THE WISDOM OF FEDERALISM AFTER *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION*

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INTRODUCTION

In the wake of *Dobbs v. Jackson Women's Health Organization*,[1] abortion proponents and pro-life advocates are advancing distinct equal protection theories. Abortion advocates seek Fourteenth Amendment equal protection for women as a stronger constitutional rationale for abortion rights than the privacy right devised by the Supreme Court in *Roe v. Wade*[2] or the liberty right in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[3] Conversely, pro-life advocates seek equal protection of the Fourteenth Amendment for the unborn child to override state laws which broadly legalize *elective* abortion.[4]

Questions arise about how, in what form, and at what level of government should advocates seek to secure "equal protection" for prenatal human beings.

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

2. Roe v. Wade, 410 U.S. 113 (1973). *See, e.g.*, Donald Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979).

3. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992). *See, e.g.*, Cary Franklin & Reva Siegel, *Equality Emerges as a Ground for Abortion Rights in and After* Dobbs, *in* ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION 22–50 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024); Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature. *See*, *e.g.*, Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Law, *Re-thinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1002–28 (1984)."); Anita Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 419 (1995).

4. *See, e.g.*, Joshua J. Craddock, *Personhood After* Dobbs, 74 CATH. U. L. REV. 536 (2025); John Finnis & Robert George, *Equal Protection and the Unborn Child: A Dobbs Brief*, 45 HARV. J.L. & PUB. POL'Y 927 (2022); Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J. L. & PUB. POL'Y 539, 550–52 (2017).

These questions require more attention than they have received since *Roe v. Wade*. Plan A, for some advocates, is for the U.S. Supreme Court to declare constitutional personhood for the unborn child. However, a Supreme Court declaration of Fourteenth Amendment personhood should not be considered the only, best, or even the most productive means to curtail *elective* abortion and its risks and harms to women or to secure enduring protection for the unborn child.

Careful consideration should be given to utilizing the strengths of federalism, growing legal protection state by state, and building an enduring majority support at the state and local level. This multifaceted path would secure clear democratic legitimacy in our republic, for which the Court's decision in *Dobbs* set the table. Securing legal protection in 38 states, for example, would not only demonstrate the support of a broadly-based majority of Americans but would also secure enough States for a potential constitutional amendment, if that is needed to protect prenatal human beings at some point in the future.

I. WHAT *DOBBS* ACCOMPLISHED

Whether Fourteenth Amendment personhood is necessary or prudent after *Dobbs* requires a detailed understanding of the rationale, effect, and implications of the *Dobbs* decision. But first, it is essential to understand the original defects of *Roe v. Wade*, which made the *Dobbs* decision necessary. The Supreme Court first accepted *Roe v. Wade* and *Doe v. Bolton*[5] for review in May 1971 *not* to address the abortion issue but to review the application of *Younger v. Harris*,[6] a case about federal jurisdiction, to the procedural scenario of *Roe* and *Doe*—whether state court criminal defendants could take their cases into federal court.[7] Five months later, a crisis erupted in the Court in September 1971 when both Justices Hugo Black and John Marshall Harlan abruptly retired for health reasons. That reduced the Court to seven Justices, and a temporary majority of four Justices saw the opportunity to use *Roe* and *Doe* to eliminate the abortion laws before the vacancies could be filled by President Richard Nixon.

But the case selection was terrible: *Roe* and *Doe* had no evidentiary record on elective abortion, its history, nature, risks, or implications. Consequently, everything in the *Roe* majority opinion is based on Justice Harry Blackmun's own research, his clerks' research, or derived from interest group briefs filed in the Supreme Court for the first time.[8] That includes: (1) the historical discussion that makes up virtually half of the *Roe* opinion and was meant to justify the substantive due process right to abortion, (2) the trimester system, (3) the viability rule, which the parties never briefed or mentioned once in four hours

5. Doe v. Bolton, 410 U.S. 192 (1973).

6. Younger v. Harris, 401 U.S. 37 (1971). See the analysis regarding *Younger* in CLARKE D. FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF ROE V. WADE 17-24 (Encounter Books 2013).

7. 402 U.S. 941 (1971). *See also* FORSYTHE, ABUSE OF DISCRETION, *supra* note 6.

8. FORSYTHE, ABUSE OF DISCRETION, *supra* note 6.

of oral arguments in either case, (4) the key sociological assumption that abortion is safer than childbirth, which was the basis for *Roe*'s framework—including the deference to abortion providers, the trimester system, the viability rule, and the unlimited "health" exception after viability. These defects provoked immediate, substantial, and sustained criticism, which kept *Roe* unsettled.[9] After *Webster v. Reproductive Health Services*,[10] most if not all of the succeeding Supreme Court abortion decisions were decided by a divided, 5-4 Court. Because *Roe* was unsettled for forty-nine years, *stare decisis et quieta non movere* obligated the Court to reconsider *Roe* and settle the law.[11]

Dobbs thoroughly reviewed *Roe* according to the modern factors of *stare decisis et quieta non movere*, and concluded that *Roe* was unsettled, wrongly decided, unworkable, and without substantial reliance interests. *Dobbs* clearly overturned *Roe* and *Casey* and returned the abortion issue to "the people and their elected representatives" as the Court reiterated several times.[12] *Dobbs* refuted the false history that *Roe* imposed on the nation for 49 years and replaced it with a thorough and accurate history of Anglo-American law that protected prenatal human life.

Dobbs established clarity in constitutional law by explaining what "overruling" *Roe* meant as a legal matter: (1) The Court *expressly* overruled both *Roe* and *Casey* in several passages, and clearly held that "the Constitution does not confer a right to abortion."[13] (2) Citing *Ferguson v. Skrupa*,[14] the Court's 1963 decision on the scope of the States' police powers, the Court clarified that abortion laws are part of the States' police powers, along with other health and safety laws,[15] and that "rational basis review is the appropriate standard."[16] (3) Therefore, "[a] law regulating abortion, like other health and welfare laws, is entitled to a strong presumption of validity."[17] (4) "It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."[18] (5) "These legitimate interests

9. Clarke D. Forsythe & Regina Maitlen, *Stare Decisis, Settled Precedent, and* Roe v. Wade*: An Introduction*, 34 REGENT U. L. REV. 385 (2022); Clarke D. Forsythe & Rachel N. Morrison, *Stare Decisis, Workability, and* Roe v. Wade*: An Introduction*, 18 AVE MARIA L. REV. 48 (2020); Clarke D. Forsythe, *Legal Criticism & Unsettled Precedent: A Survey of Judicial & Scholarly Criticism of* Roe v. Wade *Since 1973*, SSRN (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4912144.

10. 492 U.S. 490 (1989).

11. Forsythe & Maitlen, *supra* note 9.

12. 597 U.S. at 232, 240, 256, 259, 269, 292, 302.

13. *Id.* at 257, 292.

14. Ferguson v. Skrupa, 372 U.S. 726 (1963). Justice Black wrote the opinion for a unanimous Court, though Justice Harlan "concur[red] in the judgment on the ground that this state measure bears a rational relation to a constitutionally permissible objective. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 491. *Id.* at 733.

15. 597 U.S. at 289, 300–01.

16. *Id.* at 300.

17. *Id.* at 301.

18. *Id.*

include respect for and preservation of prenatal life at all stages of development . . . ."[19] (6) The Court denied an alternative constitutional *rationale* for *Roe*; no *implied or unenumerated* constitutional right to abortion is lurking elsewhere in the Constitution.

As a result of *Dobbs*' clarity, state officials announced within hours or days their intent to enforce abortion limits. State and federal courts obeyed and enforced *Dobbs*. Approximately, thirty-five federal court cases challenging state health and safety regulations for abortion filed before *Dobbs* were dismissed within weeks or months.[20] Gestational limits at twelve weeks or less were enforced in nineteen states in 2024.[21]

II. WHAT THE CONSERVATIVE CRITICS OF *DOBBS* HAVE OVERLOOKED

In the two years since *Dobbs*, some critics have complained that the Supreme Court did not go far enough to end abortion, or that the opinion was "morally empty" by not relying on natural law or addressing the question of prenatal personhood. This perspective overlooks what *Dobbs* said. It is important to recognize the decisive institutional constraint levied by Justice Kavanaugh's concurring opinion. As the necessary fifth vote to overturn *Roe*, Justice Kavanaugh prevented any broader majority decision—assuming that any was contemplated—with the statement in his concurrence that "the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral."[22]

A push by less than five Justices to go farther might have splintered the Court and not produced a majority decision to overturn *Roe*. Or, perhaps more likely, it could have led to a plurality opinion that did not decisively overrule *Roe*. This ambiguous result could have led to years of litigation to clarify *Dobb*'s meaning and impact, as *Roe* did.

Instead, the *Dobbs* Court's clear statement to return the abortion issue to the States kept together a majority that decisively overturned *Roe* behind one strong opinion that allowed abortion limits to be enforced in many states. The clarity of *Dobbs* was striking and effective, leading to acceptance—and action—by state and federal judges and state officials.[23]

Still, the *Dobbs* opinion did more. The Court repudiated *Roe v. Wade* in such strong terms that some progressive law professors have raged that the Court breached norms of judicial decorum.[24] The Court wrote that *Roe*'s

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19. *Id.*

20. Clarke D. Forsythe & Carolyn McDonnell, *The States' Response to* Dobbs, 39 NOTRE DAME J.L. ETHICS & PUB. POL. 171 (2025).

21. Forsythe & McDonnell, *supra* note 20, at 202 n. 183, 236. The nineteen states are listed on page 236; the statutory citations can be found on page 202 n. 183. .

22. 597 U.S. at 338.

23. *See* Forsythe & McDonnell, *supra* note 20.

24. *See e.g.*, Clarke D. Forsythe, *What Will Settle Dobbs? A Review of Roe v. Dobbs: The Past, Present, and Future of a Constitutional Right to Abortion*, 25 FEDERALIST SOC'Y REV. 364 (Nov. 11, 2024), https://fedsoc.org/fedsoc-review/what-will-settle-dobbs.

"survey of history ranged from the constitutionally irrelevant . . . to the plainly incorrect,"[25] that "*Roe* was egregiously wrong from the start,"[26] that "[i]ts reasoning was exceptionally weak, and the decision has had damaging consequences,"[27] that "*Roe* . . . was remarkably loose in its treatment of the constitutional text,"[28] and that "the right to obtain an abortion [does not] have a sound basis in precedent."[29]

The Court also refuted the notion that any right to *elective* abortion is rooted in American history or law. In a direct rebuttal to the three dissenters, the Court pointed out that they "cannot establish that a right to abortion has *ever* been part of this Nation's tradition."[30] The Court documented that there is "no support for the existence of an abortion right that predates the latter part of the 20th century,"[31] and affirmed that "[t]his overwhelming consensus endured until the day *Roe* was decided."[32] The Court emphasized that "[t]here is ample evidence that the passage of [the 19th-century abortion laws] was . . . spurred by a sincere belief that abortion kills a human being,"[33] citing "many judicial decisions from the late 19th and early 20th centuries" which "made that point."[34]

Contrary to the claims by critics, the Court affirmed the humanity of the unborn child by quoting liberally from the Mississippi legislature's factual findings for the state's 15-week limit, treating those as fact.[35]

Moreover, in two Appendices of nearly thirty pages, the Court documented that the States over the past two centuries have repeatedly chosen to protect children—as the Court emphasized—at *all stages* of prenatal development.[36] That data provided the foundation for the Court to affirm the important constitutional rule that the states' "legitimate interests include respect for and preservation of prenatal life at all stages of development . . . ."[37]

Contrary to the "morally empty" charge, the Court explicitly recognized abortion to be a moral issue at least five times. Abortion, the Court declared, "presents a profound moral issue . . . "[38] and is "a question of profound moral and social importance."[39] The Court recognized the "the critical moral question

25. 597 U.S. at 226.
26. *Id.* at 231.
27. *Id.* at 231.
28. *Id.* at 235.
29. *Id.* at 256.
30. *Id.* at 261.
31. *Id.* at 251.
32. *Id.* at 249.
33. *Id.* at 254.
34. *Id.* at 254.
35. *Id.* at 232–33.
36. *Id.* at 302 (App. A), 324 (App. B).
37. *Id.* at 301.
38. *Id.* at 223.
39. *Id.* at 269.

posed by abortion,"[40] and affirmed that "the fundamental moral question that it poses is ageless."[41] The Court then closed its opinion where it began, by affirming that "[a]bortion presents a profound moral question."[42] Another moral principle that the Court repeatedly reaffirmed is *the consent of the governed*. Before *Roe*, the Court emphasized, the issue of abortion was decided by "the people and their elected representatives," and authority must be returned to them.

Most importantly, the critics have missed the fact that the Court in *Dobbs* expressly erased the "mystery passage" as part of the poor reasoning of *Planned Parenthood v. Casey*[43] and implicitly erased the amorphous constitutional "right to privacy" as part of the poor reasoning of *Roe*.[44] Together, this house-cleaning of poor reasoning and facile dicta implicitly jettisons for *future* decisions the influence on constitutional law of modern secular liberalism and its plank that government must be neutral on all "comprehensive views" in political questions.[45]

The conservative critics also miss the historic contribution the *Dobbs* Court added to our heritage. For forty-nine years, *Roe* gave our Nation a false history,[46] erasing the fact that Anglo-American law and medicine for centuries aimed to protect the developing human being (and women from coerced abortion and the inherent medical risks of elective abortion). The *Roe* Court stripped away our Nation's legal and cultural heritage.[47] The *Dobbs* Court repudiated *Roe*'s false history and restored our legal and cultural heritage founded in Anglo-American law and medicine.

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40. *Id.* at 257.

41. *Id.* at 258.

42. *Id.* at 302.

43. *Id.* at 255–56 ("While individuals are certainly free *to think* and *to say* what they wish about 'existence,' 'meaning,' the 'universe,' and 'the mystery of human life,' they are not always free *to act* in accordance with those thoughts. License to act on the basis of such beliefs may correspond to one of the many understandings of 'liberty,' but it is certainly not 'ordered liberty.'") (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

44. *Id.* at 255 ("*Roe* termed this a right to privacy, 410 U.S. at 154, and *Casey* described it as the freedom to make 'intimate and personal choices' that are 'central to personal dignity and autonomy,' 505 U.S. at 851."); *id.* at 273 ("Citing a broad array of cases, the Court found support for a constitutional 'right of personal privacy,' but it conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. Only the cases involving this second sense of the term could have any possible relevance to the abortion issue, and some of the cases in that category involved personal decisions that were obviously very, very far afield.") (citations omitted); *id.* at 279 ("When *Casey* revisited *Roe* almost 20 years later, very little of *Roe*'s reasoning was defended or preserved. The Court abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment's Due Process Clause.").

45. *See generally* CHIRSTOPHER WOLFE, NATURAL LAW LIBERALISM (2006).

46. *See generally* JOSEPH DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY (1st ed. 2006).

47. 410 U.S. at 130–60.

Yes, the *Dobbs* Court cautioned that "our decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests."[48] And it said, "[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."[49] In context, these remarks possibly secured Justice Kavanaugh's vote or are responses to the dissenting Justices, but, in any case, they are dictum. As such, they are minor compared to the enormous amount of data about that Anglo-American legal protection of the prenatal human being which the *Dobbs* Court compiled, relied upon, and quoted for the first time in Supreme Court history.

What the *Dobbs* opinion suggests is that, in a republic, the accumulated Anglo-American historical record, and the state judicial and legislative actions of the American people and officials extending over three centuries, are more significant and authoritative than the personal moral opinions of *four* Justices—minus Justice Kavanaugh who made his position of neutrality clear—who happened to sit in 2022. Such a broader statement by four or less—it's entirely speculative whether any was contemplated—would have been dismissed as the personal opinion of a minority.

Had the Court tied a natural law discussion to the word "person" in the Fourteenth Amendment, however, it would have hinted at notions of Fourteenth Amendment personhood and likely confused the clarity of its determination to return the abortion issue to "the people and their elected representatives" and the police power of the States, thereby obscuring, almost certainly, the clarity that the *Dobbs* Court achieved.

III. HOW *DOBBS* SETTLED THE FOURTEENTH AMENDMENT PERSONHOOD QUESTION

Advocacy for Fourteenth Amendment personhood is nothing new. Parties or amici curiae have presented this argument to the U.S. Supreme Court for over 50 years. It was raised in the first modern abortion case, *United States v. Vuitch*.[50] Texas and Georgia argued personhood in *Roe* and *Doe*.[51] Amicus briefs advocating Fourteenth Amendment personhood were filed in *Vuitch*, *Roe*, and *Doe* and in virtually every abortion case since.[52] The question of Fourteenth Amendment personhood was raised during oral argument in *Roe*, *Doe*, and *Webster v Reproductive Health Services*. It is likely that Fourteenth Amendment

48. 597 U.S. at 254.

49. *Id.* at 263.

50. United States v. Vuitch, 402 U.S. 62 (1971).

51. FORSYTHE, ABUSE OF DISCRETION, *supra* note 6, at 113–20. The original oral argument audio and transcripts are available at www.oyez.org.

52. *See* the briefs cited in Clarke D. Forsythe & Keith Arago, *Roe v. Wade & the Legal Implications of State Constitutional "Personhood" Amendments*, 30 NOTRE DAME J.L. ETHICS & PUB. POL'Y 273 (2016).

personhood is the legal question *most frequently briefed* for the Court in abortion cases.[53]

Dobbs represents, however, a major development in the debate over Fourteenth Amendment personhood. There have been fifty years of experience with the Supreme Court's centralized control of the abortion issue. Following *Roe*, all Supreme Court nominees have grappled with the abortion issue, and, after *Casey*, a completely new bench of Justices have lived through this contentious abortion debate. In *Dobbs*, the question of Fourteenth Amendment personhood was again raised at oral argument by Justice Kavanaugh and briefed by *amicus curiae*, including by two internationally renowned legal philosophers, John Finnis of Oxford and Notre Dame and Robert George of Princeton.

The Justices in *Dobbs* unanimously rejected Fourteenth Amendment personhood, if not expressly, by the strongest implication. Dissenting in *Dobbs*, Justices Breyer, Kagan and Sotomayor would have reaffirmed *Roe* and its sweeping constitutional right to abortion and thus rejected constitutional personhood.[54] Chief Justice Roberts refused to overturn *Roe* and would have supported some "reasonable opportunity" to seek abortion.[55] Justice Alito, joined by the remaining four justices, issued an opinion containing these strong statements:

> For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens.[56]
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> . . .
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> 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.[57]
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> . . .
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> But 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."[58]

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53. *Id.*

54. 597 U.S. at 359, 364.

55. *Id.* at 348.

56. *Id.* at 225.

57. *Id.* at 232 (quoting Planned Parenthood v. Casey, 505 U.S. at 979 (Scalia, J., concurring in judgment in part and dissenting in part)) (citations omitted).

58. *Id.* at 256.

> . . .
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> Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.[59]
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> . . .
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> [T]he Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people.[60]
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> . . .
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> *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.[61]
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> . . .
>
> The Constitution does not prohibit the citizens of each state from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.[62]

Finally, the *Dobbs* majority also implied that the Court could not settle the abortion issue—as *Roe* and *Casey* did not—if it asserted control of the issue under the Fourteenth Amendment:

> [T]he Casey plurality also misjudged the practical limits of this Court's influence. *Roe* certainly did not succeed in ending division on the issue of abortion. On the contrary, *Roe* 'inflamed' a national issue that has remained bitterly divisive for the past half century. . . . And for the past 30 years, *Casey* has done the same. Neither decision has ended debate over the issue of a constitutional right to obtain an abortion. Indeed, in this case, 26 States expressly ask us to overrule *Roe* and *Casey* and to return the issue of abortion to the people and their elected representatives. . . . This Court's inability to end debate on the issue should not have been surprising. This Court cannot bring about the permanent resolution of a rancorous national controversy simply by dictating a settlement and telling the people to "move on." Whatever influence the Court may have on public attitudes must stem from the strength of our opinions, not an attempt to exercise "raw judicial power."[63]

These numerous statements, along with others in the opinion, are incompatible with Fourteenth Amendment personhood. Since no Justice on the current Court supports Fourteenth Amendment personhood, it is highly unlikely

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59. *Id.*

60. *Id.* at 269.

61. *Id.*at 292.

62. *Id.* at 302.

63. *Id.* at 292 (citing 410 U.S. at 222 (White, J., dissenting)) (citations omitted).

that this Court will ever revisit this issue, unless directly and unavoidably presented by a Congressional statute.

IV. TEXT, CONTEXT, STRUCTURE & LEGISLATIVE HISTORY IN INTERPRETING THE FOURTEENTH AMENDMENT

Besides *Dobbs*' strong statements, there are legitimate legal, historical, and institutional reasons by which the Court could expressly reject Fourteenth Amendment personhood. Given the political blowback to *Dobbs*, even greater political turmoil likely would result from declaring constitutional personhood and coercing more than a dozen pro-abortion states—the population of California, New York, and Illinois alone totals 71,000,000 people. Consequently, the Court would need clear and compelling evidence of constitutional authority to override the dissenting pro-abortion states, convince Americans of the Court's authority to safeguard prenatal human life, and survive retaliatory attempts to pack the Court. Is that evidence compelling?

A. Text and Context

Advocates of Fourteenth Amendment personhood over the past fifty years have typically emphasized one word, "person," in Section One of the Fourteenth Amendment. The other seventy-nine words in Section One show that it is implausible that the prenatal human being is encompassed by Section One. Unlike the Thirteenth Amendment, which prohibited the private act of slavery, the Fourteenth Amendment does not touch private conduct; its prohibition is limited to action by a "state." The Fourteenth Amendment was intended to confirm the constitutionality of the Civil Rights Act of 1866 against judicial invalidation and to cancel the "Black Codes" in the southern states that violated the rights of the freedman, controlled their lives, and maintained social segregation.

In addition, the other seventy-nine words of Section One address ways in which the three branches of the southern states were violating the rights of the freedmen. "Due process" is something that government provides and is not the obligation of private citizens. "Equal protection" is something that government provides, not private citizens. Due process limits the legislature and the courts. Equal protection limits the executive who enforces the law. These constitutional protections do not apply to an abortionist—a private actor—who ends the life of the unborn child or to the woman who has an abortion.

B. The Silence of the Legislative History

Besides text and context, the 39th Congress *never* concerned itself with the abortion issue. Despite decades of research, no committee report, no statement in the Congressional Globe, no letter, memorandum, or newspaper article or op-ed from that era has ever been cited which mentions abortion or the unborn child as an interest of the 39th Congress or of any state that ratified the amendment. There is a clear and compelling reason for this: *the States were expanding legal prohibitions of elective abortion, while the 39th Congress was*

focused on the freedman. Between 1820 and the 1860s, the States were the focus of anti-abortion policy in America,[64] as the Supreme Court laid out in *Dobbs*.

C. The Common-Law Born-Alive Rule

Instead of looking at treatises or dictionaries for the "original public meaning" of "person," the Court would most likely look at *the law as it existed in the 1860s*—specifically, homicide law and its limits. The important distinction between abortion law and homicide law is often overlooked. Abortion law deals with preventing and criminalizing *the procedure* of interrupting or terminating pregnancy.[65] Homicide law deals with the crime of *killing human beings*.[66] The born-alive rule was a limitation on the law of homicide and prevented an indictment in the case of a stillbirth or, in other words, unless the child was born alive.[67]

In contrast to dictionaries and treatises, the born-alive rule was *the law* at least since 1601.[68] It was declared to be the law by Edward Coke in the seventeenth century[69] and by William Blackstone in the eighteenth century.[70] Advocates emphasize the aspirations in Book One of Blackstone (the right to life of the prenatal "infant")[71] while often ignoring the practical medico-legal limits expressed in Book 4 of Blackstone (referencing the born alive rule and the difficulty of proof),[72] though the limitation of homicide law is in fact mentioned in Book One of Blackstone.[73]

The born-alive rule was adopted by the Pennsylvania Supreme Court as early as 1791,[74] and by at least forty-five other state courts throughout the nineteenth century and into the twentieth century. Most if not all of these courts assumed that the born-alive rule was a *substantive* element—not an evidentiary

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64. *See* 597 U.S. at 248 n.33 (and citations therein); Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOU. U. PUB. L. REV. 15, 103 (1993) (Appendix A: The Tradition of Prohibiting Abortion).

65. *See Abortion*, BOUVIER LAW DICTIONARY, vol. I, at 45 (14th ed. 1871).

66. *See Homicide*, BOUVIER LAW DICTIONARY, *supra* note 65 at 670.

67. *See generally*, Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563 (1987); Paul Benjamin Linton, *The Legal Status of the Unborn Child Under State Law*, 6 U. ST. THOMAS J. L. & PUB. POL'Y 141 (2011).

68. *See* Regina v. Sims, Gouldsb. 176, 75 Eng. Rep. 1075 (K.B. 1601).

69. *See* EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (1628) (Garland Pub. Reprint 1979).

70. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 198 (1765 ed.) (Univ. Chi. Facsimile 1979).

71. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 125–26.

72. *See* 4 BLACKSTONE, *supra* note 70 at 198.

73. *See* 1 BLACKSTONE, *supra* note 71 at 125–26.

74. *See* State v. McKee, 1 Add. 1 (Pa. 1791).

rule—of the common law crime of homicide.[75] The evidentiary problems were not overcome by medical developments until the 1940s, at the earliest.[76]

For example, the Alabama Supreme Court in *Mack v. Carmack*[77] described how that court understood the significance of the born-alive rule in its previous 1926 decision, *Stanford v. St. Louis–San Francisco Ry. Co.*[78]

> Nonetheless, the *Stanford* Court concluded that "[t]he authorities . . . are unanimous in holding that a prenatal injury affords no basis for an action in damages, in favor either of the child or its personal representative." The reason behind this rule was the belief that "'a child before birth is, in fact, a part of the mother and is only severed from her at birth.'"[79]

It is simply wrong to describe the born-alive rule as a "legal fiction" at common law or in the nineteenth century. It was grounded in the concrete difficulties and limitations of primitive medicine—the problems of proof were real—and those lasted well into the twentieth century.[80] The born-alive rule could not become a "legal fiction" until medical science developed to the point that medicine could determine the *corpus delicti* of the homicide of a prenatal human being who died *in utero* (i.e., a stillborn child) as a result of prenatal injuries.[81] Hence, the born-alive rule was a limit on the scope of homicide law. Those medical developments were not realized until decades after the 39th Congress wrote and debated the Fourteenth Amendment.[82]

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75. *See* Forsythe, *supra* note 67 at 595–607 (analyzing state judicial application).

76. *See id.* at 602.

77. 79 So. 3d 597 (2011).

78. 214 Ala. 611, 108 So. 566 (1926).

79. 79 So.3d at 601 (citing 214 Ala. at 612, 108 So. at 567 (quoting the majority opinion in Allaire v. St. Luke's Hosp., 184 Ill. 359, 368, 56 N.E. 638 (1900))). For example, when the Alabama Supreme Court in 1972 overturned its 1926 decision, which denied a cause of action for prenatal injury, the 1972 court specifically rejected the rationale of the 1926 court which "was based upon the prevailing medical opinion *of that day*, that a fetal child was a part of the mother and not a 'person' until it was born." *Id.* at 602 n.212 (emphasis in original), citing decisions.

80. *See* Forsythe, *supra* note 67.

81. *See id.* at 565.

82. Ironically, some courts considered legal protection in property law, outside the criminal law, to be the "legal fiction." The Alabama Supreme Court in *Stanford* in 1926, stated: "By a legal fiction or indulgence, a legal personality is imputed to an unborn child as a rule of property for all purposes beneficial to the infant after birth, but not for purposes working to its detriment." 108 So. at 566. The Illinois Supreme Court in 1900 in Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900), used similar language. "The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as in esse for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth." *Id.* at 640.

D. The Silence of Post-Ratification Enforcement

For a century after the Fourteenth Amendment was ratified, 1868–1968, it was never claimed that the Fourteenth Amendment addressed abortion, either prohibiting or protecting the practice.[83] No state or federal governmental document suggested that the Amendment applied to abortion. No state or federal court case involved the claim that the Fourteenth Amendment limited the States in regulating abortion. There has been no citation of a law review article posing this question.

It cannot be claimed that there was no opportunity to apply the Fourteenth Amendment to state action regarding abortion. During the 1960s, states began adding exceptions to their state laws prohibiting abortion (which already permitted the premature separation of the mother and unborn child to save the mother's life). But even before this period, some legislatures wrote health exceptions into abortion limits, such as the District of Columbia's abortion law in 1901. Numerous cases, raising questions about the application of the Fourteenth Amendment to abortion, could have been filed in the decades after the Fourteenth Amendment was ratified in 1868, but this never happened.

E. The Potential Applications of Constitutional Personhood

No one should think that abortion is the only issue at stake with Fourteenth Amendment personhood. The Amendment does not refer to abortion or the unborn child but applies more broadly to "person." Judicial incorporation of the "unborn child" within the word "person" would not single out abortion but would include the prenatal human being within the protection of an untold number of possible laws and applications. It is the life and health of the unborn child that becomes the subject of judicial review of state action, not the abortion issue specifically. "Equal protection of the laws" (which is plural) would require judicial oversight of the state's "equal protection" of the prenatal human in numerous applications.

Consider these situations. The Fourteenth Amendment could apply to drug or alcohol abuse during pregnancy. It could apply to the risks of home births: if a woman has multiple babies, how much risk can be tolerated in a home birth? The Fourteenth Amendment would conceivably apply to state regulation of every labor and delivery. Accordingly, states cannot deny equal protection in any pregnancy or any delivery.

These questions would raise more questions. How does the state protect the unborn child from drug use during pregnancy? How does the state protect the unborn child from alcohol use? If a pregnant woman wants a home birth with a midwife, and then finds out through an ultrasound at eight weeks that she

83. The Court in *Dobbs* pointed to Roy Lucas' 1968 law review article as being the first to contend that the Fourteenth Amendment protected a right to abortion. 597 U.S. at 241 n.23 (citing R. Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N. C. L. REV. 730 (1968)). Lucas relied on *Griswold*. Lucas filed one of the first federal court challenges to abortion laws and was co-counsel with Sarah Weddington in *Roe v. Wade*.

is carrying twins or triplets, what laws and legal procedures must the state have in place to monitor the medical risks during pregnancy and delivery to provide "equal protection"? At what point does the state need to step in, and how does a federal court decide that?

But why should the Fourteenth Amendment be construed as limited to the "unborn child" or the "prenatal human being"? Does it also incorporate the extra-uterine, extracorporeal human embryo? It might apply to in vitro fertilization (IVF) or other reproductive technology, although the argument could well be made that the extracorporeal human embryo is not "prenatal" or "unborn."

Finally, the Fourteenth Amendment does not specify the judicial standard of review that would apply to the unborn child. Treating the prenatal human or unborn child as a "person" under the Fourteenth Amendment would necessarily (1) engulf both the Due Process and Equal Protection Clauses, and (2) apply layers of *existing doctrine* concerning due process and equal protection, including the tiers of scrutiny applicable to them.[84]

For example, would every abortion be subject to judicial review under the due process clause? If life is a fundamental right, as advocates would argue, can anything less than strict scrutiny be the appropriate standard of review? Due to the physical dependence of the prenatal human on his or her mother, is the prenatal child "similarly situated"—as current equal protection doctrine demands—with his or her mother or other children?

In sum, there are obstacles to the Supreme Court's consideration of constitutional personhood after *Dobbs*. Since these obstacles are significant, federalism is the best course of action for the near future, for which *Dobbs* decisively set the table.

V. ORIGINALISM AND THE ORIGINAL PUBLIC MEANING

Originalism in constitutional interpretation—the aim of determining and applying the original intent of the text—is the proper aim of constitutional interpretation in a republic, which rests upon the sovereignty of the people and is expressed through the people's representatives.[85] The United States Constitution's text supports originalism,[86] as does the Court's practice during its first century and beyond.[87] By focusing on preserving the application of the

84. Forsythe & Arago, *supra* note 52 at 295. *Cf.* Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMM. 397 (1998).

85. J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022).

86. *See* Michael Stokes Paulsen, *Originalism: A Logical Necessity*, NAT'L REV., Oct. 1, 2018, at 29.

87. *See e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179 (1803) ("the intention of those who gave this power"); Hylton v. United States, 3 U.S. (3 Dall.) 171, 177 (1796) (Chase, J.) ("if the framers of the Constitution did not contemplate"), 176 (Paterson, J.) ("It was, however, obviously the intention of the Framers of the Constitution"), 177 ("the only, objects, that the framers of the

original text as ratified by the people or their representatives, originalism is necessary to preserve self-government.

However, originalism as a method of constitutional interpretation "has evolved over the past several decades from 'original intent' to 'original understanding' to, most recently, 'original meaning' . . . ."[88] It was traditional, as Lincoln stated in his First Inaugural, to hold that "the intention of the law-giver is the law."[89] That accurately reflected the Supreme Court's early practice. Legal scholars since the 1970s used the term "original intent." Modern legal theorists, however, have criticized "original intent" as under-theorized and problematic. Many have undertaken to reestablish original intent in terms of the "original public meaning."

However, whether "original intent" or "original public meaning" is utilized, originalism cannot, in a republic, legitimately be detached from the authority of the people and their elected representatives who make the law. In a March 2023 lecture, Professor Kurt Lash, a Distinguished Chair in Law at the University of Richmond School of Law, in an explication of originalism and the Fourteenth Amendment, emphasized that "[p]ublic acceptance of the legitimacy of the Court's decisions requires a convincing account of how those decisions reflect the actual sovereign will of the people . . . ."[90]

The case for the original public meaning of the Fourteenth Amendment cannot rely only on dictionaries and treatises to determine the meaning of "person," detached from the purposes of the 39th Congress or the ratifiers in the States. Such detachment would be virtually indistinguishable from "living constitutionalism."

The repercussions of incorporating the prenatal human being into the Fourteenth Amendment would be enormous. Instead of asking whether abortion laws are too *strict*, the Supreme Court would be forced to ask whether abortion laws are too *loose*. It shifts the authority for abortion laws and their enforcement from the states to the federal courts, just as *Roe* did. It moves responsibility from elected state and local officials to federal judges.

The impact is seen, in part, by the Court's analysis in *Dobbs*, which treated abortion law as subsumed within the States' police powers, pursuant to *Ferguson v. Skrupa*.[91] Had Justice Black, the author of *Ferguson*, and Justice Harlan remained on the Court during the deliberations in *Roe* and *Doe*, had there been proper case selection for the consideration of abortion, and had *Roe* and *Doe* been adequately briefed and argued, it is possible that the *Roe* Court would

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Constitution contemplated as falling within the rule of apportionment"), 183 (Iredell, J.) ("in the sense of the constitution") ("contemplated by the constitution").

88. Vasan Kesavan and Michael Stokes Paulsen, *The Interpretative Force of the Constitution's Secret Drafting History*, 91 GEO. L. J. 1113, 1114 (2003).

89. ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1859–1865, 216 (Libr. of Am. 1989).

90. Kurt T. Lash, *Originalism and Fixing the Fourteenth Amendment*, Edwin Meese III Originalism Lecture at the Heritage Foundation (Mar. 21, 2023), available at: https://www.heritage.org/sites/default/files/2023-04/HL1334.pdf [https://perma.cc/N5XF-DKMJ].

91. 372 U.S. 726 (1963).

have applied *Ferguson v. Skrupa* to uphold the constitutionality of the Texas and Georgia abortion laws and left the responsibility for abortion (as the *Dobbs* Court did) in the hands of "the people and their elected representatives" in 1973.[92]

The 38th Congress considered the Thirteenth Amendment: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." It prohibited slavery, a private action, as distinguished from state action. The Senate adopted the Thirteenth Amendment on April 8, 1864, and, at President Lincoln's behest, the House debated and passed it on January 31, 1865.[93] President Lincoln signed the Joint Resolution, which submitted the Amendment to the States, on February 1, 1865. After the president's assassination, it was ratified by the necessary number of states on December 8, 1865.

The 39th Congress convened on December 4–5, 1865. The Thirteenth Amendment was deemed ratified a few days later, and the Congress and took up the Fourteenth Amendment that month. Having just passed the Thirteenth Amendment, why did not Congress use the Thirteenth Amendment as a model to prohibit the private action of abortion? Why would Congress prohibit *state* action in the Fourteenth Amendment as a tool against abortion, when the States in 1865 and 1866 were the locus of anti-abortion mobilization and law-making? Why would Congress take authority from those States and shift authority to the federal courts at that time? And why shift power to Congress under Section 5 to enforce the state action limits with "appropriate legislation"?

There is no history of the Fourteenth Amendment—from Congress, committees, or any member of Congress, or in reports, memos, letters, newspapers—which indicates that any member gave abortion any thought whatsoever. There are two good reasons for this: Congress was focused on the freedmen, and the States were expanding legal protection for women and children from abortion year by year, state by state.

Exclusive focus on the word "person" in the Fourteenth Amendment does not constitute an adequate case for the "original public meaning" of the Fourteenth Amendment. An "originalist" case that derives the "original public meaning" from dictionaries and treatises but contravenes the original purposes of the 39th Congress, and contemporary law, and separates itself from the sovereign will of the people or their elected representatives in a republic, is illegitimate. *Dobbs* indicates that the Supreme Court understands that by the

92. *See* FORSYTHE, ABUSE OF DISCRETION, supra note 6, at 89–124 (Chapter Three).

93. "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII.

Court's several references to "returning" authority over the abortion issue to "the people" or "their elected representatives."[94]

It is also far from clear that "equal protection" provides an effective slogan for any political campaign. Abortion advocates have occupied this ground for forty years.[95] Both sides would be claiming "equal protection"—one side for the woman, the other for the unborn child. That juxtaposition feeds the current reigning paradigm of "women's rights v. fetal rights." Two sides claiming "equal protection" would reinforce, not challenge, that reigning paradigm. Pro-life advocates need to be on the side of women—in resisting coerced abortion, in preferring marriage as the most stable relationship to raise children, in balancing work and family, in making the case that abortion is bad for both women and children.[96] If the dominant cultural paradigm continues to be "women's rights v. fetal rights," however, the public argument against *elective* abortion will continue to be an uphill battle.

VI. BUILDING AN ENDURING MAJORITY FOR LIFE THROUGH DEMOCRATIC AND ELECTORAL ACTION

A Supreme Court declaration of Fourteenth Amendment personhood of the unborn child is highly unlikely in the foreseeable future. And no conceivable strategy has been devised that would elect the President and the majority of Senators who would nominate and confirm five justices who would consider it. Accordingly, an alternative strategy of state law and policy should be pursued to provide legal protection for women and children from the risks and harms of elective abortion. That is the constitutional and political path to which *Dobbs* points.

The focus should be on building an enduring majority for life in the states—to grow the number of states that protect human lives and human dignity. That will require, *inter alia*, erasing the negative cultural and social impact of *Roe*, shaping public sentiment, implementing the strengths of our federalist system, and refuting the myths that *elective* abortion is necessary for women's health, equality or autonomy. These can most effectively be done at the state and local level, not by the Court, not by Congress.

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94. 597 U.S. 215, 222, 232, 256, 259, 269, 292 (twice), 302.

95. Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (". . . legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature. *See, e.g.*, Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L.REV. 261 (1992); Law, *Re-thinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1002–28 (1984).").

96. *See e.g.,* ERIKA BACHIOCHI, THE RIGHTS OF WOMEN: RECLAIMING A LOST VISION (2021); RYAN T. ANDERSON & ALEXANDRA DESANCTIS, TEARING US APART: HOW ABORTION HARMS EVERYTHING AND SOLVES NOTHING (Rev. ed. 2023); Cunningham & Forsythe, *Is Abortion the First Right for Women?: Some Consequences of Legal Abortion,* chapter 4 *in* ABORTION, MEDICINE AND THE LAW (J. Butler & D. Walbert eds., 4th ed. 1992).

A. The Negative Impact of Roe v. Wade

Roe v. Wade had a negative impact on American law, politics, medicine, culture, and society.[97] *Roe* poisoned the American mind for three generations, and its impact could not expire immediately upon its overruling in June 2022. *Roe*'s damaging effects cannot be discounted, and the extent of them is not completely understood, even three years after *Dobbs*.

Since *Dobbs*, there have been setbacks for policies aimed at reducing elective abortion and its risks for women and children.[98] These were foreseeable, because, for decades, Gallup polling data have showed support for abortion *under* 12 weeks and support for a prohibition *after* 12 weeks.[99] And it is important to recall the 1990 Gallup Poll on "Abortion and Moral Beliefs" and its findings that Americans were deeply ambivalent about abortion.[100]

Abortion politics have been roiled since *Dobbs*. Should that be surprising? The first paragraph of Justice Alito's opinion started with a blunt note about American public opinion:

> Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.[101]

What might have been read in June 2022 as a stark note of realism about the failure of *Roe* might now be taken as an insightful warning of political limits. *Roe*'s negative impact will not be quickly reversed.

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97. RYAN T. ANDERSON & ALEXANDRA DESANCTIS, TEARING US APART: HOW ABORTION HARMS EVERYTHING AND SOLVES NOTHING (Rev. ed. 2023); DELLAPENNA, *supra* note 46; *see also* JOHN T. NOONAN, JR., A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES (1979).

98. Knights of Columbus, "Americans' Opinions on Abortion: January 2023 (KOC-Marist Poll)," Jan. 2023, at 3, https://www.kofc.org/en/resources/communications/polls/2023-kofc-marist-poll-presentation.pdf [https://perma.cc/UR7A-VWSR] (showing that 56% of Americans support legal abortion through the first three months of pregnancy).

99. Gallup's May 2023 survey on abortion found that more than two-thirds thought abortion "should be legal in the first trimester (69%)," *Where do Americans Stand on Abortion?*, GALLUP, https://news.gallup.com/poll/321143/americans-stand-abortion.aspx#:~:text=A%20May%201%2D24%2C%202023,and%2022%25%20for%20the%20third (last updated June 17, 2024). FORSYTHE, ABUSE OF DISCRETION, supra note 6, at 298 (Table 4, citing Gallup data from 1975–2011).

100. See the analysis of the 1990 Gallup Poll and its findings in JAMES DAVISON HUNTER, BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR 85–121 (1994) (Chapter 4: The Anatomy of Ambivalence: What Americans Really Believe About Abortion*). See also* LINDA BIRD FRANCKE, THE AMBIVALENCE OF ABORTION (1978).

101. 597 U.S. at 223–25. *See* FORSYTHE, ABUSE OF DISCRETION, *supra* note 6, at 298 (Table 4) (citing Gallup Polling data 1975–2011).

The ballot initiatives adopted by 15 states since *Dobbs* certainly demonstrate that negative impact. They have demonstrated the American Founders' concerns about direct democracy and why the Founders wisely adopted republicanism and representative government over direct democracy.[102] A product of the progressive era in American history, ballot initiatives are susceptible to at least three corruptions: exploitation of the most passionate issues, deceptive language, and the injection of enormous amounts of money in a short period of time. Because advocates could not succeed by emphasizing abortion alone, several state ballot initiatives were crafted to include a series of relatively uncontroversial gynecological procedures, followed by abortion, the only procedure that is really challenged in the public square. By scaring a larger number of voters beyond those devoted to abortion alone into believing that these procedures are threatened, they succeeded in securing at least 51% of the popular vote in several states.[103]

B. Building an Enduring Majority for Life

Dobbs solidly situated abortion within the States' police power, relying on *Ferguson v. Skrupa*.[104] Because of *Dobbs*, majority rule will be the framework for enduring success. Ironically, at a time when the Court has shifted the abortion issue from the Court to the people and their elected representatives, some on the Left and on the Right doubt the morality of majority rule. They wonder why a majority should be able to prohibit or legalize abortion in any state,

The Founders understood the problems of majority rule long ago, and Abraham Lincoln wrestled with those questions anew in the 1850s amid the national debate over slavery. The Declaration of Independence identified certain moral propositions as self-evident truths—equal creation, unalienable rights, consent of the governed—which leads, through republican (representative) government, to majority rule.

However, the U.S. does not have a system of unlimited majority rule but one of constitutionally checked majority rule. Yes, majorities can violate natural rights, but—as James Read wrote of Lincoln's approach—"without majority support, there is no effective way to realize them in practice."[105] As Read has documented in *Sovereign of Free People*, among Lincoln's insights was to use

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102. DENNIS HALE & MARC LANDY, KEEPING THE REPUBLIC: A DEFENSE OF AMERICAN CONSTITUTIONALISM (2024); YUVAL LEVIN, AMERICAN COVENANT: HOW THE CONSTITUTION UNIFIED OUR NATION—AND COULD AGAIN 116–19 (2024).

103. *See* Bradley N. Kehr & Danielle G. Pimentel, *Abortion on the Ballot: Tracking 2024 State Ballot Initiatives*, AM. UNITED FOR LIFE (Oct. 25, 2024), https://aul.org/2024/10/25/abortion-on-the-ballot-tracking-state-ballot-initiatives/ [https://perma.cc/EYG6-5F36].

104. 372 U.S. 726 (1963).

105. JAMES H. READ, SOVEREIGN OF A FREE PEOPLE: ABRAHAM LINCOLN, MAJORITY RULE, AND SLAVERY (2023); James H. Read, *Abraham Lincoln, Divisive Issues, and the Capability of a People to Govern Themselves*, 39 NOTRE DAME J.L., ETHICS & PUB. POL'Y (Special Issue) 123 (2025).

majority rule to shape public sentiment and make policy progress. Lincoln understood majority rule as "one of the building blocks of democratic self-government."[106] Majorities change regularly, and they are capable of deliberate change. As Read has written, "stable majorities on contested public issues do not form spontaneously but require political organization and public persuasion."[107] Political parties play an essential role—they can be the democratic means for building an enduring majority. Majority rule can be part of the solution to political division. Elected representatives propose policies and defend them and educate, public sentiment supports or opposes, laws are approved or rejected, and the cycle happens again. That recursive exchange between public policy proposals and public sentiment is a critical means in a republic to shape public sentiment. In this way, majority rule requires public persuasion to shape public sentiment.

C. Federalism and the States' Police Power

1. Federalism as Principle

Federalism is our constitutional framework and a strength of our constitutional system. James Madison wrote in Federalist 45: "The powers delegated by the proposed Constitution to the federal government are few and defined, those which are to remain in the State governments are numerous and indefinite."

Federalism is anchored in the Ninth Amendment which states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[108] And in the Tenth Amendment, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As the Supreme Court emphasized in *National Federation of Independent Business v. Sebelius*:

> State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." [cit. omit.] Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J.

106. ALLEN C. GUELZO, OUR ANCIENT FAITH: LINCOLN, DEMOCRACY, AND THE AMERICAN EXPERIMENT (2024).

107. JAMES H. READ, *supra* note 105.

108. *See also* Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801 (2008).

> Madison). The independent power of the States also serves as a check on the power of the Federal Government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."[109]

Thus, as Yuval Levin has written, "Within their distinct spheres, the federal government and the state governments each have full sovereign authority."[110]

The federal government has limited power and prospects to advance the cause for life in the short-term. Congress' legislative power is limited by the Constitution. Congress' Commerce Clause authority to restrict abortion has been questioned and is almost certain to spark a test case if relied upon for federal legislation.[111]

Among *Roe*'s democratic corruptions, it aggravated the politicization of abortion and focused abortion politics on the Supreme Court. *Roe* centralized abortion politics at the national level. The Court's control of abortion virtually relieved the American people and state and local representatives of responsibility for abortion. *Roe*, and the Court's abortion decisions that followed, increasingly made clear that elected representatives at the state and local level could do very little in terms of even marginal regulations of abortion. The people and their elected representatives were no longer responsible. All of this served to isolate women in their pregnancies, exposing them to the pressures surrounding them.[112]

There are several virtues of federalism that should help a generational campaign after *Dobbs*. Federalism is an important republican principle by reinforcing representative government at the state and local level.[113]

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109. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 535–36 (2012) (quoting Bond v. United States, 564 U.S. 211, 222 (2011); New York v. United States, 505 U.S. 144, 181 (1992)).

110. LEVIN, AMERICAN COVENANT, *supra* note 102, at 103.

111. *See e.g.*, Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. LEGIS. 319 (2005).

112. *See e.g.*, SUE NATHANSON, SOUL CRISIS: ONE WOMAN'S JOURNEY THROUGH ABORTION TO RENEWAL 25–30 (Signet paperback ed. 1990). After her husband told her that he did "not want a fourth child under any circumstances," she wrote, "it is at that moment that I know that I will take responsibility for the decision that must be made and that I will have an abortion . . . the final responsibility for the choice clearly rests with me alone.") *See generally*, THERESA BURKE, FORBIDDEN GRIEF: THE UNSPOKEN PAIN OF ABORTION (2002).

113. The literature is vast. *See e.g.*, LEVIN, *supra* note 102; MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 680–913 (2010) (Chapter 4); FEDERALISM AND SUBSIDIARITY (James E. Fleming & Jacob T. Levy eds., 2014); ANTHONY J. BELLIA, JR., FEDERALISM (2011); ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM (2001); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE (1995); FEDERALISM: A NATION OF STATES: MAJOR HISTORICAL INTERPRETATIONS (Kermit L. Hall, ed., 1987); Steven G. Calabresi, *A Government of Limited and Enumerated Powers: In Defense of* United States v. Lopez, 94 MICH. L. REV. 615 (1995); Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987); Martin Diamond, *The Federalist on Federalism*: *"Neither a National Nor a*

It is deeply rooted in the sovereignty of the states as political entities. It preserves freedom from an overbearing federal government freedom to adopt independent policies, as the states demonstrated during the COVID-19 pandemic in 2020–2022.[114] That means diversity in political and policy approaches which can challenge the national government and political orthodoxy. Federalism preserves minority rights. Federalism actualizes the legislative and political means to express dissent from the federal government or majority opinion.

2. Federalism in Practice

There is also clear historical practice and success, demonstrating how federalism and reliance on state public policy have protected the inviolability of human life in the United States. State protection of prenatal human life grew, informed by medicine and medical developments, throughout the nineteenth and twentieth centuries, in abortion law,[115] and in prenatal injury, wrongful death, and fetal homicide law.[116] That body of law was significant in the success of the campaign to overturn *Roe v. Wade*[117] and is likely to play a critical role in a future campaign to build an enduring majority for life in America.

The common law incorporated the principle of the inviolability of human life.[118] The American colonies and States adopted this principle.[119] Until the 1960s, all but a handful of states prohibited abortion except to save the life of the mother.[120] From 1967–1970—four legislative years—legislatures adopted exceptions to abortion laws in thirteen or more states.[121] By the end of 1970,

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Federal Constitution, But a Composition of Both", 86 YALE L.J. 1273 (1977); Jean Yarbrough, *Federalism in the Foundation and Preservation of the American Republic*, 6 PUBLIUS 43 (Summer 1976).

114. *See e.g.*, NFIB v. Dep't of Labor 595 U.S. 109 (2022) (per curiam) (staying federal rule which "enacted a vaccine mandate for much of the Nation's work force"); West Virginia v. EPA, 597 U.S. 697 (2022) (applying the major questions doctrine to invalidate EPA rule because Congress did not grant authority); Biden v. Nebraska, 600 U.S. 477 (2023) (invalidating presidential student loan forgiveness program because the so-called HEROES Act does not grant such authority).

115. *See Dobbs*, 597 U.S. at 302–30 (Appendices A & B); DELLAPENNA, *supra* note 46; Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations,* 49 GEO. L.J. 173 (1960); Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395 (1961).

116. Linton, *supra* note 67.

117. Clarke D. Forsythe & Alexandra DeSanctis, *Pushing Roe v. Wade Over the Brink* (2023).

118. John Keown, The Law and Ethics of Medicine: Essays on the Inviolability of Human Life (Oxford 2012).

119. DELLAPENNA, *supra* note 46; William J. Maledon, Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME L. REV. 349 (1971).

120. Linton, *supra* note 67; Maledon, *supra* note 119.

121. Paul Benjamin Linton, *Enforcement of State Abortion Laws After* Roe: *A State-by-State Analysis*, 67 U. DET. L. REV. 157, 158–60 (1990) ("Pre-Roe statutes may be divided into five broad categories: (1) thirty states allowed abortion only to save the life of the mother; (2) two states and

that momentum failed.[122] In the November 1972 elections, Michigan and North Dakota rejected, by public referenda, legalization for abortion (beyond the existing exception for the life of the mother).[123]

Before *Roe*, property, tort, and criminal law have, state by state, provided legal protection for prenatal human beings.[124] *Roe* did not halt or cancel such protection of the prenatal human in property, tort and criminal law unless the laws were applied to directly interfere with the right to abortion.[125] *Roe* prevented the enforcement of abortion law, but, otherwise, existing legal protection through wrongful death law, prenatal injury, and fetal homicide laws did not diminish.[126] As of 2011, at least forty plus states allowed a prenatal injury suit for the killing of an unborn child at some point of pregnancy, most if not all at any time of pregnancy; thirty-eight states allowed a suit for wrongful death of an unborn child, approximately ten at any time of pregnancy; 35 states allowed a prosecution for fetal homicide, twenty-nine at any time of pregnancy.[127] Those protections survived *Roe* and advanced in many states despite *Roe*.

Federalism enabled the states to build a broad and diverse body of law to protect women from the risks and harms of abortion and to protect prenatal human beings. These laws included parental notice and consent provisions, prohibitions on public funding of abortion, informed consent laws, health and safety regulations, anonymous public health data collection, legal limits on late-term abortions, prevention and prohibition of coerced abortion.[128] In addition, beginning with Texas in 1999, states started to pass "safe haven laws,"

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the District of Columbia allowed abortion to preserve the life or health of the mother; (3) one state allowed abortion to save the mother's life or to terminate a pregnancy resulting from rape; (4) thirteen states adopted [section] 230.3 of the American Law Institute's Model Penal Code or some variant thereof; (5) four states allowed abortion on demand but set limits in terms of the age of the fetus.").

122. DELLAPENNA *supra* note 46, at 631–38 (discussing the loss of momentum); DAVID J. GARROW, LIBERTY & SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 350–51, 482, 495–96 (1994) ("Few promising legislative developments were occurring anywhere in the country"); Paul Benjamin Linton, *Overruling Roe v. Wade: Lessons from the Death Penalty*, 48 PEPP. L. REV. 261, 273 (2021) ("With the exception of Florida, which in 1972 enacted an abortion statute based on the Model Penal Code in response to the state supreme court's decision striking down the state's life-of-the-mother statute, no state relaxed its restrictions on abortion after November 1970.").

123. NOONAN, *supra* note 97, at 34.

124. Maledon, *supra* note 119.

125. Linton, *supra* note 67; Joanne Pedone, *Filling the Void: Model Legislation for Fetal Homicide Crimes*, 43 COLUM. J.L. & SOC. PROBS. 77 (2009); People v. Davis, 7 Cal.4th 797, 807, 872 P.2d 591, 602 (Cal. 1994) ("[W]hen the state's interest in protecting the life of a developing fetus is not counterbalanced against a mother's privacy right to an abortion, or other equivalent interest, the state's interest should prevail.").

126. See the data compiled in FORSYTHE, ABUSE OF DISCRETION, *supra* note 6, at 283–86; Linton, *supra* note 67.

127. *Id.*

128. *See* Forsythe & DeSanctis, *supra* note 117.

providing a "safe haven" for a parent to release custody of infants to public authorities.[129] Today, all fifty states have "safe haven" laws."[130] Likewise, expanding upon judicial decisions in the nineteenth centuries which treated women as victims and not accomplices of abortion, states have enacted statutory exclusions and exemptions of women from prosecution for abortion.[131]

The states responded strongly to *Roe* and *Doe* with regulations to fill the vacuum that *Roe* created by striking down virtually all state abortion laws,[132] and many legislated to protect prenatal human life as much as possible in the face of *Roe*.[133] Federalism enabled the states to challenge *Roe v. Wade* and to establish a body of protective law which has survived three opposing presidential administrations and bills introduced annually in Congress to eliminate state laws (variously called the Freedom of Choice Act or the Women's Health Protection Act).[134]

The *Dobbs* decision strengthened federalism and reaffirmed the states' police power. Working through federalism and majority rule can lead to democratic legitimacy for legal limits on elective abortion. Instead of Supreme Court Justices being responsible for the delicate question of the "equal protection" of unborn children in all pregnancies and deliveries from numerous risks, it is better for the states to address such medical questions and implications at the local level.

D. Elective Abortion and Women's Health, Equality or Autonomy

Certain schools of modern feminist thought took a detour from traditional feminism, which opposed abortion.[135] The argument of certain modern feminist

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129. DELLAPENNA, *supra* note 46 at 124 (citing Margaret Graham Tebo, "Texas Idea Takes Off: States look to Safe Haven Laws as Protection for Abandoned Infants," ABA J., September 2001, at 30).

130. Lynne Marie Kohm, *Roe's Effects on Family Law*, 71 WASH. & LEE L. REV. 1339, 1354 n.58 (2014) (citing the laws of all 50 states).

131. *See* Forsythe & McDonnell, *supra* note 20.

132. *See* FORSYTHE, ABUSE OF DISCRETION, *supra* note 6.

133. *See* Joseph P. Witherspoon, *The New Pro-Life Legislation: Patterns and Recommendations*, 7 ST. MARY'S L.J. 637 (1976); B.J. George, Jr., *State Legislatures Versus the Supreme Court: Abortion Legislation in the 1980s,* Chapter 2 *in* ABORTION, MEDICINE, AND THE LAW 23–105 (J. Douglas Butler & David W. Walbert eds., 1986) (a fifty-state survey of state abortion legislation enacted before and since *Roe*); Lynn Wardle, *Time Enough:* Webster v. Reproductive Health Services *and the Prudent Pace of Justice*, 41 FLA. L. REV. 881, 958 (1989) (App. A: State Statutes Regarding Abortion (March 1990)).

134. *See* Eileen McDonagh, *The Next Step After* Roe: *Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion Legislation*, 56 EMORY L.J. 1173 (2007); Kristen L. Burge, *When It Rains, It Pours: A Comprehensive Analysis of the Freedom of Choice Act and Its Potential Fallout on Abortion Jurisprudence and Legislation*, 40 CUMB. L. REV. 181 (2009).

135. MONICA KLEM & MADELEINE MCDOWELL, PITY FOR EVIL: SUFFRAGE, ABORTION & WOMEN'S EMPOWERMENT IN RECONSTRUCTION AMERICA (2023); ERIKA BACHIOCHI, THE RIGHTS OF WOMEN: RECLAIMING A LOST VISION (2021); DELLAPENNA, *supra* note 46, at 371–409 (Chapter

leaders is that abortion is necessary for women's health, equality and autonomy. Pro-life feminist advocates need to reclaim the argument and counter contemporary culture and the campaign to market abortion as necessary for women's health, equality and autonomy.

Different state abortion policies will be inevitably compared. Claims will be made that women flourish better in states with no abortion limits than in state with abortion limits. In fact, the debate has already begun, with claims that women have died in states because of abortion limits.[136] That requires securing the public health data and publishing a Women's Wellness Index of socio-economic and health data in the states. More must be made of the history and prevalence of coerced abortion.

The claims that abortion is necessary for women's health, equality and autonomy are pervasive.[137] But such claims are not supported by empirical evidence.[138] Many media sources since *Dobbs* have assumed but never defended those assumptions. Few women claim health as the reason for their abortions, even in late-term abortions. Surveys show very few abortions are performed for health reasons. Empirical data does not support the claim that that "abortion is safer than childbirth."[139] In addition, U.S. abortion data is defective and cannot be relied upon. Foreign data is more reliable because it is based on registries, which the U.S. lacks, and shows short-term and long-term risks from abortion, including an increased risk of pre-term birth in future abortions and an increased risk of mental trauma after abortion.[140]

Likewise, the claim that elective abortion is necessary for women's equal opportunity in American society also lacks empirical support.[141] Women's

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8) (the views of the nineteenth century feminists); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 111–13 (1978) (citing opposition to abortion by feminist leaders).

136. *Compare* Kavitha Surana, *Abortion Bans Have Delayed Emergency Medical Care. In Georgia, Experts Say This Mother's Death Was Preventable.*, PROPUBLICA (Sept. 16, 2024, 5:00 AM), https://www.propublica.org/article/georgia-abortion-ban-amber-thurman-death [https://perma.cc/7NJW-4KPU] (claiming that Amber Thurman died due to Georgia's law), *with* Nicholas Tomaino, *The Truth about Amber Thurman's Death*, WALL ST. J., Oct. 7, 2024, available at: https://www.wsj.com/opinion/the-truth-about-amber-thurmans-death-abortion-procedure-state-laws-healthcare-f302e4f9?page=1.

137. Helen M. Alvare, *Nearly 50 Years Post-Roe v. Wade and Nearing Its End: What Is the Evidence that Abortion Advances Women's Health Equality?*, 34 REGENT U. L. REV. 165 (2022).

138. *Id.*

139. John M. Thorp, Jr., *Public Health Impact of Legal Termination of Pregnancy in the U.S.: 40 Years Later*, 2012 SCIENTIFICA, http://dx.doi.org/10.6064/2012/980812 (also available at: https://pmc.ncbi.nlm.nih.gov/articles/PMC3820464/); Clarke D. Forsythe & Bradley N. Kehr, *A Road Map through the Supreme Court's Back Alley*, 57 VILL. L. REV. 45, 50–55, 60–62 (2012) (analyzing the data).

140. Clarke D. Forsythe, *The Medical Assumption at the Foundation of* Roe v. Wade *and Its Implications for Women's Health*, 71 WASH. & LEE L. REV. 827, 873–92 (2014) (App. A, B, & C, citing numerous peer-reviewed medical studies finding increased risks of pre-term birth, mental trauma, and breast cancer after abortion).

141. Alvare, *supra* note 134.

social and economic advances preceded *Roe*. Federal and state laws protecting equal opportunity for women preexisted *Roe*. Those laws were not dependent on *Roe* and continue to be enforced, and they are more deeply supported by public opinion than *Roe*. Data do not show that women's advances are tied to abortion. Labor force participation may be tied to contraception but not to abortion.[142]

Finally, it is widely assumed that abortion is about women exercising autonomy. However, there is a long history of coerced abortion, and it did not go away with *Roe*. Many of the common law cases involved coerced abortions.[143] Coerced abortion is one of the reasons that women were treated by courts as a victim of abortion, not a participant in it. Ernest Hemingway brilliantly portrayed the subtle way that men pressure women into abortion in his 1927 short story, *Hills Like White Elephants*. Spousal and domestic abuse is defined broadly, and coerced abortion should be understood as a type of domestic abuse. Even offering to pay for the abortion is a form of coercion; it reflects abandonment of the woman and her child and alters the financial calculus in favor of abortion.

There are several reasons to be optimistic about securing protection state by state over the next two or three generations. First, the campaign for abortion rights in the states stalled, as many historians have recognized, by 1971. Second, substantial legal protection existed at the time of *Roe*. Third, legal protection in property, tort, and criminal law wasn't erased by *Roe* or since *Dobbs*. Legal protection advanced despite *Roe*. Fourth, the United States needs a rising birth rate. The population explosion scare has dissipated. Finally, data showing short-term and long-term health risks make a compelling case against elective abortion.

CONCLUSION

A Supreme Court declaration of Fourteenth Amendment personhood would recentralize the abortion issue in the Court, while recent experience has demonstrated that the Justices are vulnerable and not insulated from politics. It would put the Justices back in charge of the abortion issue, and thereby refocus abortion politics on the Justices, who have life tenure and are unaccountable to the people through elections. Shifting responsibility to the Court deforms republican government by shifting responsibility and accountability for abortion. It might well be counterproductive to effective, enduring protection for women and children from elective abortion. The better means is local and state responsibility through elected officials who are accountable to the people through regularly scheduled elections. Pursuing a strategy of legal protection

142. *Id.*

143. DELLAPENNA, *supra* note 46, at 10 ("[T]he coercive aspects of male involvement in abortion" have been evident "for as long as we have recorded history."), 10 n.42 ("[N]umerous legal documents dating back centuries record men as pressuring women into abortions they did not want, and even as physically forcing abortions on unwilling women."), 377 n.61 (citing Rex v. Scharp (1276) as holding that "a husband cannot compel his wife to have an abortion").

at the state level and growing the number of life-protective states to thirty-eight could lead to the strongest, broadest, most durable social and legal support and protection.