POSSIBLE PARTIAL PERSONHOOD FOR THE UNBORN

TERESA COLLETT*

INTRODUCTION

Dobbs v. Jackson Women's Health Organization,[1] presents the opportunity for pro-life advocates to secure constitutional rights for the last group of human beings in the United States who are not constitutionally recognized as persons—unborn human beings. Achieving this monumental goal will require both prudence and patience. This article argues that one path to attaining constitutional protection for all unborn children begins with establishing legal recognition for those who are viable, that is, unborn children capable of surviving outside the womb, albeit with medical assistance.

Many in the pro-life movement will argue this initial objective is too little, accurately noting that protecting only viable unborn children leaves a large proportion of unborn children—those under five months gestation—unprotected. Indeed, over 95% of abortions take place during this period.[2] Others will argue that the *Dobbs* opinion itself forecloses use of viability in such an approach as providing insufficient legal justification.

This article aims to demonstrate that pursuing personhood for viable unborn children is not only an essential first step in the broader fight to protect all unborn lives but also an achievable legal objective within the near future.

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* Professor of Law and Director of the Prolife Center at the University of St. Thomas. This article has benefited greatly from extended debate with my friends Clarke Forsythe and Paul Linton. I am also grateful for the research assistance of Tate Thielfoldt.

1. 597 U.S. 215 (2022).

2. Stephanie Ramer et al., *Abortion Surveillance—United States, 2022*, 73 SURVEILLANCE SUMMARIES CDC 1, 6 (2024) (noting that nearly all abortions in 2022 took place early in gestation, 92.8% of abortions were performed at ≤13 weeks' gestation, a smaller number of abortions (6.1%) were performed at 14–20 weeks' gestation, and even fewer (1.1%) were performed at ≥21 weeks' gestation).

I. DEFINING ABORTION

At the outset, it is essential to clarify the definition of abortion, especially given the profound impact that terminology has on legal analyses.[3] For physicians and other healthcare professionals, abortion is:

> [T]he expulsion of a fetus from the uterus before it has reached the stage of viability (in human beings, usually about the twentieth week of gestation). An abortion may occur spontaneously, in which case it is also called a miscarriage, or it may be brought on purposefully, in which case it is often called an induced abortion.[4]

In *Roe v. Wade*, the United States Supreme Court defined abortion as "the right of a woman to decide whether or not to terminate her pregnancy."[5] The Court emphasized that this "right" was not absolute, explaining that a woman is not "entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses."[6] This understanding of abortion as a right to terminate pregnancy persisted through the next forty-nine years of jurisprudence,[7] up to and including the *Dobbs* opinion overruling *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

The *Dobbs* majority repeatedly referred to or quoted earlier cases describing abortion as the termination of a pregnancy.[8] In his concurrence Chief Justice Roberts emphasized that "[o]ur abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy."[9] Similarly, the dissenting Justices Breyer, Sotomayor, and Kagan echoed this description.[10]

There is no case suggesting that the putative legal right to abortion is or was ever understood by the Court as an affirmative right to kill the unborn.[11] True, multiple decisions of the Court acknowledged that "'[a]bortion is a unique act' because it terminates 'life or potential life,'"[12] but these acknowledgments merely reflect the intense political debates surrounding abortion,[13] rather than conferring a right to intentionally kill the unborn.

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3. *See* Kate Zernike, *What Does 'Abortion' Mean? Even the Word Itself Is Up for Debate*, N.Y. TIMES (Oct. 18, 2022), https://www.nytimes.com/2022/10/18/us/abortion-roe-debate.html (on file with author).

4. *Abortion*, BRITANNICA, https://www.britannica.com/science/abortion-pregnancy [https://perma.cc/99NQ-JS44].

5. Roe v. Wade, 410 U.S. 113, 170 (1973) (Stewart, J., concurring), *overruled by Dobbs*, 597 U.S. 215. On a slightly irreverent note, it might be observed that almost all pregnancies will terminate eventually, the majority of them within thirty-seven to forty-two weeks' gestation.

6. *Id.* at 153.

7. *See, e.g.*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 871, 879 (1992).

8. *Dobbs*, 597 U.S. at 255, 290, 296–98, 334.

9. *Id.* at 348 (Roberts, C.J., concurring).

10. *Id.* at 359 (dissenting).

11. *See, e.g.*, Wynn v. Scott, 449 F. Supp. 1302, 1321 (N.D. Ill. 1978) ("If, however, there are instances where a physician has a choice of procedures, both of equal risk to the woman, the physician must choose the procedure which is least likely to kill the fetus. This choice would not interfere with the woman's right to terminate her pregnancy. It never could be argued that she has a constitutionally protected right to kill the fetus. She does not.").

12. *Dobbs*, 597 U.S. at 290 (quoting *Case*y, 505 U.S. at 852) (alterations in original).

13. *Id.* at 223–24.

The perceptions of induced abortion by citizens, legislators, and courts often are based on their judgments about the intentions of women obtaining abortions. Americans know that abortion is intended to—and almost always does—result in the death of the fetus or unborn child,[14] but they are sympathetic to many of the reasons women give for seeking abortions.[15] People often—perhaps subconsciously—employ reasoning similar to that used by the Supreme Court in the assisted suicide cases, *Vacco v. Quill*[16] and *Washington v. Glucksberg*.[17] In those cases, the Court distinguished laws recognizing a patient's right to refuse care or obtain pain medications that might hasten death from laws creating a right to a physician's active assistance in a patient's suicide.[18] "[T]he . . . common law of homicide often distinguishes . . . between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another's life."[19] Similarly, abortion has consistently been framed as the termination of pregnancy rather than the deliberate killing of an unborn child.

Despite the undeniable medical fact that "terminating a pregnancy" through induced abortion ends the life of a whole, separate, unique, living human being—a being that is an "individual living member of the species of Homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation,"[20] the Supreme Court has never held that women have a right to seek abortions with the "specific purpose" of taking the child's life.

Thus, while the Court has recognized the consequence of induced abortion, there is simply no judicial precedent for the proposition that a legal right to abortion necessarily confers upon a woman the right to "act with the specific purpose" of killing the unborn child.

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14. *See Fact Sheet: Questions and Answers on Born-Alive Abortion Survivors*, CHARLOTTE LOZIER INST. (Dec. 19, 2024), https://lozierinstitute.org/fact-sheet-questions-and-answers-on-born-alive-abortion-survivors/ [https://perma.cc/W4VV-Y93A]. *But see* TRICIA C. BRUCE, HOW AMERICANS UNDERSTAND ABORTION 12, 16 (2020) (available at https://news.nd.edu/assets/395804/how_americans_understand_abortion_final_7_15_20.pdf#:~:text=Interviews%20also%20reveal%20that%20most%20Americans%20have,for%20themselves%20what%20they%20believe%20about%20abortion [https://perma.cc/UR2Z-SL2W]) (discussing conflicting views on whether abortion impacts a life other than that of the pregnant woman).

15. Barbara Norrander & Clyde Wilcox, *Trends in Abortion Attitudes: From Roe to Dobbs*, 87 PUB. OP. Q. 427, 443–44 (2023).

16. 521 U.S. 793 (1997).

17. 521 U.S. 702 (1997).

18. *Vacco*, 521 U.S. at 800–03; *see also Glucksberg*, 521 U.S. at 780.

19. *Vacco*, 521 U.S. at 802 (quoting United States v. Bailey, 444 U.S. 394, 403–06 (1980)) (alterations in original).

20. Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, 530 F.3d 724, 745 (8th Cir. 2008) (en banc) (emphasis omitted). Much of the science establishing this fact is discussed in Brief for Biologists as Amici Curiae Supporting Neither Party in Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2021) (No. 19-1392), 2021 WL 3375871, at 3 ("The fertilization view is widely recognized—in the literature and by biologists—as the leading biological view on when a human's life begins."). *See also* Steven Andrew Jacobs, *The Scientific Consensus on When Human's Life Begins*, 36 ISSUES L. & MED. 221, 224 (2021) (noting that 5,577 biologists from eighty-six countries who work at 1,061 top-ranked academic institutions confirmed the scientific consensus that human life begins at fertilization).

This understanding—that abortion is a right to end pregnancy but not a right to kill—underpins my argument that any purported "right" to abortion recognized by law under *Dobbs* ends once a child reaches viability. However, this argument hinges on two key elements: a precise definition of the act of abortion and a clear understanding of the object of abortion—ending the pregnancy and thus the life of the fetus within the woman's womb. With this foundation established, we now turn to the far more contentious issue of defining legal, and specifically constitutional, persons.

II. THE PERSONHOOD QUESTION AFTER *DOBBS*

With the overruling of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the question of whether the unborn are constitutional persons under the Fourteenth Amendment remains unresolved. The *Dobbs* majority explicitly stated that their decision was "not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests."[21] Instead, the Court emphasized that states now have the authority to either recognize or reject claims about a woman's right to abortion or the unborn child's right to life.[22]

However, *Dobbs* did not hold that states may define these rights without any constitutional constraints. The Supremacy Clause of the U.S. Constitution remains in effect, and any state law or constitutional provision violating federal constitutional rights is void.[23] This is a critical point for legal arguments supporting the constitutional recognition of unborn personhood.

The legal definition of person is broader than the medical definition of person,[24] and varies based on the facts and legal authorities in a particular case.[25] To be a "nonperson" means to not only foreclose the privileges of citizenship,

21. Dobbs v. Jackson Women's Health Org, 597 U.S. 215, 254 (2022). This is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth.

22. *Id.* at 256.

23. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

24. *See* Teresa Stanton Collett, *Personhood and the Post*-Dobbs *Abortion Debate*, 71 DRAKE L. REV. 289, 301–05 (2024).

25. *Compare* Order to Issue Subpoenas for the Taking of Depositions Pursuant to 28 U.S.C. § 1782, Cmty. of Hippopotamuses Living in the Magdalena River v. Ministerio de Ambiente y Desarrollo Sustenible, No. 1:21-mc-23 (S.D. Ohio, Oct. 15, 2021) (finding community of Columbian hippos are persons for purposes of conducting discovery in connection with a lawsuit pending in Ecuador), *with* Nonhum. Rts. Project, Inc. v. Breheny, 197 N.E.3d 921 (N.Y. 2022) (denying writ of habeas corpus to Happy, the elephant residing in Bronx Zoo). *See also* Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting) (arguing that standing doctrine should be amended to allow organizations to sue on behalf of inanimate things, including land, rivers, trees, etc.); Santa Clara County v. Southern Pac. R.R. Co., 118 U.S. 394 (1886) (holding that a corporation is a constitutional person for purposes of the Equal Protection clause); Tucker v. Alexandroff. 183 U.S. 424, 438 (1902) ("A ship is born when she is launched, and lives so long as her identity is preserved . . . . She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner and be sued in her own name.").

but even the barest minimum of human rights.[26] Prior to its 1973 ruling in *Roe v. Wade*,[27] the Supreme Court rejected the characterization of any human beings as nonpersons, at least within the realm of family relations.[28] The Court emphasized that the legal definition of the parent-child relationship must be grounded in biological reality.[29]

Despite this precedent, *Roe* held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn [child]."[30]

A. Roe*'s Weak Personhood Analysis*

Ignoring its own precedents of a mere five years prior, the *Roe* majority rejected fetal personhood on three grounds. First, no case was cited holding that a fetus is a person within the meaning of the Fourteenth Amendment. Second, "[t]he Constitution does not define 'person' in so many words" and "in nearly

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26. *See e.g.*, Wolff v. McDonnell*,* 418 U.S. 539, 594 (1974) ("Conviction of a crime does not render one a nonperson whose rights are subject to the whim of the prison administration . . . ."); Linda R.S. v Richard D., 410 U.S. 614, 621 (1973) (White, J., dissenting) (characterizing majority's treatment of mothers of non-marital children as "nonperson"). *See generally* Abe Fortas, *Equal Rights—For Whom?*, 42 N.Y.U. L. REV. 401, 409 (1967).

27. 410 U.S. 113 (1973).

28. *See* Levy v. Louisiana, 391 U.S. 68, 70 (1968) (rejecting the state's claim that non-marital children were "nonpersons" and outside the protection of the Constitution and declaring that "[the children] are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."). *Cf.* United States v. Palmer, 16 U.S. 610, 631–32 (1818) (explaining that "every human being" and "the whole human race" was included in the words "person or persons" in federal law). *See generally* Joshua J. Craddock, Note, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539 (2017).

29. In Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968), the Court addressed the ability of mothers of non-marital children to recover for their children's wrongful death:

> In this sense[,] the present case is different from the *Levy* case, where, by mere accident of birth, the innocent, although illegitimate, child was made a 'nonperson' by the legislature when it came to recovery of damages for the wrongful death of his mother. Yet we see no possible rational basis for assuming that, if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be far-fetched to assume that women have illegitimate children so that they can be compensated in damages for their death. A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors. But it hardly has a causal connection with the "sin," which is, we are told, the historic reason for the creation of the disability. *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.* Opening the courts to suits of this kind may conceivably be a temptation to some to assert motherhood fraudulently. That problem, however, concerns burden of proof. Where the claimant is plainly the mother, the State denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock.

Id. at 75–76 (emphasis added) (citation omitted).

30. *Roe*, 410 U.S. at 158. On this point, it is important to note that *Roe* predated the birth of Louise Joy Brown, the first child conceived through artificial means and born. Lynsey Eidell, *Where Is the First 'Test-Tube Baby' Now? All About Louise Joy Brown, the First Child Ever Born Via IVF*, PEOPLE (Nov. 23, 2024, at 8:00 ET), https://people.com/where-is-louise-joy-brown-the-first-ivf-baby-now-8748006 [https://perma.cc/FD7V-WYEG]. At the time *Roe* was decided, every child in utero was the biological child of the pregnant woman.

all these instances, the use of the word is such that it has application only postnatally."[31] Third, "throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today . . . ."[32] Each of these rationales in *Roe* was wrong at the time, as the *Dobbs* majority carefully documents.

At least one pre-1973 federal case held that a fetus was a person within the meaning of the Fourteenth Amendment. In *Steinberg v. Brown*, the court rejected a challenge to Ohio's abortion ban, holding that the implied right to privacy:

> [M]ust inevitably fall in conflict with the express provisions of the [F]ifth and Fourteenth Amendments that no *person* shall be deprived of life without due process of law. The difference between this case and *Griswold* [overturning a ban on the use of contraceptives] is clearly apparent, for here there is an embryo or fetus incapable of protecting itself.[33]

The court explained, "a new life comes into being with the union of human egg and sperm cells,"[34] and "[o]nce human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state a duty of safeguarding it."[35]

Justice Blackmun's failure to recognize this contrary lower court ruling undercuts his analysis of the constitutional text. As Professor Gerard Bradley observed in an essay published soon after the *Dobbs* decision was handed down,

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31. *Roe*, 410 U.S. at 157.

32. *Id.* at 158.

33. Steinberg v. Brown, 321 F. Supp. 741, 745–46 (N.D. Ohio 1970) (emphasis added). Three cases from Ohio and Oregon involving prenatal injuries and wrongful death held that an unborn child who was viable at the time it was negligently killed or injured was protected as a person under the "right to a remedy" provision of the state's constitution. Werling v. Sandy, 476 N.E.2d 1053, 1055 n.4 (Ohio 1955); Williams v. Marion Rapid Transit, 87 N.E.2d 334, 335 (Ohio 1949); Mallison v. Pomeroy, 291 P.2d 225, 228 (Or. 1955). Oregon even affirmed the rule post *Roe* in Libbee v. Permanente Clinic, 518 P.2d 636, 637–40 (Or. 1974).

34. *Steinberg*, 321 F. Supp. at 746. *See* Expert Testimony of Dr. Jerome Lejeune, Davis v. Davis, 1989 WL 140495 (C.C. Tenn. 1989).

35. *Steinberg*, 321 F. Supp. at 746–47. *Cf.* McArthur v. Scott, 113 U.S. 340, 402 (1885) (noting that children *in utero* had vested rights at the time of their grandfather's death). Some state courts appeared to have similar views that "once human life has commenced" the state had an obligation to protect it. *See, e.g.*, Thompson v. State, 493 S.W.2d 913, 918 (Tex. Crim. App. 1971) ("The difference between preventing conception and terminating a pregnancy when conception has already occurred should be apparent to all. Something, albeit submicroscopic, exists which did not exist before and has at least the potential of human life which may or may not be realized. The State of Texas is committed to preserving the lives of its citizens so that no citizen 'shall be deprived of life . . . except by the due course of the law of the land.' Texas Constitution, Article 1, Section 19, Vernon's Ann. St. Article 1191, V.A.P.C., is designed to protect fetal life, and this justifies prohibiting termination of the life of the fetus or embryo except for the purpose of saving the life of the mother.") (citation omitted) (alteration in original), *vacated*, 410 U.S. 950 (1973). *See also* Nelson v. Planned Parenthood Ctr. of Tucson, Inc., 505 P.2d 580, 585 (Ariz. Ct. App. 1973) ("Both appellants and appellees frame the issue as being whether a fetus is a 'person' within the meaning of the Constitutions of the United States and the State of Arizona. We do not believe that we have to decide this issue in order to decide whether the Arizona abortion statutes are a valid exercise of the police power."). The court observes in an accompanying footnote, "A substantial case can be made for holding the fetus is a 'person' within the due process clause of the Fourteenth Amendment." *Id.* at 585 n.3.

Justice Blackmun "decided to treat the question not as one about who really is a person, but rather as about a technical term of art . . . . Blackmun catalogued in *Roe* the 22 or so usages of the word 'person' in the entire Constitution."[36] These usages, however, are merely:

> [A] list of things which various subsets of persons can do or can have done to them. Fetuses do not, for example, run for president, and the Constitution implicitly disqualifies them from doing so. But that exclusion does not render them non-persons, any more than it renders anyone who is foreign-born, or who is not yet 35 years old, or who has not lived in America for 14 years, a non-person.[37]

Further, the *Roe* Court failed to consider multiple U.S. constitutional provisions that could be applied to unborn children.[38] None of these provisions by their terms exclude any particular class of children, born or unborn.

There are many constitutional persons who do not have full constitutional rights. These include prisoners,[39] minors,[40] aliens,[41] and adults subject to guardianship.[42] However, all of these human beings retain the most basic constitutional rights of life and equal protection. Yet the limits placed on their constitutional rights do not render these human beings "nonpersons" nor exclude them from the legal protection of their lives. The only exception is the unborn child unwanted by his or her mother.

Finally, and most importantly, *Roe*'s recitation of the history of abortion law was so wildly inaccurate that it was never relied upon by the Court in any subsequent cases, and *Dobbs* expressly repudiated it: "*Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis."[43]

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36. Gerard V. Bradley, Dobbs *and the Constitutional Limits on Abortion*, 48 HUM. LIFE REV. 5, 8 (2022).

37. *Id.*

38. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 1 (establishing tax on importation of "persons"); U.S. CONST. amend. IV (granting security of the person against unreasonable searches and seizures); U.S. CONST. amend. V (requiring due process for deprivation of life); U.S. CONST. amend. XIV (establishing due process and equal protection).

39. *See* Shaw v. Murphy, 532 U.S. 223, 229 (2001) ("We nonetheless have maintained that the constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large. In the First Amendment context, for instance, some rights are simply inconsistent with the status of a prisoner or 'with the legitimate penological objectives of the corrections system.'" (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974))).

40. *See* Nunez by Nunez v. City of San Diego, 114 F.3d 935, 945 (9th Cir. 1997) ("The Supreme Court has articulated three specific factors that, when applicable, warrant differential analysis of the constitutional rights of minors and adults: (1) the peculiar vulnerability of children; (2) their inability to make critical decisions in an informed, mature manner; and (3) the importance of the parental role in child rearing." (citing Bellotti v. Baird, 443 U.S. 622, 634 (1979))).

41. *See* Mathews v. Diaz, 426 U.S. 67, 77 (1976) (holding that the Fifth and Fourteenth Amendments protect against deprivation of life, liberty, or property without due process of law); Plyler v. Doe, 457 U.S. 202, 210 (1982) (holding that children of undocumented aliens are afforded equal protection).

42. Youngberg v. Romeo, 457 U.S. 307, 315 (1982) (holding that even after involuntary commitment, mentally challenged man retained rights under Fourteenth Amendment).

43. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 241 (2022).

III. THE AGNOSTICISM OF *DOBBS* ON PERSONHOOD

As Professor Bradley predicted, many opponents of fetal personhood claim that *Dobbs* merely overruled *Roe* in part, leaving intact *Roe*'s holding that the unborn are not constitutional persons.[44] They are plainly wrong.

Personhood opponents commonly point to the majority's statement that "[o]ur opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth."[45] Accepting this statement at face value requires accepting *both* that the *Dobbs* opinion is not premised on recognition of fetal personhood, *and* that it is not premised on *Roe*'s denial of such personhood—the latter being required if *Roe*'s holding denying personhood survives *Dobbs*.[46]

Some opponents rely on passages of the majority opinion that emphasize the Court's determination that the issue of abortion is to be returned to the states and the people's elected representatives.[47] They reason that the Court could not return the regulation of abortion to the states if it had concluded that unborn children were constitutional persons.[48] But my claim is not that *Dobbs* recognized the personhood of the unborn, but merely that it overruled *Roe*'s prior holding denying such personhood.

Finally, some commentators argue that *Roe*'s denial of personhood survives because shortly after issuing *Dobbs*, the Court denied certiorari to

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44. Bradley, *supra* note 36, at 9 ("Does *Dobbs*' silence mean that the Court implicitly *affirmed* Blackmun's conclusion that the unborn do not count as 'constitutional persons'? That is a plausible reading of the opinion and, evidently, how the Court wants it to be read. But the only coherent reading of *Dobbs* belies this interpretation.").

45. *Dobbs*, 597 U.S. at 263.

46. Professors John Finnis and Robert P. George share my opinion that *Dobbs* returns the Court to agnosticism on the question of fetal personhood. *See* John Finnis & Robert P. George, *Equal Protection and the Unborn Child: A Dobbs Brief*, 45 HARV. J.L. & PUB. POL'Y 927, 1030 (2022).

47. Prominent pro-life scholar and advocate Clarke Forsythe is among those who are skeptical about efforts to persuade the courts to recognize fetal personhood. *See* Clarke D. Forsythe, *The 14th Amendment's Personhood Mistake*, NAT'L REV. (Dec. 21, 2023, at 15:43 ET), https://www.nationalreview.com/magazine/2024/02/the-14th-amendments-personhood-myth/ (on file with author). His skepticism is based, in large part, on several passages in the majority opinion stressing the decision to restore the regulation of abortion to the states. Examples include: "The State's primary argument is that we should reconsider and overrule *Roe* and *Casey* and once again allow each state to regulate abortion as its citizens wish." *Dobbs*, 597 U.S. at 230.

> It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.' The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.' That is what the Constitution and the rule of law demand.

Id. at 232 (internal citation omitted).

> [B]ut the people of the various states may evaluate those interests differently. In some states, voters may believe that the abortion right should be even more extensive than the right that *Roe* and *Casey* recognized. Voters in other states may wish to impose tight restrictions based on their belief that abortion destroys an "unborn human being."

Id. at 256. "[O]ur opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin." *Id.* at 263.

48. *See generally* Forsythe, *supra* note 47.

petitioners in *Doe v. McKee*, a Rhode Island Supreme Court decision.[49] The Rhode Island court had relied on *Roe*'s denial of fetal personhood in ruling that unborn children lacked standing to challenge that state's repeal of prior legal protections for the unborn. This argument, however, ignores both the fact that the *McKee* opinion was issued one month before *Dobbs*—and therefore *Roe* (as modified by *Casey*) continued to bind all lower courts—and that "denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."[50]

It is true that when asked by the Court, the parties in *Dobbs* agreed that neither side had raised the issue of personhood in its filings with the Court.[51] The issue was raised only by amici.[52] And it is equally true that Justice Kavanaugh expressly declined to recognize the personhood of the unborn in his concurring opinion,[53] but such denial does not equate with the Court retaining *Roe*'s ruling on personhood.

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49. Benson v. McKee, 273 A.3d 121 (R.I. 2022), *cert. denied sub nom*., Doe as Next Friend Doe v. McKee, 143 S. Ct. 309 (2022).

50. United States v. Carver, 260 U.S. 482, 490 (1923).

51. *See* Transcript of Oral Argument at 43–44, Dobbs v. Jackson Women's Health Org., 527 U.S. 215 (2022) (No. 19-1392).

> JUSTICE KAVANAUGH: And to be clear, you're not arguing that the Court somehow has the authority to itself prohibit abortion or that this Court has the authority to order the states to prohibit abortion as I understand it, correct?
> MR. STEWART: Correct, Your Honor.
> JUSTICE KAVANAUGH: And as I understand it, you're arguing that the Constitution's silent and, therefore, neutral on the question of abortion? In other words, that the Constitution's neither pro-life nor pro-choice on the question of abortion but leaves the issue for the people of the states or perhaps Congress to resolve in the democratic process? Is that accurate?
> MR. STEWART: Right. We're—we're saying it's left to the people, Your Honor.
> JUSTICE KAVANAUGH: And so, for the—if you were to prevail, the states, a majority of states or states still could or—and presumably would continue to freely allow abortion, many states; some states would be able to do that even if you prevail under your view, is that correct?
> MR. STEWART: That's consistent with our view, Your Honor. It's—it's one that allows all interests to have full voice and—and many of the abortions we see in certain states that I don't think anybody would think would be moving to change their laws in a more restrictive direction.
> JUSTICE KAVANAUGH: Thank you.

52. *See* Ellena Erskine, *We Read All the Amicus Briefs in* Dobbs *So You Don't Have To*, SCOTUSBLOG (Nov. 30, 2021, at 17:24 ET), https://www.scotusblog.com/2021/11/we-read-all-the-amicus-briefs-in-dobbs-so-you-dont-have-to/ [https://perma.cc/6QJT-L632] ("The Foundation to Abolish Abortion and other anti-abortion groups describe *Roe* as an 'unconstitutional abuse of power' and urge the court not just to overturn that decision but also to hold that 'a preborn human being, no matter how small, is a person under the Fourteenth Amendment' and is therefore entitled to equal protection. The March for Life Education and Defense Fund, originalism scholar Lee Strang, jurisprudence scholars John Finnis and Robert George, and the Billy Graham Evangelistic Association and other groups make similar arguments. The Pacific Justice Institute suggests that abortion violates the 13th Amendment's prohibition of slavery. 'When aborting her fetus, a mother treats her child as slave property,' the institute contends.").

53. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 338–39 (2022) (Kavanaugh, J., concurring) ("Some amicus briefs argue that the Court today should not only overrule *Roe* and return to a position of judicial neutrality on abortion, but should go further and hold that the Constitution outlaws abortion throughout the United States. No Justice of this Court has ever advanced that position. I respect those who advocate for that position, just as I respect those who argue that this Court should hold that the Constitution legalizes pre-viability abortion throughout

The *Dobbs* majority's description of *Casey* noted "[s]everal important abortion decisions were overruled *in toto*, and *Roe* itself was overruled in part."[54] This distinction between overruling *Roe* and *Casey in toto* or in part is the primary dispute between the majority and Chief Justice Roberts.[55] The Chief Justice urged that *Roe*, *Casey*, and their progeny be overruled only insofar as necessary to recognize the states' ability to regulate pre-viability abortions.[56] The *Dobbs* majority rejected this position emphatically, stating that *Roe* and *Casey* are overruled *in toto*:

> In sum, the concurrence's quest for a middle way would only put off the day when we would be forced to confront the question we now decide. The turmoil wrought by *Roe* and *Casey* would be prolonged. It is far better—for this Court and the country—to face up to the real issue without delay.[57]

The majority opinion provides no support for the argument that *Roe*'s rejection of fetal personhood remains good law. There simply is no basis for converting *Dobbs*' statement of agnosticism into an endorsement of *Roe*'s denial of personhood of the unborn.[58]

There is no federally recognized constitutional right to induced abortion; personhood of the unborn is now an open question, and the authority of states to permit, regulate, or prohibit abortion is now the law of the land. So, what then is the relevance of the federal constitution to current state abortion laws and regulations?

IV. CLAIMS OF CONFLICTING RIGHTS

Abortion, properly defined for legal purposes, is not the right to intentionally kill an unborn child, but rather a woman's right to intentionally terminate her pregnancy prior to natural termination through childbirth.[59] A right to abortion necessarily conflicts with any right the child may have to continue his or her development, since termination of a previable pregnancy necessarily ends the life of the unborn child regardless of the care taken in his or her removal from the mother's womb.[60] Pre-viability development is

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the United States. But both positions are wrong as a constitutional matter, in my view. The Constitution neither outlaws abortion nor legalizes abortion.").

54. *Id.* at 229.

55. *Id*. at 295–300.

56. *Id.* at 352–54 (Roberts, C.J., concurring).

57. *Id*. at 300.

58. Seema Mohapatra, *An Era of Rights Retractions:* Dobbs *as a Case in Point*, 48 HUM. RTS. 4, 5 (2023) ("[O]ne of *Roe*'s holdings was that a pre-viability fetus is not a person in the eyes of the Constitution. *Roe* stood as a backstop against the legal recognition of fetal personhood. However, such protection no longer exists. The majority in *Dobbs* specifically states that they do not make any kind of declaration about the merits of fetal personhood. Thus, the Court leaves the issue of fetal personhood to the states.").

59. *See supra* text accompanying notes 5–20.

60. The vast majority of cases involve a child's presence in his or her biological mother's womb, but with the advent of in vitro fertilization and gestational surrogacy, in some instances the pregnant woman has no genetic relationship to the child and therefore is not the genetic mother of the child within her womb. *See How Many IVF Babies Are Born in the US?*, USAFACTS (Apr. 19, 2024), https://usafacts.org/articles/how-many-ivf-babies-are-born-in-the-us/ [https://perma.cc/2PMP-HXTG].

dependent upon the child's continued presence within the woman's womb. Legislation addressing pre-viability abortions necessarily requires a state to choose between recognizing a woman's ability to terminate a pregnancy prior to viability and recognizing the unborn child's ability to continue his or her life: "When it comes to abortion, one interest must prevail over the other at any given point in a pregnancy."[61]

While this statement is overbroad in its inclusion of post-viability abortion, it is certainly accurate as to abortions occurring prior to viability. Regardless of the means used to intentionally terminate a pregnancy before the child in the womb attains viability, the child will die.[62] Respecting the unborn child's ability to continue development requires a woman to continue the pregnancy until viability, at least at this time with current medical technology.[63] This necessarily means that the law will either privilege the woman's ability to end an unwanted pregnancy prior to viability or the child's ability to continue developing until he or she achieves viability. This is the policy decision *Dobbs* returns to the states.[64] What *Dobbs* did not do—and I argue could not constitutionally do—is to authorize states to create and protect a right to act with the specific intention of killing the child, regardless of who authorizes or performs the killing, and a right to discriminate in the rights of similarly situated children.

Today, viability is the point in time when it is no longer true that, in Justice Gorsuch's words, "one interest must prevail over the other."[65] At the point of viability, a woman may terminate an unwanted pregnancy by early delivery and avoid the responsibilities of parenthood, while guaranteeing a fetus's right to life:

> The statutes of practically all states provide for the voluntary surrender of children. When the statutes are complied with, the child is legally and practically as dead to its natural parents as if it had been aborted, stillborn, or had died in infancy. . . . There is no need for parents to terminate an undesired pregnancy by killing the unborn child physically, when with less risk to themselves its legal death can so easily be procured.[66]

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61. *Dobbs*, 597 U.S. at 337 (Kavanaugh, J., concurring).

62. *See Another Look at Abortion*, U.S. CONF. OF CATH. BISHOPS, https://www.usccb.org/committees/pro-life-activities/another-look-abortion [https://perma.cc/VSN2-T3WP] ("It is morally licit to remove [a] threat to the mother's life by removing the cancerous uterus or the fallopian tube where the child implanted, even though it is foreseeable that the child will die as an indirect and unintended result of such surgery.").

63. It is beyond the scope of this article to speculate on the proper state of the law when artificial wombs become capable of sustaining human life prior to viability. Such technology is not yet ready to enter the human testing phase but appears to be poised for such testing within the next few years. *See* PEDIATRIC ADVISORY COMM.: FDA, 24 HOUR SUMMARY OF THE PEDIATRIC ADVISORY COMM. ARTIFICIAL WOMB TECH. (2023), https://www.fda.gov/media/172441/download [https://perma.cc/GN4K-PH2M]. When such technology becomes available, many, if not most, bioethicists agree that the moral evaluation of abortion becomes more complex. *See, e.g.*, Leonard Michael Fleck, *Abortion, Artificial Wombs, and the "No Difference" Argument*, 23 AM. J. BIOETHICS 94 (2023).

64. *Dobbs*, 597 U.S. at 256.

65. *Id.* at 337 (Kavanaugh, J., concurring).

66. Steinberg v. Brown, 321 F. Supp. 741, 747 (N.D. Ohio 1970).

The factual predicates of the *Steinberg* ruling remain true today. All states have some version of a safe haven law allowing a mother to voluntarily surrender her rights and be relieved of all legal duties to the child.[67]

The *Steinberg* court is also correct that abortion poses risks to the mother which increase exponentially as pregnancy progresses.[68] In almost all cases of abortions performed at twenty or more weeks gestation, the abortion procedures pose more risks for the mother than initiating delivery. The abortion industry and their allies regularly argue that any delay in obtaining an abortion increases the risks to the woman obtaining abortion,[69] yet simultaneously argue that late-term abortions pose less risks than carrying the child to term.[70] This second contention is patently false.

The complication rate is 3%–6% at twelve to thirteen weeks gestation and increases to 50% and higher for abortions performed in the second and third trimester.[71]

This reality is also reflected in the fact that few abortion providers perform abortions after twenty weeks because of the high risk of complications.[72] These

67. "All 50 states, District of Columbia, Guam, Puerto Rico and Virgin Islands have passed some form of law to protect where parents can safely and anonymously relinquish their children without the fear of prosecution." Thomson Reuters, *50 STATE STATUTORY SURVEYS: Family Law: Child Abuse Safe Haven Laws,* 0080 SURVEYS 2 (2024).

68. *Steinberg*, 321 F. Supp. at 747.

69. *See, e.g.*, Planned Parenthood Minnesota, North Dakota, South Dakota v. Noem, 584 F. Supp. 3d 759, 773 (Dist. S.D. 2022) ("Planned Parenthood notes that health risks increase as the gestational age increases."); Planned Parenthood South Atlantic v. Stein, 742 F. Supp. 3d 472 (M.D.N.C. 2024) ("Surgical abortions in hospitals are more expensive, logistically difficult, and more time-consuming for patients than those performed in clinics, and such financial and logistical challenges may result in delay and increase the gestational age of the pregnancy, and thus the maternal health risks, by the time the abortion occurs."). *Cf.* Monique Chireau Wubbenhorst, *Midtrimester Abortion Epidemiology, Indications and Mortality*, 5 ON SCI.: CHARLOTTE LOZIER INST. 1 (2021).

70. *See* David K. Turok et al., *Second Trimester Termination of Pregnancy: A Review by Site and Procedure Type*, 77 CONTRACEPTION 155, 155 (2008) ("Nonetheless, surgical elective abortion is a safe and effective procedure with a mortality rate lower than that of continued pregnancy.").

71. *See* Priscilla K. Coleman et al., *Late-Term Elective Abortion and Susceptibility to Posttraumatic Stress Symptoms*, 2010 J. PREGNANCY 1 (2010). *See also* Byron Calhoun, *The Maternal Mortality Myth in the Context of Legalized Abortion*, 80 LINACRE Q. 264, 270 (2013) ("Bartlett et al. (2004) examined national U.S. data from 1988 to 1997 and found: the relative risk of abortion-related mortality increased dramatically with gestational age of the procedure increasing from 14.7/100,000 procedures at 13–15 weeks' gestation, to 29.5/100,000 procedures at 16–20 weeks' gestation, and to an astounding 76.6/100,000 procedures at/or after 21 weeks' gestation."); Patrick J. Marmion & Ingrid Skop, *Induced Abortion and the Increased Risk of Maternal Mortality*, 87 LINACRE Q. 302, 302 (2020) ("In the United States, the death rate from legal induced abortion performed at 18 weeks gestation is more than double that observed for women experiencing vaginal delivery.").

72. Report of the Grand Jury at 3, In re County Grand Jury XXIII, Misc. No. 0009901-2008 (Pa. Ct. C.P. 2011). In 2013, Dr. Gosnell was convicted of three counts of first-degree murder for severing the spinal cords of infants born alive during failed abortions, one count of involuntary manslaughter in the death of a patient who was overdosed by his untrained staff, and twenty-one counts of performing illegal abortions on women who were more than twenty-four weeks pregnant. Commonwealth v. Gosnell, No. CP-51-CR-0001667-2011 (Pa. Ct. C.P Phila. May 15, 2013). Some dangers associated with abortions performed after twenty-four weeks gestation are illustrated by the tragic case of Jamie Lee Morales. Ms. Morales was twenty-four to twenty-six weeks pregnant, when she sought an abortion from Dr. Robert Rho:

risks are due in large part to the methods used to terminate pregnancies that have progressed past twenty weeks. The vast majority of post-twenty-week abortions are performed through a surgical procedure called dilation and extraction.[73] Justice Kennedy described this method in *Stenberg v. Carhart*:[74]

> [T]he D&E procedure requires the abortionist to use instruments to grasp a portion (such as a foot or hand) of a developed and living fetus and drag the grasped portion out of the uterus into the vagina. Dr. Carhart uses the traction created by the opening between the uterus and vagina to dismember the fetus, tearing the grasped portion away from the remainder of the body. The traction between the uterus and vagina is essential to the procedure because attempting to abort a fetus without using that traction is described by Dr. Carhart as "pulling the cat's tail" or "drag[ging] a string across the floor, you'll just keep dragging it. It's not until something grabs the other end that you are going to develop traction." The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off. Dr. Carhart agreed that "[w]hen you pull out a piece of the fetus, let's say, an arm or a leg and remove that, at the time just prior to removal of the portion of the fetus, . . . the fetus [is] alive." Dr. Carhart has observed fetal heartbeat via ultrasound with "extensive parts of the fetus removed," and testified that mere dismemberment of a limb does not always cause death because he knows of a physician who removed the arm of a fetus only to have the fetus go on to be born "as a living child with one arm." At the conclusion of a D&E abortion no intact fetus remains. In Dr. Carhart's words, the abortionist is left with "a tray full of pieces."[75]

> During the [abortion procedure], Rho severed Morales' uterine aorta, ripped her cervix and pierced her uterine wall. Profuse post-operative bleeding forced the doctor to perform another procedure, but that did not fix the damage, prosecutors said. Rather than call an ambulance, prosecutors said, Rho sent Morales home with her sister, despite signs she was in grave condition, because he wanted to get back to seeing other patients.

Ms. Morales died later that night. Originally charged with manslaughter, prior to the jury rendering its verdict Dr. Rho agreed to and was convicted of criminally negligent homicide. Verena Dobnik, *Doctor in Badly Botched Abortion Is Tried for Manslaughter*, ASSOCIATED PRESS (May 1, 2018, at 20:44 ET), https://apnews.com/general-news-cf1d789e5fc142c982a91cbdbabd7467 [https://perma.cc/YV7K-4EK9].

73. Ivette Gomez et al., *Abortions Later in Pregnancy in a Post-Dobbs Era*, KFF: WOMEN'S HEALTH POL'Y (Feb. 21, 2024), https://www.kff.org/womens-health-policy/issue-brief/abortions-later-in-pregnancy-in-a-post-dobbs-era/ [https://perma.cc/XX98-ZUD2] ("Almost all abortions performed at or after 21 weeks are performed by a dilation and evacuation (D&E) procedure (93–95% per CDC data).").

74. 530 U.S. 914 (2000) (declaring Nebraska partial-birth abortion ban unconstitutional), *overruled by* Gonzales v. Carhart, 550 U.S. 124 (2007).

75. *Id*. at 958–59 (Kennedy, J., dissenting) (alterations in original) (citations omitted). It should be noted that live dissection of most domestic livestock requires rendering the animal "insensible to pain" prior to beginning the procedure or it is prohibited by federal law. 7 U.S.C.A. § 1902. There is no such federal requirement for abortion.

Despite the brutality of this procedure, representatives of the abortion industry describe the practice as continuing. Researchers from Advancing New Standards in Reproductive Health ("ANSIRH") report that post-*Dobbs* the number of abortion clinics providing post-viability abortions (defined as abortions occurring at or after 20 weeks gestation) increased, with fifty clinics provided abortions at or after twenty-four weeks.[76] An earlier study by the same organization identified five clinics providing abortion services at or after twenty-eight weeks.[77]

A large majority of Americans believe abortion after the first trimester should be illegal[78] except for "traumatic cases" when the abortion is necessary to preserve the mother's life, or the child has a lethal fetal defect.[79] This is true notwithstanding the myths surrounding such abortions that dominate public debate.

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76. Nancy F. Berglas et al., *Changes in Availability of Later Abortion Care Before and After* Dobbs v. Jackson Women's Health Organization, 145 OBSTETRICS & GYNECOLOGY e31 (2025).

77. Gomez et. al., *supra* note 73, at 9.

78. Polls indicate a large majority of Americans favor restricting abortions after the first trimester. While the exact numbers have fluctuated slightly over the years, Americans' opposition to third trimester has been consistently low:

> The American public is most supportive of abortion in the first trimester, with an average of 64 percent supporting abortion during this time. Support for abortion declines to an average of 27 percent in the second trimester and 13 percent in the third trimester. These public opinion values have not changed much over time, though the 2022 results show an increase in support for abortion in all three stages.

Norrander & Wilcox, *supra* note 15, at 444. The May 2023 Gallup poll shows the more permissive shift identified by the authors:

> A May 1–24, 2023, survey asked about the legality of abortion at different stages of pregnancy and found about two-thirds of Americans saying it should be legal in the first trimester (69%), while support drops to 37% for the second trimester and 22% for the third. Majorities oppose legal abortion in the second (55%) and third (70%) trimesters.

Where Do American Stand of Abortion?, GALLUP (July 7, 2023), https://news.gallup.com/poll/321143/americans-stand-abortion.aspx [https://perma.cc/4SRV-QMA7]. Whether such a shift persists is a question only time can answer. Recent polls indicate more Americans support a law strictly limiting abortions as early at sixteen weeks gestation, a full six to eight weeks prior to viability, than oppose it.

> Among all U.S. adult citizens, more people support than oppose a 16-week ban among both men (49% support; 33% oppose) and women (47% vs. 39%). A 16-week ban has the support of 31% of people who say they'd vote for Joe Biden in November, 67% of those who say they'd vote for Trump, and 43% of those who say either that they're not sure who they'll vote for, would vote for a third-party candidate, or would plan to not vote.

David Montgomery & Kathy Frankovic, *More Americans Support than Oppose a 16-Week Abortion Ban*, YouGov (2024), https://today.yougov.com/politics/articles/48727-abortion-ban-16-weeks-poll-support-trump [https://perma.cc/63UC-N22W].

79. Norrander & Wilcox, *supra* note 15, at 443 ("The General Social Survey (GSS) asks about six such conditions since 1972, with results illustrated in figure 12. In general, GSS surveys reveal high acceptance levels for abortions done for 'traumatic' reasons: woman's health, rape, and fetal defect. Less support is found for abortion for 'social' reasons: married and does not want any more children, married and cannot afford any more children, and unmarried and does not want to marry the father.").

V. WOMEN'S REASONS FOR LATE-TERM ABORTIONS

Contrary to claims by the abortion industry, peer-reviewed research and state reports on women's reasons for obtaining abortions establish that women seeking abortions after post-twenty-weeks rarely do so for the "traumatic" reasons of rape, fetal anomaly, or pregnancies endangering the mother's life.[80] The most common reasons women obtain late-term abortions are (1) ambivalence or difficulty deciding whether to terminate the pregnancy, (2) financial barriers, and (3) late detection of the pregnancy.[81] These reasons, while concerning, do not justify the killing of unborn children who could survive childbirth and could be provided the necessary care for them to thrive and grow.[82]

VI. A THOUGHT EXPERIMENT

Consider the following thought experiment: For several months Margaret, a 26-year-old woman, suspected she was pregnant. She knew her boyfriend would not be happy, so she delayed seeing a doctor. Seven months into her pregnancy she finally goes to a local health clinic, only to learn she is indeed pregnant and is carrying twins. In discussions with the doctor, Margaret is told that she is healthy, and both babies appear to be developing normally, although, as with all multiple pregnancies, the twins will be small at birth. Given that the pregnancy has already progressed to twenty-eight weeks' gestation, the doctor expressed relative confidence that many of the risks attendant to twin pregnancies would not materialize.[83]

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80. James Studnicki, *Late-Term Abortion and Medical Necessity: A Failure of Science*, 6 HEALTH SERVS. RSCH. & MANAGERIAL EPIDEMIOLOGY 1 (2019) ("The Guttmacher Institute has provided a number of reports over 2 decades which have identified the reasons why women choose abortion, and they have consistently reported that childbearing would interfere with their education, work, and ability to care for existing dependents; would be a financial burden; and would disrupt partner relationships. A more recent Guttmacher study focused on abortion after 20 weeks of gestation and similarly concluded that women seeking late-term abortions were not doing so for reasons of fetal anomaly or life endangerment.").

81. *See* Elizabeth Janiak et al., *Abortion Barriers and Perceptions of Gestational Age Among Women Seeking Abortion Care in the Latter Half of the Second Trimester*, 89 Contraception 322 (2014); Rachel K. Jones & Lawrence B. Finer, *Who Has Second-Trimester Abortions in the United States?*, 85 CONTRACEPTION 544 (2012); Diana Greene Foster & Katrina Kimport, *Who Seeks Abortions At or After 20 Weeks?*, *in* PERSPS. ON SEXUAL & REPROD. HEALTH 210 (2013). The most current summary of the reasons women obtained second-trimester abortions is contained in Wubbenhorst, *supra* note 69.

82. *See generally* CHARLOTTE LOZIER INST., *supra* note 14.

83. Risks include early miscarriage, premature labor, low birth weight, and twin to twin transmission syndrome. Typical twin pregnancy last thirty-five to thirty-six weeks instead of the thirty-seven weeks defined as full term. During pregnancy, the mother is at higher risk of gestational diabetes, preeclampsia, and anemia, as well as other adverse conditions. *Twin Pregnancy*, CLEVELAND CLINIC (June 1, 2022), https://my.clevelandclinic.org/health/articles/23158-twin-pregnancy [https://perma.cc/9N4Y-GGNB]. There is some debate regarding proper treatment of gestational diabetes which occurs at a slightly higher rate among women caring twins than those carrying singletons. Nir Melamed et al., *Gestational Diabetes in Twin Pregnancies—A Pathology Requiring Treatment or a Benign Physiological Adaptation?*, AM. J. OBSTETRICS & GYNECOLOGY 92 (2024); Nipp Chantanahom & Vorapong Phupong, *Clinical Risk Factors for Preeclampsia in Twin Pregnancies*, 16 PLOS ONE 1, 2 (2021) ("In twin pregnancies, the rate of preeclampsia is higher than singleton and overall rate is around 9.5%, about two- to three-fold increased risk compared to singleton."); Amit Kosto et al., *The Effect of Maternal Anemia on Maternal and*

While she was generally excited about her pregnancy, her boyfriend, the father of the twins, was not. In fact, he threatened to end their relationship if she continues the pregnancies.[84] Feeling overwhelmed at the prospect of caring for two infants simultaneously, and seeking to compromise with her boyfriend, Margaret asks her doctor if it is possible to abort one of the fetuses, while successfully delivering the other.

The doctor tells her that given her current stage of pregnancy, he would recommend against such a procedure since fetal reduction after the first trimester is associated with "an increased rate of prematurity and adverse neonatal outcome."[85]

This hypothetical reflects some of the realities experienced by many women considering post-viability abortions. Margaret is unmarried and healthy, yet delays diagnosis because of concerns about her relationship with her boyfriend, who ultimately attempts to coerce her into terminating her pregnancy.[86] Both fetuses are healthy, developing normally, and have achieved viability. Both could be born immediately with a high probability of healthy development.[87] Margaret welcomes motherhood but is fearful of abandonment by her boyfriend and the challenges of raising twins[88]—especially without support from the father of the twins.

To be clear, this is not a case in which continuing Margaret's pregnancy poses a direct threat to her life.[89] It is not a case in which the unborn children were conceived through rape. Nor are the children suffering from fatal or any known fetal anomalies. It is a case in which Margaret could and would welcome both children if supported by her sexual partner or others. Her decision to end the life of one of the twins will simultaneously increase risks to her life and to the life of the child she

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Neonatal Outcomes in Twin Pregnancies, 29 J. MATERNAL-FETAL & NEONATAL MED. 1476, 1476 (2016) ("Second trimester anemia in women carrying twins is associated with a high parity and increases the risk for blood transfusions. However, in our population, maternal anemia in twin gestations does not increase the risk for adverse perinatal outcome.").

84. Such threats constitute reproductive coercion. *See* Am. Coll. of Obstetrics & Gynecology, Committee on Underserved Women, *Committee Opinion No.554: Reproductive and Sexual Coercion*, 121 OBSTETRICS & GYNECOLOGY 411 (2013). Surveys indicate that at least twenty-four percent of abortions are the result of reproductive coercion. David C. Reardon et al., *The Effects of Abortion Decision Rightness and Decision Type on Women's Satisfaction and Mental Health*, 15 CUREUS 1 (2023).

85. R. Zemet et al., *Optimal Timing of Fetal Reduction from Twins to Singleton: Earlier the Better or Later the Better?*, 57 ULTRASOUND OBSTETRICS & GYNECOLOGY, 134, 135 (2021). *See also* Tal Weissbach et al., *Late Selective Termination In Dichorionic Twins: Comparing Late Second and Third Trimester Procedures*, 49 REPROD. BIOMEDICINE ONLINE 1 (2024) (Outcomes are better for late second trimester selective termination than third trimester selective termination based on higher birthweight of surviving twin, and lower rates of intrauterine growth restriction and Caesarean deliveries). *See Third Trimester Pregnancy*, SCIENCEDIRECT, https://www.sciencedirect.com/topics/biochemistry-genetics-and-molecular-biology/third-trimester-pregnancy [https://perma.cc/T5FL-X49H].

86. *See supra* text accompanying note 76.

87. *See* Edward F. Bell et al., *Mortality, In-Hospital Morbidity, Care Practices, and 2-Year Outcomes for Extremely Preterm Infants in the US, 2013-2018*, 327 JAMA 248 (2022) (noting that ninety-four percent of infants born at twenty-eight weeks survived).

88. *See* Melanie Bidwell, *A Twin Mum's Tips for Dealing With Anxiety*, TWINS TRUST (Sept. 23, 2020), https://twinstrust.org/resource/a-twin-mum-s-tips-for-dealing-with-anxiety.html.

89. *See* Merin Abraham et al., *Delivery Methods in Twin Gestations: Evaluating Outcomes, Risk Factors, and the Paradigm Shift Towards Elective Cesarean Deliveries*, 15 CUREUS e46514 (2023).

wants.[90] Giving birth to both children will not require her to care for both or either child. State laws allow her to surrender her rights, and there are thirty-six American families eager to welcome the unwanted babies into their families.[91] In short, there is no persuasive argument, beyond raw maternal power, that supports "selective termination" of the unwanted twin or the abortion of both children.[92]

If Margaret voluntarily gives birth to the twins, the lives of both would be legally protected. Every state protects the lives of viable children who are born prematurely and living outside the womb,[93] with only a small—though growing—number of states that fail to protect children born during a failed abortion.[94] Yet in nine states and the District of Columbia, the unwanted twin can be killed by the doctor performing the induced abortion at any stage of gestation.[95] There is nothing in the United States Constitution that warrants such grotesque permissiveness.[96]

VII. DUE PROCESS PROTECTION OF HUMAN LIFE

Prior Supreme Court cases have defined "person" so broadly that the word has been held to include legal constructs like corporations,[97] affording these

90. Weissbach*, supra* note 85, at 2.

91. *How Many Couples Are Waiting to Adopt a Baby?*, AM. ADOPTIONS, https://www.americanadoptions.com/pregnant/waiting_adoptive_families [https://perma.cc/XP5U-UD4W].

92. Margaret may claim, as many litigants in cases involving disposition of frozen embryos have, that by giving birth and surrendering their parental rights they are being forced into unwanted parenthood or "procreational autonomy." *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992).

93. The Born-Alive Infants Protection Act, 1 U.S.C. § 8 (2002) extends legal protection to an infant born alive after a failed attempt at induced abortion.

94. *See* CHARLOTTE LOZIER INST., *supra* note 14 ("Many of the states with the most extreme abortion laws do not afford such protection to born-alive babies. Alaska, Colorado, New Jersey, New Mexico, Oregon, Vermont, and the District of Columbia all permit abortion at any time for any reason, yet none of these states has established legal protections for born-alive infants. Some states have even enacted laws that eliminated previous protections for babies born alive, including New York in 2019, Illinois in 2019, and Minnesota in 2024 (removing a requirement that medical professionals take reasonable steps to save the baby's life)."). *See also* Nathalie Auger et al., *Second-Trimester Abortion and Risk of Live Birth*, 230 AM. J. OBSTETRICS & GYNECOLOGY 679 (2024) (documenting 1,227 live births—21.7 per 100 abortions—among 5,642 abortions performed at twenty to twenty-four weeks' gestation in Canada between 1989 and 2021).

95. Alaska, Colorado, Maryland, Michigan, Minnesota, New Jersey, New Mexico, Oregon and Vermont are the nine states. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER, https://www.guttmacher.org/state-policy/explore/state-policies-abortion-bans [https://perma.cc/E3T8-LU99] (last updated May 28, 2025). Few other countries allow abortions so late in pregnancy. Mary Harned & Mia Steupert, *Gestational Limits on Abortion in the United States Compared to International Norms*, 25 AM. REPS. SERIES: CHARLOTTE LOZIER INST. 1 (2024).

96. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) ("The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'").

97. *See* Santa Clara Cty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886). The Court has even accepted the "personhood" of some inanimate objects like ships. Tucker v. Alexandroff, 183 U.S. 424, 438 (1902).

"persons" a wide range of constitutional rights.[98] "Person" has been held to include slaves,[99] Native Americans,[100] and even enemy combatants held by the U.S. military.[101]

As for children in the womb, American law has long protected them from being deprived of their property rights,[102] as well as from being deprived of their lives through capital execution of their mothers.[103] Thirty-nine states protect unborn children of varying gestational ages from lethal attacks by unauthorized assailants under their homicide laws.[104] In thirty-six states the lives of viable unborn children are also protected against tortious acts resulting in their deaths.[105] Indigent unborn children have been recognized as having standing to seek protective orders against violence[106] and to receive public assistance for their needs.[107] In summary, recognizing unborn children as legal persons is the norm in American jurisprudence; *Roe*'s "abortion exception" is the anomaly.[108]

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98. Adam Winkler, *The Long History of Corporate Rights*, 98 B.U. L. REV. ONLINE 64, 64 (2018) ("Today, corporations have nearly every right a corporation might want under the Constitution: free speech, freedom of religion, Fourth Amendment privacy rights, due process, equal protection, property rights—rights corporations use to challenge laws regulating the economy and the marketplace.")

99. Groves v. Slaughter, 40 U.S. 449 (1841) (Mclean, J., dissenting).

100. United States ex rel. Standing Bear v. Crook, 25 F. Cas. 695, 697 (C.C.D. Neb. 1879).

101. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

102. Roe v. Wade, 410 U.S. 113, 162 (1973).

103. Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 253 (1891) ("The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law in order to guard against the taking of the life of an unborn child for the crime of the mother.").

104. *State Homicide Laws that Recognize Unborn Victims*, NAT'L. RIGHT TO LIFE (Jan. 5, 2024), https://nrlc.org///uploads/stateleg/StateHomicideLaws.pdf [https://perma.cc/6QTB-YQ44]. Colorado, Delaware, Hawaii, Maine, New Mexico, New York, Rhode Island, and Vermont provide no criminal penalty for fetal homicide. The District of Columbia also provides no penalty. NAT'L. ACAD. SCIS., ENG'G & MED., ADVANCING CLINICAL RESEARCH WITH PREGNANT AND LACTATING POPULATIONS: OVERCOMING REAL AND PERCEIVED LIABILITY RISK, App. C (2024), https://nap.nationalacademies.org/resource/27595/Advancing_Clinical_Research_Appendix-C.pdf [https://perma.cc/J2RU-S8AH]. For some historical perspective see *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, NAT'L CONF. STATE LEGISLATURES (May 1, 2018), https://web.archive.org/web/20201204114502/https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx. Some states have begun repealing (or attempting to repeal) these laws, ostensibly out of concern that an "abortion exception" indeed violates the Equal Protection Clause. *See, e.g.*, HR 5125 § 4 (R.I. 2019) ("The Reproductive Privacy Act") (eliminating protection for unborn "quick" children from fetal homicide).

105. Michael P. Penick, *Wrongful Death of Fetus*, 19 AM. JUR. PROOF FACTS 3d 107 § 1 (2024).

106. Gloria C. v. William C., 476 N.Y.S.2d 991 (N.Y. Fam. Ct. 1984).

107. Boines v. Lavine, 354 N.Y.S.2d 252, 253 (N.Y. 1974) ("The legislative and departmental regulations recognize that unborn children have needs separate and independent from those of its mother; that they are, therefore, eligible for public assistance and included among those benefited."). The court specifically relied upon the equal protection rights of the child in reaching its ruling.

108. The original meaning of the Fourteenth Amendment also compels the conclusion that viable unborn children are "persons" as contemplated by the Fourteenth Amendment. *See* District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008) (consulting text and history to interpret constitutional provisions). In 1864, "person" was defined as relating "especially [to] a living human being; a man, woman, or child; an individual of the human race." Craddock, *supra* note 28, at 549 n. 46. Additional historical evidence of the constitutional personhood of the unborn is provided in Finnis & George, *supra* note 46. The essential aspect of "person" was understood as a human being.

The intellectual vacuity justifying that exception was exposed by the *Dobbs* majority—and discussed previously in this article[109]—so those arguments will not be repeated here. Suffice it to say, an "abortion exception" under a legal regime that created an almost absolute right for women to intentionally terminate their pregnancies prior to childbirth may make sense in cases where exercising the woman's right necessarily and directly conflicts with a child's right to life and continued development within the womb. But even within that legal regime, when a woman's right to be free of an unwanted pregnancy can be exercised without directly killing the child, the "abortion exception" makes little sense and violates fundamental principles of justice and human equality.

As the Supreme Court has noted, Anglo-American law has historically recognized a difference between an action taken with the knowledge that certain consequences will follow, and an action taken for the purpose of obtaining those consequences.[110] In the language of the common law, most crimes required only general intent or knowledge that certain consequences would follow, while a much smaller group of crimes like homicide and treason require specific intent.[111] As the Court explained in *United States v. Bailey*, "a person who causes a particular result is said to act purposefully if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct.'"[112] In contrast, "[a] person . . . is said to act knowingly if he is aware 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'"[113]

Prior to viability, a woman who chooses to terminate her pregnancy—absent some mental impairment—does so with knowledge that the child will be killed. However, these facts alone do not establish that she is acting with the specific intent of killing the child since terminating a pregnancy pre-viability is by definition terminating the conditions that allow the unborn child to continue its life and development. However, after a child becomes capable of living outside the woman's womb, and the mother has the option of inducing early delivery of that child—an option that is safer for her and protects the life of the child—the choice to undergo an induced abortion is at least presumptively done with the specific intent and for the purpose of killing the child.[114] Such actions,

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The drafters of the Fourteenth Amendment demonstrably used the term "person" to refer to human beings. *See* Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 48–51 (2013). The common law and legislatures recognized all human beings as "persons" as well. The medical texts and societies at the time, and the historical understanding of the term "person," likewise support the conclusion that "person" would have included all human life, including the unborn. *See* Craddock, *supra* note 28, at 555.

109. *See supra* text accompanying notes 31–58. *See also* Collett, *supra* note 24.

110. *See* United States v. Bailey, 444 U.S. 394, 404 (1980).

111. *Id.* at 403–04.

112. *Id.* at 404.

113. *Id.*

114. *Cf.* Vacco v. Quill, 521 U.S. 793, 802 (1997) ("The law has long used actors' intent or purpose to distinguish between two acts that may have the same result.").

even in a pro-abortion legal regime like that imposed by *Roe* and its companion case *Doe v. Bolton*,[115] are not justifiable.[116]

VIII. DUE PROCESS AND THE STATE'S DUTY TO PROTECT

Assuming *arguendo* that the unborn are properly understood to be constitutional persons, abortion advocates will argue that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."[117] This argument should be rejected. A state actor can generally be held liable for its own conduct under 42 U.S.C. § 1983.[118] When a state provides funding for activities, creates policies encouraging those activities, and authorizing agency action, the state *itself* deprives viable unborn children of existing (though unrecognized) rights to life and liberty without due process. In such states, the attacks by abortion providers rest upon the state's own conduct and actions.[119] The assessment here involves traditional constitutional analysis that does not implicate the affirmative duty to prevent third-party, private harm addressed by *DeShaney v. Winnebago County Department of Social Services*.

Perhaps more to the point, *DeShaney* and its progeny do not excuse the violation of equal protection that occurs when a state chooses to protect some children but not others.

IX. EQUAL PROTECTION OF ALL SIMILARLY SITUATED PERSONS

It is equally clear that the "abortion exception" to the general criminalization of deadly attacks on other human beings violates the equal protection of the laws. *Romer v. Evans*[120] is instructive on this point. In *Romer*, several cities and municipalities passed ordinances—some carrying criminal penalties—protecting homosexuals from discrimination. These laws were controversial in the state, and, through a referendum process, citizens of the state voted to amend the state constitution to prohibit local protections based on sexual orientation. More specifically, the amendment repealed local ordinances that prohibited discrimination based on sexual orientation.[121]

In striking down the state constitutional provision the Court observed:

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115. 410 U.S. 179, 192 (1973) (defining health as "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient").

116. It is a core principle of American and international law that individuals possess dignity, worth, and rights based upon their membership in the human community, and not the political vicissitudes of the time. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) ("[O]ur basic concept of the essential dignity and worth of every human being [is] a concept at the root of any decent system of ordered liberty." (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring))). *See* Universal Declaration of Human Rights, art. I, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) ("All human beings are born free and equal in dignity and rights.").

117. DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. 189, 195 (1989). *See also* Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (holding that there is no constitutional right to the enforcement of a restraining order).

118. *See* Robbins v. Oklahoma, 519 F.3d 1242, 1251 (citing *DeShaney*, 489 U.S. at 197).

119. *See* Civil Rights Cases, 109 U.S. 3, 18 (1883) ("[T]he evil or wrong actually committed [by a private party] rests upon some State law or State authority for its excuse and perpetration.").

120. 517 U.S. 620 (1996).

121. *Id.* at 624.

> [L]aws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.[122]

Laws that allow the indiscriminate killing of unborn children—while protecting the lives of virtually identical children who have emerged from the birth canal—are a clear example of what the Court describes as "a denial of equal protection of the laws in the most literal sense."[123] Returning to the thought experiment posited earlier in this article,[124] the fact that some states would allow the post-viability killing of one twin, while the life of the second twin who successfully emerges from the womb, perhaps earlier or only minutes later, is protected from the abortionist's lethal aggression, is clear evidence of the "denial of equal protection in the most literal sense."[125]

Some may argue that the variation in state laws regarding abortion and feticide is simply the product of our federalist system, and that *Dobbs* permits both interstate and intrastate distinctions between children within the womb and children who have emerged from the womb. The Supreme Court has long recognized that a mere showing of differential treatment among persons is not enough, without more, to show a denial of equal protection.[126] But such distinctions do not hold when addressing laws that deny one group of children protection of their lives, while safeguarding the lives of almost identically situated children. To paraphrase the holding of *Griffin v. County School Board of Prince Edward County*,[127] whatever grounds might support a state's allowing a woman to terminate her pregnancy prior to delivery, the object must be a constitutional one, and to excuse the intentional killing of one group of children while protecting others does not qualify as constitutional.[128]

X. THE RELEVANCE OF VIABILITY

The *Dobbs* majority, in its general repudiation of *Roe* and *Casey*, rejected viability as the point at which state interests become sufficiently compelling to override what the Court had previously recognized as the woman's right to abortion.[129] "The most obvious problem with any such argument is that viability [has changed over time and] is heavily dependent on factors [—such as medical

122. *Id.* at 633.

123. *Id.*

124. *See supra* text accompanying notes 79–92.

125. *Romer*, 517 U.S. at 633. It should be noted that this argument has been rejected by at least one federal court when asserted by victims of assaults resulting in the death of their viable unborn children. Smith v Hochul, 568 F. Supp. 3d 190, 202 (N.D.N.Y. 2021), *appeal docketed*, No. 23-686 (2nd Cir. Apr. 24, 2023). However, the court declined to address the same claim by a class of viable unborn children because the claim was not presented by a next friend or guardian ad litem for the class. *Id.* at 203.

126. *See, e.g.*, Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947).

127. 377 U.S. 218 (1964) (finding that equal protection was violated by school district's closure of public schools available to all students while subsidizing private racially segregated schools).

128. *Id.* at 231.

129. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 280 (2022).

advances and the availability of quality medical care—] that have nothing to do with the characteristics of a fetus."[130] Instead, the *Dobbs* Court declared that states are free to afford wide or narrow legal protection for fetal life from the moment of fertilization.[131]

I have no quarrel with this rule.[132] But even this favored rule—like its antithetical counterpart permitting states to deny protection to fetal life—remains subject to constitutional constraints on state actions. These constraints include requirements that laws must provide substantive and procedural due process to all, subject to the laws and equal protection to all who are similarly situated.[133]

The *Dobbs* majority criticized *Roe* for its "failure to justify the critical distinction it drew between pre- and post-viability abortions,"[134] and found that the *Casey* plurality "made no real effort to remedy one of the greatest weaknesses in *Roe*'s analysis: its much-criticized discussion of viability."[135]

The observation by the *Dobbs* majority that viability is heavily dependent on a variety of factors is true, but not dispositive. In *Casey*, the Court observed that viability at twenty-eight weeks was "usual at the time of *Roe*," that a fetus is "sometimes" viable at twenty-three or twenty-four weeks "today," and that viability may move to "some moment even slightly earlier in pregnancy . . . if fetal respiratory capacity can somehow be enhanced in the future."[136] But the *Casey* Court concluded that these facts "have no bearing" on the viability rule itself, as it "in no sense turns on when viability [may occur]."[137]

Many laws and constitutional principles depend on the particularity of the facts for the application of those laws and principles. For example, protection against government takings of property turns on the state's proposed use of the property, as well as the fairness of the payment to be made.[138] Clearly proposed use and fair value are determined in part by location of the land, and both fluctuate with time.[139]

Free speech norms depend on an initial determination of whether the speech is political, commercial, or nonideological,[140] but also include consideration of the structure of the contested laws or regulations. Courts look

130. *Id.* at 276.

131. *Id.* at 301 (noting that state interests "include respect for and preservation of prenatal life at all stages of development"). *See also id*. at 360 (Breyer, J., dissenting) (positing that states could bar abortions from fertilization).

132. *See* Collett, *supra* note 24.

133. U.S. CONST. amend. XIV.

134. *Dobbs*, 597 U.S. at 274.

135. *Id.* at 279.

136. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 860 (1992).

137. *Id.*

138. The first factor is not inherent in the characteristics of the property. *See* Kelo v. New London, 545 U.S. 469 (2005) (holding that urban redevelopment is a "public purpose"); Hawaii Hous. Auth. v. Midkiff, 467 US 229 (1984) (holding that property redistribution is permissible "public use").

139. *Cf. Dobbs*, 597 U.S. at 277 (criticizing viability standard as varying by location and time).

140. VICTORIA L. KILLION, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH (2024).

to see if whether the laws, not the speech, are content neutral,[141] and whether the regulated speech occurs in a public forum, a limited public forum, or a nonpublic forum.[142] Inclusion of these two factors does not eliminate speech protections simply because they "have nothing to do with the characteristics" of the speech.[143] Similarly, the fact that the viability of any particular unborn child is determined by factors like the current state of medical technology and its availability at the location of the child's birth,[144] does not invalidate viability as the point in which due process requires state protection of those unborn children who are viable against intentional killing.

CONCLUSION

The current legal landscape of abortion law in the United States presents an opportunity to address the unresolved question of fetal personhood. However, this moment also demands a strategic, measured approach that balances the moral urgency of protecting all human lives with the practical necessity of securing legal victories. Recognizing the personhood of viable unborn children is not only a defensible starting point but a critical step in the broader quest for justice.

The viability threshold, though medically variable, remains a meaningful marker where the state's interest in protecting life intersects with its ability to respect a woman's choice to terminate her pregnancy. To allow the intentional destruction of unborn children capable of surviving outside the womb—while affording full legal protection to prematurely born infants—is an egregious denial of equal protection under the law. This contradiction not only undermines the integrity of our legal system but also exposes the moral incoherence of laws that treat similarly situated human beings differently based solely on their physical location.

Throughout history, the extension of personhood to previously excluded groups has marked significant progress toward a more just society. The unborn are the last group of human beings systematically denied this recognition. While opponents of personhood often cite *Dobbs* as agnostic on the issue, such arguments misinterpret the ruling, which dismantled *Roe*'s shallow reasoning and left the question of fetal personhood open for further legal and societal debate. The refusal of *Dobbs* to categorically deny unborn personhood should embolden rather than discourage efforts to extend constitutional protections to this vulnerable group.

Recognizing viable unborn children as constitutional persons aligns with longstanding principles of justice and equality enshrined in the Fourteenth Amendment. It acknowledges the state's duty to protect those who cannot

141. Amdt. 1.7.3.1 *Overview of Content-Based and Content-Neutral Regulation of Speech*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-3-1/ALDE_00013695/ [https://perma.cc/P7KN-ZQQ6] (providing example of Ward v. Rock Against Racism, 491 U.S. 781 (1989) where New York City officials could control the volume of amplified music at rock concerts in Central Park without violating the First Amendment).

142. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37 (1983).

143. *Cf. Dobbs*, 597 U.S. at 276.

144. *Id.* at 277.

protect themselves, while respecting the rights of women to choose options—such as early delivery and adoption—that do not involve taking a life. Furthermore, such recognition would signal a rejection of the utilitarian calculus that has long dominated abortion debates, replacing it with a commitment to uphold the inherent dignity and worth of every human being.

The history of social and legal reform shows that change often begins with small but significant steps that pave the way for larger transformations. By starting with the recognition of viable unborn children as persons, pro-life advocates can demonstrate the reasonableness of their cause and create momentum for more comprehensive protections in the future.

By focusing on viable unborn children as the initial point of legal recognition, we reaffirm the foundational principle that all human beings are entitled to equal protection under the law. This is not the end of the journey, but the beginning. It is a necessary step toward creating a society where the rights of the most vulnerable are fully acknowledged and protected. As history has shown, the fight for personhood is not merely about the law—it is about affirming the dignity and worth of every human life.