slavery as a moral good. Pro-life advocates do the same.

261. *See* Jacobs, *supra* note 70, at 830–31.

262. *Id.* at 830

263. Neal v. Farmer, 9 Ga. 555, 582 (1851); *see also* Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047, 1061 (2007).

recover for his loss.[264] In both instances, neither the unborn child nor the African American had full personhood rights for their own sake but were considered persons on a case-by-case basis.

The United States is yet again in the position where human beings can be legally classified as property, not persons. Coming full circle, human embryos cryo-frozen in time can be considered chattel property after a judge in Fairfax County, Virginia, resurrected a slave law to justify a February 2023 ruling in a divorce proceeding.[265] The code provision at issue is almost identical to the version of the Code enacted prior to the Civil War and passage of the Thirteenth Amendment.[266] The pre-Civil War code provision included African Americans as "partitionable in kind or subject to sale" because they were considered "personal property." As personal property, in other words "goods and chattels," African Americans were partitionable and could be "adjudged to be personal estate."[267] Because the pre-Civil War code, the direct predecessor of the current code, allowed the partition of goods and chattel, including African Americans, as personal property not annexed to the land, the current Code "must be interpreted as including personal property not attached to the land as 'goods or chattels.'"[268] The judge concluded, despite the context of the pre-Civil War code, that "as there is no prohibition on the sale of human embryos, they may be valued and sold, and thus may be considered 'goods or chattels' within the meaning of the current Virginia Code."[269]

C. Personhood and Arbitrary Characteristics

When faced with objective evidence of the existence of human life, subjective viewpoints on how valuable that life is should not be

264. *Neal*, 9 Ga. at 582.

265. Heidemann v. Heidemann, No. CL-2021-0015372, 2023 Va. Cir. LEXIS 13 (Va. Cir. Ct. Feb. 8, 2023). In contrast, in February 2024, the Alabama Supreme Court ruled that frozen embryos were "children" under the language of the law and negligent destruction of the embryos could be litigated under Alabama's Wrongful Death of Minors law. *See* Lepage v. Ctr. for Reprod. Med., P.C., No. SC-2022-0515, 2024 Ala. LEXIS 60, at *59 (Ala. Feb. 16, 2024).

266. *Heidemann*, 2023 Va. Cir. LEXIS 13, at * 10.

267. *Id.* at *11.

268. *Id.*

269. *Id.* at *13.

the basis of any law. Abortion rights advocates put a number of legal and philosophical limitations on unborn children in an effort to deny personhood status.[270] An objective standard, however, should always guide lawmakers when determining whether to recognize the absolute right to life.[271] Arbitrary characteristics such as viability, development, interests, or birth are illogical standards for constitutional personhood.[272]

1. The Intrinsic Value of Human Beings

Those who believe every life beginning at fertilization is intrinsically valuable and those who believe abortion is a justified medical procedure can typically agree on one thing: the unborn individual is a human being. The disagreement occurs over whether the unborn individual should be assigned value (or personhood) at fertilization as an individual human being worthy of life,[273] or whether value should be assigned at some moment in the future when the unborn individual has some characteristic, property, or function that makes the individual a person.[274]

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270. *See supra* Sections III.B.2–3.

271. *See supra* Section III.B.1.

272. The *Dobbs* opinion cited numerous philosophers and legal authors requiring specific characteristics for personhood to be afforded to the unborn. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 275 n.50 (2022). Among the characteristics discussed *infra*, cited authors claimed *at least one of five traits* were necessary conditions for personhood: consciousness, reasoning, self-motivated activity, capacity to communicate, and "the presence of self-concepts, and self-awareness, either individual or racial, or both." *Id.* (quoting Mary A. Warren, *On the Moral and Legal Status of Abortion*, 57 MONIST 1, 5 (1973) (emphasis added)).

273. Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wyoming all expressed this viewpoint in their legislative findings in their laws protecting the unborn. *See* ALA. CODE § 26-23H-1 (2019); ARK. CODE ANN. § 5-61-301 (2019); IDAHO CODE § 18-622 (2020); KY. REV. STAT. ANN. § 311.772 (West 2019); LA. STAT. ANN. § 40:1061 (2015); MISS. CODE ANN. § 41-41-45 (2022); MO. REV. STAT. §188.017 (2019); OKLA. STAT. tit. 12, § 861 (2023); S.D. CODIFIED LAWS § 22-17-5.1 (2005); TENN. CODE ANN. § 39-15-213 (2019); TEX. HEALTH & SAFETY CODE ANN. §245.002 (West 2017); W. VA. CODE § 16-2R-3 (2022); WYO. STAT. ANN. §35-6-102 (2022).

274. BECKWITH, *supra* note 56, at 132 (discussing why unborn children are valuable from conception just for being human).

A human being is a unified organism, developing as the same human individual from fertilization through birth to all stages of life and, finally, death.[275] Thus, a human being is "intrinsically valuable because of the sort of thing it is . . . even if it is not presently . . . or currently able to immediately exercise these activities that we typically attribute to active and mature rational moral agents."[276] In other words, even an embryo is intrinsically valuable because its nature is human. This type of view of the unborn affords them personhood simply for being human, nothing more.[277] It is this innate human nature that should serve as the foundation for constitutional personhood for the unborn.

2. Thomson's Foundational Argument for Bodily Rights

A common argument for denying fetal personhood to unborn children is that the mother should have total bodily autonomy. Philosopher Judith Jarvis Thomson laid the foundation for the case that bodily rights supersede any rights of the unborn child.[278] Thomson, unlike other abortion advocates, accepts the premise that an unborn child is intrinsically valuable but still ultimately concludes that the mother should have a right to abortion because she is not morally required to use her body and organs to sustain the unborn child's life.[279] However, instead of providing any reason for the rejection of "special responsibilities for one's offspring," Thomson dismisses the concept altogether by presupposing "a view of autonomy as obviously true."[280]

Thomson argues, however, that a right to life "does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body—even if one needs it for life itself."[281] This argument, however, misrepresents the essential

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275. *See supra* Section II.B.3.

276. BECKWITH, *supra* note 56, at 130.

277. *Id.* at 134.

278. Judith Jarvis Thomson, *A Defense of Abortion*, *in* THE PROBLEM OF ABORTION,173–87 (Joel Feinberg ed., 2d ed. 1984).

279. *Id.* at 174.

280. BECKWITH, *supra* note 56, at 184.

281. Thomson, *supra* note 278, at 180. Thomson uses her now-famous violinist example to demonstrate this point. Her example proceeds as follows:

nature of pregnancy. A mother is completely responsible for the dependency of her child on her.[282] Inapposite to Thomson's argument, "when one is completely responsible for dependence, refusal to continue to aid is indeed killing."[283] Thomson's argument creates an artificial dependency between two people, but development in utero is something *every* human being must go through to exist in the world post-natally.[284] The natural dependency between mother and child means there *must* be a "special responsibility" towards the unborn child.[285]

Thomson essentially claims that the woman only consented to sex, not to pregnancy, and her unborn child can be "unplugged" from

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> You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, "Look, we're sorry the Society of Music Lovers did this to you – we would have never permitted it if we had known . . . To unplug you would be to kill him. But never mind, it's only for nine months. By then he will have recovered from his ailment, and can safely be unplugged from you." Is it morally incumbent on you to accede to this situation? No doubt it would be very nice of you if you did, a great kindness. But do you *have* to accede to it? What if it were not nine months, but nine years? Or still longer? What if the director of the hospital says, "Tough luck, I agree, but you've now got to stay in bed, with the violinist plugged into you, for the rest of your life. All persons have a right to life, and violinists are persons. Granted you have a right to decide what happens in and to your body, but a person's right to life outweighs your right to decide what happens in and to your body. So you cannot ever be unplugged from him.

Id. at 174–75.

282. MICHAEL LEVIN, FEMINISM AND FREEDOM 288–89 (1987).

283. *Id.* at 288.

284. BECKWITH, *supra* note 56, at 188.

285. *Id.*

her body.[286] This theory distorts abortion as a whole, which is not simply the unplugging of a child, or a flip of a switch, but an intentional action to kill a living human being via starvation, suction, dismemberment, or induced cardiac arrest.[287] Because pregnancy is intrinsically different than Thomson's supposition, the case for the bodily rights of the mother fails against the right to life of her unborn child.[288]

In a similar way, southern courts found the rights of the slaveowner trumped the rights of the slave.[289] In the decade before the Civil War, southern courts openly advocated for the idea that slavery was not a violation of any sort of natural rights held by the slave.[290] Slaves, courts in Mississippi and Kansas opined, were "just another form of property," while the rights of slaveowners were "inviolable as the right of the owner of *any* property whatever."[291] Property rights,

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286. Thomson, *supra* note 280, at 46. The idea that a woman can consent only to sex, and not pregnancy, raises an interesting but ultimately biologically incorrect point. The purpose of having reproductive organs is to reproduce, and the sperm and the ova are intrinsically designed to merge and create the zygote, which then develops into the same embryo, fetus, baby, child, teenager, adult. BECKWITH, *supra* note 56, at 180. Thus, regardless of whether one intends pregnancy when engaging in sexual intercourse, consent to sex implies consent to pregnancy because it is the natural result of reproductive organs working in tandem. *Id.*

287. *See supra* Section II.B.4.

288. This is different than an ectopic pregnancy, or when the life of the mother is actually in danger while she is pregnant. Beckwith offers this explanation:

> [I]f that [saving both mother and child] is not possible, the physician must choose the course of action that best upholds the sanctity of human life. Because it is the mother's body that serves as the environment in which the unborn is nurtured, it is impossible to save the unborn child before viability . . . . [T]he physician must save the mother's life even if it results in the death of the unborn. The physician's intention is not to kill the child but to save [the life of] the mother. But because salvaging both is impossible, and it is, all things being equal, better that one should live rather than two die, "abortion" to save the mother's life, in this case, is justified.

BECKWITH, *supra* note 56, at 165.

289. Upham, *supra* note 9, at 144.

290. *Id.*

291. *Id.* (emphasis added)

like bodily rights, are not in and of themselves violative. The right to property or bodily autonomy, however, cannot supersede another human being's right to life or liberty.

3. Viability

After *Roe* was decided, states were not allowed to regulate abortion until viability, the point at which the Court deemed acceptable for the states to have a compelling interest in protecting prenatal life.[292] In response, and untouched by *Dobbs*, states enacted statutes based on the viability line for when protection of the unborn can be asserted.[293] Any restriction on abortion beginning at twenty-two weeks and beyond is based on viability, even though it is no longer the constitutional standard.[294] *Planned Parenthood v. Casey* defined viability as "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb. . . ."[295] Essentially, once the unborn child can live an independent life, not requiring the physical resources of the mother to survive, the unborn child has earned the right to be protected.[296]

An unborn child, however, has an independent existence beginning at fertilization as a separate and unique human being, and "changing from nonviable to viable or vice versa does not . . . change that being's identity."[297] In other words, a nonviable child in the womb does not change its nature, or gain any new personhood qualities, when she reaches the gestational age of survival outside of the womb.[298]

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292. *See* Roe v. Wade, 410 U.S. 113, 164–65 (1973).

293. *See* DEL. CODE ANN. tit. 24, § 1790 (2017); 23 R.I. GEN. LAWS § 23-4.13-1 (2019); VA. CODE ANN. § 18.2-72–18.2-73 (1975); MONT. CODE ANN. § 50-20-109 (1974); CONN. AGENCIES REGS. §19-13-D54 (2005); HAW. REV. STAT. ANN. § 453-16 (1970); 775 ILL. COMP. STAT. ANN. 55/1-15 (LexisNexis 2019); ME. REV. STAT. ANN. tit. 22, § 1598 (1978); MD. CODE ANN., HEALTH–GEN. § 20-209 (LexisNexis 1991); N.Y. PUB. HEALTH LAW § 2599-aa (LexisNexis 2019); WASH. REV. CODE § 9.02.100 (1992).

294. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022)

295. Planned Parenthood v. Casey, 505 U.S. 833, 872 (1992).

296. Personhood, however, is not mandated at viability; it is just the time which states can regulate abortion more strictly.

297. BECKWITH, *supra* note 56, at 35.

298. Making viability the time at which personhood attaches creates problems for born persons, as well; infants, for example, are nonviable if alone in the woods;

Survival outside of the womb also depends on the medical care the child can receive.[299] Is an unborn child in a rural area at twenty-four weeks less of a person than an unborn child of the same age in the city just because of the availability of high-quality medical care? If viability is the determining factor for constitutional personhood, the answer would seem to be yes.[300] Personhood should not be based on so unstable a foundation.[301]

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adults are not viable in the ocean. Both the infant and the adult are obviously still persons even though they are not viable in those environments. Viability, therefore, depends on the individual's environment and does not determine whether or not that individual is a person deserving of rights. An unborn child is not viable outside her mother's womb before a certain age because that is not the environment in which she *can* survive, but that should not mean she is any less of a person.

299. *Dobbs*, 597 U.S. at 277.

300. *Id.* Justice Alito further points out that an unborn child's odds of survival take into account "a number of variables," including fetal weight, age, the mother's general health, the "quality of the available medical facilities," among others. *Id.*

301. Ronald Dworkin, philosopher and abortion proponent, proposed a different theory for personhood, based on cortical brain activity. RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 11 (1993); *see also* Robert L. Stenger, *Embryos, Fetuses, and Babies: Treated as Persons and Treated with Respect*, 2 J. HEALTH & BIOMEDICAL L. 33, 44–45 (2006) (analyzing different standards used to deny personhood to unborn children). Dworkin believed abortion is morally permissible before the unborn child reached cortical development, when the unborn child could have interests or rights of its own. Stenger, *supra*, at 44–45. This stage of development generally occurs at around thirty weeks gestation. *Id.* at 45. Based on Dworkin's theory, there is a period of human life but not personhood, "for a person is one who has interests and rights." DWORKIN, *supra*, at 17–18.

Philosopher David Boonin expanded on Dworkin's "interests" personhood theory. DAVID BOONIN, A DEFENSE OF ABORTION 122 (2003). Boonin argued that organized cortical activity must be present for an individual to be a person; prior to this moment, an individual has no desires, and desires are necessary to have a right to life. *See* BECKWITH, *supra* note 56, at 146 (summarizing Boonin's argument in five parts). Boonin makes the distinction between dispositional and occurrent desires, and then between ideal and actual desires. *Id.* Occurrent desires are conspicuously entertained, but a dispositional desire is one an individual possesses even if he is not thinking about it at the current moment. BOONIN, *supra*, at 122; *see also* BECKWITH, *supra* note 56, at 146 (explaining Boonin's argument and why it is unusable). Thus, dispositional desires ground the right to life, for an individual has a right to life even if he is not currently thinking about it. BECKWITH, *supra* note 56, at 146. Once an unborn child reaches the cortical stage of development, she has a dispositional desire for survival, and therefore the right to life. *Id.* at 148–49 (giving two examples of why

4. Birth

Currently, seven states do not have a gestational limit on abortion and thereby declare that unborn children of any age do not have independent rights under the law.[302] Thus, personhood attaches at birth in these states. Birth signifies the physical entry into society, where the child is considered not only a legal person but also a citizen, able to capitalize on all rights vested in other born persons.[303] The Fourteenth Amendment makes the distinction between a person and citizen,[304] but for the typical American, birth signifies the merging of these two concepts.[305] All other rights protected by laws and the Constitution vest at birth.

As this country has seen in regard to slavery, location should not be a determinative factor for when constitutional rights should attach,[306] nor does it operate as a valid justification for assigning personhood based on location. Location in the womb is "not relevant to one's nature as a human being."[307] States that do not have a gestational limit for abortion discriminate against children based on

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this theory does not work: an indoctrinated slave and the creation of brainless human beings). However, the inherent wrongness in violating another's rights cannot rest on a human being's desires of any type. *Id.* at 149. The wrongness is instead "grounded in the notion that a human being . . . is deprived of real goods when it is killed . . . . [T]hese are goods its nature is intrinsically directed to achieve for its own perfection." *Id.* (explaining that "goods" here is used to describe life itself). Therefore, organized cortical brain activity cannot suffice as the foundation for constitutional personhood.

302. *See* COLO. REV. STAT. § 25-6-403 (LexisNexis2022); ALASKA STAT. § 18.16.010 (1970); N.J. REV. STAT. § 10:7-2 (2021); N.M. STAT. ANN. § 42-8-3 (LexisNexis 1973); OR. REV. STAT. § 2919.12 (1974); VT. STAT. ANN. tit. 18, § 9497 (2019).

303. U.S. CONST. amend. XIV, cl. 1; *see also* Destro, *supra* note 176, at 1288 (discussing the Fourteenth amendment's use of both natural person and citizen in its language).

304. U.S. CONST. amend. XIV; *see also supra* Section II.C (explaining the difference between citizen and person as used within the Fourteenth Amendment).

305. *See supra* notes 176–84 and accompanying text.

306. *See* Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864) No one today can argue that the Fugitive Slave Act was constitutional; the country is in almost universal agreement that African Americans by nature of being human beings, deserved constitutional protections and personhood no matter where they lived.

307. BECKWITH, *supra* note 56, at 154.

their location in or out of the womb. But birth is simply an event that happens; the nature of the child moving from the uterus through the birth canal into society does not change.[308] Birth is not "something that imparts to [a human being] a property that changes its essential nature."[309] Robert Wennberg, a pro-life advocate, summed up the birth argument nicely, writing "surely personhood and the right to life is not a matter of location. It should be *what* you are, not *where* you are that determines whether you have a right to life."[310]

IV. PROPOSED SOLUTION

The U.S. Constitution is admittedly difficult to amend.[311] The Constitution sets forth two ways it can be amended under Article V: the amendment originating in Congress or the amendment initiated by the state legislatures.[312] Regardless of where the amendment process is initiated, a supermajority, or two-thirds vote, is required. Once that is achieved, the amendment must receive the approval of three-fourths

308. *Id.*

309. *Id.*

310. ROBERT N. WENNBERG, LIFE IN THE BALANCE: EXPLORING THE ABORTION CONTROVERSY 77 (James Rachels ed., 1985). Even pro-choice advocates acknowledge the obvious fallacy in the birth argument, conceding that "the location of the baby inside or outside the womb cannot make such a crucial moral difference;" such an incoherent stance cannot be held. Peter Singer & Helen Kuhse, *On Letting Handicapped Babies Die*, *in* THE RIGHT THING TO DO: BASIC READINGS IN MORAL PHILOSOPHY 146 (1989); *see also* BECKWITH, *supra* note 56, at 154 (explaining why the birth argument is not a usable standard).

311. *See* U.S. CONST. art. V (stating the procedure to amend the Constitution). Because the U.S. Constitution is hard to amend, many pro-life commentators believe the solution should be found within the Fourteenth Amendment, either through legislation or through a Supreme Court ruling. *See, e.g.*, Jacobs, *supra* note 7,0 at 860–61 (finding the solution to the right to life in Fourteenth Amendment jurisprudence); Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 4 GEO. J.L. & PUB. POL'Y 361 (2006) (same); Brief for Mary Kay Bacallo at 1 , Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392) (advocating for unborn children as persons on behalf of neither party). Justice Alito, however, declined to address the issue of personhood within the Fourteenth Amendment in *Dobbs*, and the Court recently denied certiorari to the exact question. *See Dobbs*, 597 U.S. at 263; Doe *ex rel.* Doe v. McKee, 143 S. Ct. 309 (2022) (cert denied).

312. U.S. CONST. art. V.

of the states, either by way of state legislatures or constitutional conventions.[313] It is not surprising, then, that experts and commentators believe that a constitutional amendment, let alone an amendment affirming the right to life from conception, would be nearly impossible to achieve.[314] If, however, the "primary duty" of the government is to secure individuals' inalienable rights, including life, then the government must protect the right to life against "any such dangers" as abortion.[315] A constitutional amendment is the best way to protect the lives of unborn children and allow the government to fulfill that primary duty.

Senators and representatives proposed a constitutional amendment protecting the unborn from fertilization to natural death as an immediate response to *Roe v. Wade*.[316] The House Joint Resolution 132,[317] (hereinafter "HRJ 132") proposed in 1975 is perhaps the most comprehensive amendment and will be used as the foundation for the proposed solution herein. HRJ 132 was proposed as follows:

> Section 1: With respect to the right to life, the word "person" used in this article and in the fifth and fourteenth Articles of Amendment to the Constitution of the United States applies to all human beings irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.
>
> Section 2: No unborn person shall be deprived of life by any person; Provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

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313. *Id.*

314. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 937–39 (1973) (discussing the difficulties of passing a constitutional amendment).

315. Upham, *supra* note 9, at 142.

316. *See e.g.*, S.J. RES. 6, 94th Cong. (1975) (proposing a right to life amendment); H.R.J. RES. 317, 94th Cong. (1975) (same); H.R.J. RES. 99, 94th Cong. (1975) (same).

317. H.R.J. RES. 132, 94th Cong. (1975).

> Section 3: The Congress and the several states shall have power to enforce this article by appropriate legislation.[318]

This amendment is designed to ground the unborn explicitly within the meaning of "person" as used in the Fifth and Fourteenth Amendments and deals only with the right to life, leaving untouched other areas of the law that deal with the unborn other than state abortion laws.[319]

The language in the first section, specifically delineating age, health, function, or dependency as factors that *cannot* be used to define personhood, addresses a myriad of proposed personhood theories and eliminates non-biological barriers to personhood.[320] The amendment explicitly binds biological human beings to persons and personhood, fulfilling the ultimate purpose of the Fourteenth Amendment by including the unborn.[321] Additionally, by expressly including a provision exempting medical procedures that save the life of the mother, the amendment would not affect any medical professionals from performing miscarriage or ectopic pregnancy treatment, or any procedures where the intent of the procedure is not to kill the unborn child, even if that ultimately is the unfortunate result.

Giving Congress and the states the power to pass legislation enforcing the amendment combines the private-action restraint of the Thirteenth Amendment with state action on Congress of the Fourteenth Amendment.[322] The Fourteenth Amendment is only applicable to state action; it does not reach the private conduct between two individuals.[323]

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318. *Id.*

319. *See* Jacobs, *supra* note 70, at 831 (discussing eight areas of law where an unborn child is considered a legal person: "(1) laws that restrict abortion at some point in fetal development; (2) fetal homicide laws; (3) restrictions on capital punishment of a pregnant woman; (4) recovery for fetal deaths under wrongful death statutes; (5) the inheritance rights of preborn and posthumously born children under property law; (6) legal guardianship of prenatal humans; (7) the rights of preborn children to a deceased parent's Social Security and Disability; and (8) prenatal child support laws").

320. *See* discussion *supra* Section III.B.

321. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1034, 2542–42 (1865) (explaining the purpose of the Fourteenth Amendment); Destro, *supra* note 176, at 1288 (same).

322. U.S. CONST. amends. XIII, XIV.

323. *See e.g.*, The Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [Fourteenth] amendment,").

The Thirteenth Amendment, however, is not so limited.[324] It prohibits the private conduct of individuals imposing slavery or a badge of slavery onto another individual, irrespective of any state action.[325] It is an "absolute declaration that slavery or involuntary servitude shall not exist" in the United States.[326]

Combining the reach of state power and the private-conduct restraint gives the legislative branches of government the power of enforcement limiting an individual's right to intentionally take the life of an unborn child. Critics may fear that women may be prosecuted for losing a child and this simply gives the state license to prosecute, but every single law concerning abortion, protecting or abolishing it, exempts the mother from prosecution in violation of the law or conspiracy to violate the law.[327] There is no reason to suppose that would change with this amendment. Further, a proposed amendment such as one affirming the right to life from conception would certainly garner accusations of religious bias,[328] but such a potential bias does not render the opinion irrelevant.

Some argue that considering the unborn as legal persons might create chaos in the legal structure or social structure,[329] but this is not the case. Government structures such as the census, tax laws, and legal reapportionment do not have to take into full consideration the unborn,

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324. U.S. CONST. amend. XIII.

325. *See* William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1329 (2007) (discussing a needed expansion of "badges of slavery" within Thirteenth Amendment jurisprudence).

326. *The Civil Rights Cases*, 109 U.S. at 20.

327. *See* statutes cited *supra* note 2 (classifying ectopic pregnancy treatments as life-saving care).

328. Just because "an opinion may spring from religious beliefs does not mean that such a view is irrelevant in the political context. The establishment clause should not be available as an excuse through which to avoid discussion of the non-religious policy aspects of the issue." Destro, *supra* note 176, at 1326. Destro goes on to say that "someone's perceptions of moral propriety are always behind societal or legal prohibitions. It is not enough to make specious distinctions between 'moral' and 'legal' prohibitions; in either case the prohibited activity is considered by someone to be 'wrong.'" *Id.* at 1326 n.365.

329. STEPHEN D. SCHWARZ, THE MORAL QUESTION OF ABORTION 211–12 (1990).

only born persons.[330] Prior to states changing abortion laws, moreover, when the unborn were considered moral beings with the right to life, there were few issues regarding the census or other government activities.[331] Even if parts of the legal system were overhauled to recognize the right to life for the unborn, acknowledging the moral status of a class of human beings denied life itself is worth it. Abolitionists thought overhauling the legal and social structures to end slavery was worth it as well, against the cries of slaveowners claiming social destruction without free labor, rising unemployment, and a changing census and tax code among others.[332] The lives of African Americans were deemed to be intrinsically valuable by nature of being human, enough to rework the structure of the United States and pass amendments explicitly protecting their liberty.[333] The unborn deserve the same.

While Congress can easily find the unborn within the scope of the Fourteenth Amendment's use of "person,"[334] bills passed by Congress are subject to numerous rewrites, compromises, and lobbyists, creating a high probability that measures protecting the unborn and the right to life will not be as strong or as uniform as they need to be. [335] Any bill passed would also likely be immediately

330. BECKWITH, *supra* note 56, at 168 (2007). It would be illogical and inefficient to count unborn children in the census, but that should not be a justification to deny them personhood. *Id.*

331. *See generally* James Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY L.J. 29 (1985) (explaining state laws prohibiting abortion at the time the Fourteenth Amendment was passed).

332. Slaveowners even tried arguing that slavery was *good* for African Americans in their fight to keep their way of life. *See generally* Alfred L. Brophy, *Slaves as Plaintiffs*, 115 MICH. L. REV. 910 (2017) (exploring some surprising rights slaves could exercise before the Civil War).

333. *See supra* notes 41–48 and accompanying text.

334. Destro, *supra* note 178, at 1334 ("[T]hose most familiar with the purpose of the fourteenth amendment, its authors, rejected any but a biological standard by which to judge the existence of personal rights. . . . The alternative is to make the protection of basic rights dependent upon anything we wish.")

335. *See* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002) (studying how bills are drafted by staffers in the Senate Judiciary Committee as a case study).

challenged as unconstitutional, as evidenced by the nearly fifty years of abortion-related jurisprudence.[336]

The Supreme Court abdicated its duty to protect the rights of unborn children in the *Dobbs* decision and ceded that duty to the states. Yet, the Court exercised the power to say who is and who is not a person within the meaning of the Constitution in *Roe v. Wade*.[337] The power over life and death is the ultimate power, and the *Dobbs* decision transferred that power to the states.[338] As long as the power to make such distinctions remains in the hands of any governmental body, the ultimate safety of any group of individuals whose existence or physical need threatens to exacerbate the profound problems of others is in question.[339] Before the Civil War amendments were passed, this power was exercised by governments and courts to exclude slaves from the safety of constitutional guarantees.[340] The Civil War amendments explicitly brought African Americans within the protections of the Constitution, where they should have always been.[341] A life protective amendment will do the same; it will bring the unborn within the protections of the Constitution, where they should have always been.

V. CONCLUSION

When the Court accepted *Dobbs v. Jackson Women's Health Organization* on certiorari, pro-lifers across the country believed the unborn were finally going to get the constitutional protection of personhood they deserved as human beings. Instead, the Court returned the issue to the states, leaving the unborn in some states more vulnerable than before.[342] While some states were able to finally enforce their laws protecting the unborn from conception and recognize them as persons under state law, others repealed or amended laws,

336. *See supra* Section II.B.1.

337. 410 U.S. 113, 158 (1973) ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

338. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

339. Destro, *supra* note 176, at 1368.

340. Upham, *supra* note 9, at 142.

341. Oakes, *supra* note 19, at 415. Chase firmly believed a constitutional amendment was the *only* way to fully abolish slavery within the United States. *Id.*

342. *Dobbs*, 597 U.S. at 231.

giving little to no protection to the unborn.[343] The lack of uniformity among the states dealing with a class of human beings is not likely to continue forever. To deny an individual is a person not entitled to the inherent rights of life and liberty is to "reject the egalitarian philosophy embodied in the Declaration of Independence and the Fourteenth Amendment."[344] The right to life is "essential to the preservation of a free society," and our nation should acknowledge and protect the personhood of all human beings, regardless of age, development, dependency, location, or race.[345]

343. *See supra* Section III.A-B.

344. Destro, *supra* note 178, at 1327.

345. *Id.*