

THE PRO-LIFE CAUSE IN THE POST-*ROE* ERA

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As the pro-life movement, our ultimate goal is equal protection for the unborn under the law. Yet how we get there, and what our tactics should be, remain very much open to debate, particularly in this treacherous moment. Especially in an era of intense political uncertainty and wavering commitment from our political allies, our only choice is incrementalism. Now, more than ever, our rhetoric and policy approaches have to be calculated to appeal to the median voter, recognizing that sweeping statements and blanket bans run the risk of making it harder, rather than easier, to sway those who don't agree with us.

For nearly a half-century, the pro-life cause was primarily a legal one. *Roe v. Wade* short-circuited the democratic process, preventing laws to protect unborn life from having effect at the state level. Before any progress could be made, political coalitions had to be formed, compromises made. Getting originalist justices on the Supreme Court was the focus of so much pro-life political activism as a matter of necessity, not choice.

But that era ended, blessedly, in 2022. The terrain of our fight has shifted, and our tactics and rhetoric must shift as well. And now our field of battle has largely (though not exclusively) shifted from the courtroom to the ballot box and the hand-to-hand combat of electoral politics. For those engaged in the public square, that means less biting of bullets on metaphysical distinctions, and more efforts to build trust with a public uncertain about our motivations and policy visions.

The scorecard tells the story—since the Court overturned *Roe*,¹ there have been eighteen ballot measures that put the question of abortion in front of voters. In all but three states, the cause of life has lost.

We should celebrate the few victories. Nebraska voters approved a pro-life referendum and voted down a pro-choice one; South Dakota turned aside a bill that would have allowed abortion up to the end of the first trimester. In Florida, the state's supermajority requirement meant that the current six-week

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

ban remains on the books, despite the “reproductive rights” side outstripping the side of life by fourteen points.

Yet the overall tale of the tape is grim. In the races the pro-life side has lost, the margin between those efforts and the pro-choice side of the ledger averages 17.8 points, including fifty-point whoppers in Vermont and Maryland.² The closest calls came in Missouri and Kentucky, where the defeats were each by less than five percentage points; a 2022 Montana referendum about whether to provide care to an infant born alive as a result of a botched abortion was similarly narrow. As the pages of the *New York Times* laid out bluntly, “Ballot measures on abortion rights have succeeded beyond what even their proponents imagined when the United States Supreme Court overturned *Roe v. Wade* two years ago.”³

The dust will soon start to settle; there will only be three states left that have abortion bans as well as a citizen-initiated ballot process—Arkansas, North Dakota and Oklahoma (Illinois, Massachusetts and Oregon also allow for referenda but are muscularly pro-choice.) And that leaves us facing a landscape few expected in the heady days after *Dobbs* was first handed down. As pro-lifers, we’ve too often been caught flat-footed, having brought legal knives to a public opinion gun fight.

Anything close to equal protection will require an American heart constituted differently than the one we’ve seen in the past two years, regardless of who sits on the federal bench. The legal conception of “equal protection,” whether grounded in the Fourteenth Amendment or a federal personhood amendment, seems sufficiently beyond the political horizon to make it, at the current time, a distraction from our goal of saving as many unborn lives as possible, and counterproductive at worst. The pro-life cause is going to have an impossible time winning over enough hearts to make equal protection for the unborn anything close to a political reality if the American people don’t trust that we have the best interests of babies *and their moms* at heart.

This means taking a page out of the playbook of then-Senator J.D. Vance’s debate stage performance. Vance didn’t get everything right on abortion in the 2024 election cycle, but his way of framing and talking about the issue in response to hostile questions was a model of how pro-lifers need to be—as the saying goes—meeting the median voter where they’re at. In response to a moderator’s question, he talked about growing up in a working-class neighborhood, and knowing a woman who had an abortion:

She felt like if she hadn’t had that abortion, that it would have destroyed her life because she was in an abusive relationship. And I think that what I take from that, as a Republican who proudly wants to protect innocent life in this country, who proudly wants to protect

2. Patrick T. Brown, *What Does Another Trump Presidency Mean for the Pro-Life Movement?*, PUB. DISCOURSE (Nov. 17, 2024), <https://www.thepublicdiscourse.com/2024/11/96427/> [<https://perma.cc/MU79-H2QE>].

3. Kate Zernike, *Abortion Rights, on Winning Streak, Face Biggest Test in November*, N.Y. TIMES (Aug. 23, 2024), <https://www.nytimes.com/2024/08/23/us/abortion-ballot-measures-have-had-success-this-year-is-their-biggest-challenge.html> (on file with author).

the vulnerable, is that my party, we've got to do so much better of a job at earning the American peoples' trust back on this issue where they frankly just don't trust us.⁴

Note what Vance does here. He leads with empathy, recognizing that many women turn to the lethal violence of abortion not because they are empowered, but because they are vulnerable. He doesn't shy away from his pro-life beliefs, the way too many other nationally prominent Republicans have done this election cycle. And he forthrightly states the truth. The truth about the fact the Republican party—the only nationally viable party with meaningful pro-life representation—does not have the benefit of the doubt on issues of abortion, reproduction, and maternal health in the eyes of too many Americans.

This is fueled by viral misinformation and TikToks that lie about basic facts of biology. Too many of those since June 2022 have helped shape the public misunderstanding of the abortion debate. The waters have been muddied, not clarified, by candidates, officeholders, and media organizations lying about national pregnancy databases and or misrepresenting tragic cases of medical malpractice. But the long history of Republican officeholders making ill-advised comments about rape and abortion, or who vote for pro-life legislation while secretly paying for their mistresses' abortions, does not need to be recounted here in order to suggest voters are not always wrong to see a party that has not made life and family a priority.

What Vance's answer does so well is evincing real and heartfelt compassion for the victims of domestic violence, economic deprivation, or other innumerable tragedies that cause women to seek the violence of abortion as a solution to an unwanted problem. Acknowledging the difficult circumstances that make abortion a desired option in no way undermines the pro-life cause; in fact, failing to speak about them with compassion and understanding threatens to undermine it.

Because our current rhetorical toolbox isn't working. If messaging around the immeasurable moral worth of the unborn were the ticket to win over hearts and minds, we would have seen more promising election results for the side of life since *Dobbs*. But a strict equal protection approach, applying even in cases of rape and incest, is roughly an eighty-five-fifteen issue in much public opinion polling.⁵ Perhaps a future generation will be able to have abortion debates about philosophically principled application of the principle that every unborn human deserves a legally-protected chance at life. But in today's world, no abortion restriction without the "three exceptions" has a meaningful chance at surviving

4. J.D. Vance, *Vice Presidential Debate [Transcript]*, CNN TRANSCRIPTS (Oct. 1, 2024, 9:00 PM), <https://transcripts.cnn.com/show/se/date/2024-10-01/segment/01> [<https://perma.cc/A3VP-5CHS>].

5. See AP-NORC, *Support for Legal Abortion Increased Since Roe v. Wade Was Overturned* (July 9, 2024), <https://apnorc.org/projects/support-for-legal-abortion-increased-since-roe-v-wade-was-overturned/> [<https://perma.cc/J9E8-J2RA>]; Marist Poll, *Abortion Rights in the United States: Americans Staunch in Opposition to Overturning Roe v. Wade* (Apr. 26, 2023), <https://maristpoll.marist.edu/polls/abortion-rights-in-the-united-states/> [<https://perma.cc/BR4Y-PB46>].

a popular backlash, particularly at the federal level.⁶ We have a long, long way to go before a principled equal protection approach is embraced by even one-third of the American people, to say nothing of a majority.

The abortion rights movement likes to focus on horrific edge cases to draw attention from the fact that they make up only a small fraction of elective abortions. Leading with empathy without giving up on the principle that every life is sacred can help provide rhetorical space to maneuver. The Guttmacher Institute estimates that less than two percent of abortions stem from cases of rape and incest⁷—if pivoting from a discussion on terrain on which we are unfortunately but undeniably out of the mainstream of public opinion helps us pass or preserve a law that addresses the other 98 percent of abortions, it is a prudent step well worth taking. On the flip side of the coin, the popular rhetorical move of focusing on late-term abortions is useful for politicians trying to dodge tough questions, but they constitute between 1 and 4 percent of all abortions nationwide.⁸ That cannot be the extent of a pro-life messaging strategy.

We also don't gain anything through strategic ambiguity. According to reporting, pro-life advocates in various red states have been involved in pushing back against efforts that would clarify exceptions around when a mother's life is in danger.⁹ The case of Savita Halappanavar, in which an incomplete miscarriage led to an ultimately fatal case of sepsis, provides an all-too-real example of where unclear guidelines can lead—and because of it, campaigners in Ireland were able to misrepresent her case as an example of why Ireland needed to erase its pro-life law in a popular referendum.

Here in the United States, progressive newsrooms are working overtime to fit tragic cases of maternal mortality into the mold of deaths caused by *Dobbs*. While pro-lifers must continue to play defense, pointing out the flaws in these narratives—storylines which, let it be said, all too often let providers off the

6. The “three exceptions” framework has been closely associated with President Donald Trump. See Maggie Haberman et al., *Trump Says Abortion Restrictions Should Be Left to the States*, N.Y. TIMES (Apr. 8, 2024), <https://www.nytimes.com/2024/04/08/us/politics/trump-abortion-states.html> (on file with author). There are currently eight states that have abortion bans on the books that do not include an exception for rape and/or incest; the only one with a popular referendum procedure is Oklahoma (Missouri and Arizona, which did not have exceptions for rape or incest, had their pro-life laws nullified by a popular referendum.).

7. Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 113 (2005), <https://www.guttmacher.org/sites/default/files/pdfs/pubs/psrh/full/3711005.pdf> [<https://perma.cc/66K9-WW93>].

8. U.S. Ctrs. for Disease Control & Prevention, *Number and Percentage of Reported Abortions, by Known Weeks of Gestation and Reporting Area of Occurrence—Selected Reporting Areas, United States, 2022, Table 10*, 73 MORBIDITY & MORTALITY WKLY. REP. 1 (2024), https://www.cdc.gov/mmwr/volumes/73/ss/ss7307a1.htm#T10_down [<https://perma.cc/XG8V-MJEE>].

9. Kavitha Surana, *Some Republicans Were Willing to Compromise on Abortion Ban Exceptions. Activists Made Sure They Didn't.*, PROPUBLICA (Nov. 27, 2023, 5:00 AM), <https://www.propublica.org/article/abortion-ban-exceptions-trigger-laws-health-risks> [<https://perma.cc/H48T-7WJW>].

hook for sub-standard care—it remains the case that these color the public’s imagination. While we can appreciate the danger of allowing such exceptions to become too much of a general-purpose loophole, we should also appreciate the opposite danger—that due to media misinformation or progressive fearmongering, a doctor fails to act in a circumstance where a pregnant mom’s life is directly threatened, undermining our credibility as wanting to protect both women and their babies.

So some canniness around the supply side of abortion is necessary in our strange new post-Roe world. We can and should defend the undeniable principle of the equal worth of every human life in the woman without pushing our political allies to defend principles which are deeply unpopular with broad swaths of the electorate. On purely pragmatic grounds, tightening guidelines that prove themselves too loose at some point in the future seem less likely to inflame the post-*Dobbs* tinderbox right now. But more broadly, until we change more minds about the reality of dignity and value of every unborn life, we will have to make our peace with laws that allow for certain exceptions in the name of prudence and pluralism. Purity spirals will undermine our cause.

But if we have to make peace with laxer restrictions on the availability of abortion than our most philosophically-consistent brethren might be comfortable with, that leaves the broad swath of abortions not sought after *in extremis*. The pro-life movement can do a better job responding to the economic, social, and cultural factors that lead women to choose abortion in the first place.

This requires a broader understanding of the economics of family life; a recognition that many women choose abortion not strictly out of concerns for what it might do to their classwork or career, but because they feel like they simply cannot afford another mouth to feed; that having to search for a bigger apartment or childcare will throw their life off track in an indelible way. And we have to admit that of course parenthood does change our scripts in ways we can’t predict or script—many times, for the better. Seeking to address areas where better policy can make a difference will take up an increasingly large share of the pro-life community’s time and attention in the years to come.

At the most fundamental level, a more pro-life culture will require a more pro-marriage culture. As the President of the Ethics and Public Policy Center, Ryan T. Anderson wrote last year:

How can even those who believe unborn children are people with rights support abortion? The answer is the sexual revolution, a revolution that conservatives have never attempted to combat in a sustained way, despite many one-off campaigns and skirmishes. So long as nonmarital sex is expected, large numbers of Americans will view abortion as necessary emergency contraception. So long as marriage rates are declining and marriage age is delayed—but the human sex drive persists—abortion rates will remain high.¹⁰

10. Ryan T. Anderson, *The Way Forward After Dobbs*, FIRST THINGS (Oct. 1, 2024), <https://firstthings.com/the-way-forward-after-emdobbs-em/> [<https://perma.cc/L6DG-S7KP>].

In 2022, 88 percent of all abortions were performed on unmarried women; rates of abortion are ten times higher for unmarried women than for married ones.¹¹ Welcoming a child when you weren't expecting it—particularly without the support of a loving and committed partner—often requires heroic levels of effort.

Addressing our nation's precipitous decline in marriage is a problem that defies silver bullet solutions. But it should be front and center of any public policy agenda, which should explore removing marriage penalties from our tax and transfer programs. Policymakers should give cohabiting couples currently receiving safety net benefits a little bit of a grace period before their household income eligibility is recalculated to avoid them being penalized for doing the right thing and tying the knot; call it a "honeymoon bonus." Helping men become more marriageable through more creative approaches to education and active labor market policies can help. But ultimately the decline in marriage is not strictly an economic story, but a cultural one.

That requires messy experimentation—figuring out how the institutions of civil society like churches and universities can rebuild a culture of marriage at the micro level and then build from there. How we can revisit our models of human capital formation to remove the implicit pressures to not get married and have kids until people are in their early thirties. To teach the truth about human biology in high school so that women aren't misled into thinking it will be as easy to conceive in their late thirties as in their late twenties.

But these cultural trends didn't happen overnight; neither can they turn on a dime. And until we restore a culture which makes marriage more appealing and achievable, we will continue to be faced with the fact that many times pregnancy occurs before couples are ready for it. The impact of a half-century of legalized abortion on our nation's culture can't be erased overnight. Encouraging men to step up and do the right thing is the first step. But in cases where he can't or won't, policy needs to step in. Women facing an unexpected pregnancy need to be met with the social and economic support they need to increase the odds of a successful pregnancy and healthy baby.

What does this agenda look like? The ongoing realignment of the political parties along educational lines has opened the doors to more creative policy proposals from unexpected corners. One of the policies that have received attention in recent years is the Americans United for Life and Democrats for Life's proposal to "Make Birth Free."¹² Of course, childbirth and OB care will never truly be free; but the policy could be designed in such a way that the

11. U.S. Ctrs. for Disease Control & Prevention, *Number and Percentage of Reported Abortions, by Known Marital Status and Reporting Area of Occurrence — Selected Reporting Areas, United States, 2022, Table 7*, 73 MORBIDITY & MORTALITY WKLY. REP. 1 (2024), https://www.cdc.gov/mmwr/volumes/73/ss/ss7307a1.htm#T7_down [<https://perma.cc/HE5Y-39XW>].

12. Kristen Day & Catherine Glenn Foster, *Make Birth Free: A Vision for Congress to Empower American Mothers, Families, and Communities*, AMS. UNITED FOR LIFE (2023), <https://aul.org/wp-content/uploads/2023/01/Make-Birth-Free-White-Paper.pdf> [<https://perma.cc/4ERZ-VR73>].

government or the public picks up more of the share of those expenses, through greater social insurance or more aggressive regulation of private insurance.

We should be epistemologically humble about its impact; in fact, we shouldn't expect that efforts to make birth free would result in a large direct reduction in abortion rates. Many low and moderate-income women already receive free childbirth through Medicaid (though pro-lifers could very easily make common cause with other political groups to advocate for expanded eligibility or elimination of marriage penalties in the program). More fundamentally, the evidence that the cost of *childbirth*, itself, is motivating the choice to seek out abortion versus the other eighteen years of child raising is slim. But it should be lauded as a creative effort to shift our policymaking priorities to focus more on the needs of parents, writ large, including both the pre- and post-partum periods as well as the years that follow.

There is good news on this front. Every state that has moved to protect unborn life after *Dobbs* has also taken at least some action to increase safety-net support for new moms, some meaningfully, some marginally.¹³ Every state (save one, Arkansas) has opted into covering new mom's health insurance coverage for a year after birth, up from the previous standard of sixty days. Conservative states that have taken aggressive action to restrict abortion, like Texas and Florida, spent some new money to help mothers during pregnancy, such as funding pregnancy resource centers and childcare vouchers. North Carolina, a politically divided state, coupled its twelve-week abortion ban with an expansion of social spending, including paid leave for state employees, more money for foster care, and funding for prenatal health care for low-income moms. Pro-life states have expanded childcare subsidies and streamlined regulatory barriers, expanded coverage of female and maternal health services, expanded eligibility for safety net programs, allowed more state employees to take paid parental leave, and created or expanded grants to pregnancy resource centers. But not only have we not done enough, we've generally done a pretty poor job telling people about it.

Part of the right's failure to successfully message pro-life support successfully is because of the, at times, awkward tensions within the conservative coalition. For decades, pro-life social conservatives have had an arranged marriage with a political movement that prioritized limited government and cutting social spending, rather than increasing it.¹⁴ These tensions still exist. This is where pro-family and pro-life governing came to be at odds with traditional small government orthodoxy. Tax cuts are—or can be—great, but they are not a substitute for direct action, whether by the state itself or by empowering the institutions of civil society. Any state government that considers itself authentically pro-life should prioritize the economic and

13. Patrick T. Brown et al., *Two Years, After Dobbs: State Action to Expand Support for Moms, Babies, and Families*, ETHICS & PUB. POL'Y CTR. (June 2024), <https://eppc.org/wp-content/uploads/2024/06/24-06-Two-Years-Later.pdf> [<https://perma.cc/UE4K-FTAC>].

14. MARY ZIEGLER, DOLLARS FOR LIFE: THE ANTI-ABORTION MOVEMENT AND THE FALL OF THE REPUBLICAN ESTABLISHMENT 110 (2022).

cultural challenges facing parents with children, first and foremost, with a special attention to moms in crisis pregnancy.

In Indiana, lawmakers were working on a bill to increase support for pregnant and postpartum moms by \$45 million. In the process, some on the right side of the aisle urged the legislature to scrap that provision and instead put those funds towards across-the-board tax cuts.¹⁵ After sustained engagement with Gov. Holcomb, pro-life advocates ended up successfully defending the earmarked money, which ended up in the Hoosiers First Family Fund.¹⁶

We can dream bigger. For a time, it was trendy for blue state governors to declare themselves a “sanctuary state” for women seeking abortion. Put aside the grotesqueness of the concept of sanctuary—providing protection for someone seeking refuge—being applied to the practice of killing an unborn human. They promised “sanctuary” to women seeking an abortion, with philanthropic organizations even reimbursing the cost of travel and expenses for trips to California or New York.¹⁷

What would it take for pro-life state to declare itself a sanctuary state for the unborn? To tell pregnant moms or families unsure how they’ll make ends meet with another mouth to feed that they’ll get priority in affordable housing vouchers, a state-level child tax credit, case management services through the WIC program, generous childcare subsidies? Many of these programs already exist; some are underfunded. Tackling the administrative burdens that make it difficult for new moms to find out about or apply to these programs would be a worthwhile, and not especially costly, initiative for any state seeking to burnish its pro-life bona fides.

Community-run programs, like those envisioned in the Community Mentors for Moms Act of Sen. Marco Rubio, R-Fla., could benefit from seed funding or public service campaigns.¹⁸ And once the baby is born, the Utah Home Visiting Program is an example of evidence-backed programs that can improve outcomes for children and parents, and could merit new funding.

At the federal level, lawmakers could—at a minimum—remove barriers that make it difficult for faith-based and other charitable organizations from participating in federal programs. Non-discrimination requirements and other

15. Matt Adams, *House Committee Strips Family Fund from Senate Bill, Adds \$225 Taxpayer Refund Instead*, FOX59 (Aug. 2, 2022), <https://fox59.com/indiana-news/house-committee-discussing-bill-to-create-hoosier-families-first-fund> [<https://perma.cc/8Z5F-BT5M>].

16. Ryan Foley, *Indiana Passes Pro-Family Law on Same Day Abortion Ban Was Approved*, THE CHRISTIAN POST (Aug. 9, 2022), <https://www.christianpost.com/news/indiana-passes-pro-family-law-to-ease-parents-financial-burdens.html> [<https://perma.cc/R58M-PCZP>].

17. Emma Gallegos, *Gov. Newsom Champions California as a Sanctuary for Those Seeking Abortion*, EDSOURCE (June 27, 2023, 4:33 PM), <https://edsource.org/updates/gov-newsom-champions-california-as-a-sanctuary-for-those-seeking-abortion> [<https://perma.cc/AB3Q-FB5X>]; Press Release, N.Y. State Assemb., Governor Hochul Signs Bills to Protect Abortion and Reproductive Rights (July 1, 2023), <https://nyassembly.gov/Press/?sec=story&story=106524> [<https://perma.cc/WVG2-FSLS>].

18. S. 48, 118th Cong. (2023). Available at: <https://www.congress.gov/bill/118th-congress/senate-bill/48/text> [<https://perma.cc/N4FB-7VNL>].

strings attached to federal dollars have a chilling effect on religious non-profits who want to be able to meet vulnerable moms where they are, but don't want to have to compromise on their religious identity.

In addition to empowering civil society, the federal government could explore salient, signature moves to give parents more support at the time they need it—right around childbirth. A so-called “baby bonus” would be an improvement on the existing Child Tax Credit, ensuring that new parents get an up-front check or direct deposit shortly after birth, rather than around the time they file their tax returns (in some cases, more than a year later). A baby bonus could be designed to not discourage marriage or work and would be a relatively inexpensive federal outlay especially compared to other federal tax provisions.¹⁹ Promising new parents would receive a \$2,000 check in the mail when they received their new child's Social Security Card would be a tangible, high-profile promise to ensure new parents are celebrated and new life welcomed.

These types of initiatives deserve sustained funding and renewed enthusiasm from the public, private, and non-profit sector. The pro-life movement is all too familiar with the fact that the mainstream media is biased against us, that the pockets are much deeper on the “reproductive rights” side of the question, and that political polarization has made the pro-life Democrat extinct. Yet complaining about these shifts in the tectonic plates undergirding our political environment is like complaining about the referees during a football game. To turn the tables, we have to embrace new strategic initiatives and flagship efforts to engender trust, not just find new messaging tricks or legal stratagems.

Prudence is not the same as cowardice—which has not been in short supply over the past two years. Pro-lifers are used to being asked to take the back seat in the conservative coalition for other goals. But what makes this moment different is that a strategy of prudence and empathy is not about canny election-year politics; it's a matter of necessity for the pro-life movement. Politics isn't a suicide pact. If the issue of life becomes seen as a political albatross, we will see more of our erstwhile allies ditch us in the name of expediency; we need to give them a politically viable leg to stand on.

Which means doing the hard work of finding stances that resonate with the conflicted voter in the middle who doesn't necessarily love the idea of abortion but doesn't feel confident her state's pro-life laws won't leave a pregnant woman in the lurch in the case of some rare complication. It means committing to meaningful safety net improvements, and building out civil society efforts, to ensure that voters have confidence that single moms facing an unplanned pregnancy don't have to go it alone. It means leading with love and empathy, and meaning it, rather than the kind of in-your-face rhetoric that stirs up voters in a primary or attracts donations but does little to woo the decisive median voter.

While there will continue to be legal battles to be fought, the future of pro-life efforts will largely be decided by voters rather than judges. This should not

19. Patrick T. Brown, *It's Time for a Bonus, Baby*, AMERICAN COMPASS (Aug. 27, 2024), <https://americancompass.org/its-time-for-a-bonus-baby/> [https://perma.cc/D6H4-GHYX].

be read as an exhortation to be duplicitous or cagey in our beliefs, but to remember that we are out of a battle fought on legal terrain and into one in which every tweet, every legislative push, every campaign ad can influence public opinion and the political process. An earnest commitment to supporting women in difficult situations, and the essential work of family and parenthood more broadly, has to be the next step for the pro-life movement.