

AN EMBRYO IS NOT A PERSON: REJECTING PRENATAL PERSONHOOD FOR A MORE COMPLEX VIEW OF PRENATAL LIFE

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Without a recognized constitutional right to abortion as a backstop, the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* opens the door for arguments to recognize the zygote-embryo-fetus¹ as a legal person. "Prenatal Personhood"² (defined as bestowing legal personhood on zygotes, embryos, or fetuses) promotes the idea that prenatal life has rights and interests separate from, and potentially in conflict with, the pregnant person who carries it. Unlike typical rights claims, Prenatal Personhood "rights" expand, rather than

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1. The current trend is for personhood claims to be made from fertilization or conception. This article uses the term "zygote-embryo-fetus" because a fertilized egg does not become a fetus until the 11th week of pregnancy which is the 9th week after fertilization. See *How Your Fetus Grows During Pregnancy*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (Aug. 2020), <https://www.acog.org/womens-health/faqs/how-your-fetus-grows-during-pregnancy#:~:text=For%208%20weeks%20after%20fertilization,it%20is%20called%20a%20fetus>. Pregnancy is calculated from a pregnant person's last menstrual period and fertilization typically occurs two weeks later. *Pregnancy Week by Week*, MAYO CLINIC, <https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/prenatal-care/art-20045302> (last accessed Jan 9, 2023).

2. While this issue is popularly referred to as "Fetal Personhood," I use the term Prenatal Personhood to recognize that most arguments and legislation seek to confer rights of personhood from fertilization.

limit, state power at the expense of the autonomy and rights of individuals. In addition to justifying abortion bans designed to force people to remain pregnant against their will, Prenatal Personhood threatens to expand state power to restrict people's ability to access contraception and IVF treatments. Prenatal Personhood has already been invoked to deploy criminal and child protection laws against pregnant people who have suffered miscarriages or stillbirths or who have engaged in conduct, like substance use, that authorities claim (often with little or no evidence) could harm a fetus.

Prior to *Dobbs*,³ state legislators drafted Prenatal Personhood provisions with an eye towards *Roe v. Wade*,⁴ generally confining personhood language to legislative findings or policy statements, or by explicitly acknowledging and incorporating constitutional limitations.⁵ Where there was ambiguity, courts interpreted provisions to not run afoul of the constitutional right to abortion. Now that *Roe* has been overturned, Prenatal Personhood advocates will be encouraged to make much bolder rights claims on behalf of the zygote-embryo-fetus under existing laws, and legislatures will be able to pass laws claiming rights and privileges and even full legal personhood for the unborn.

In addition to legislative action, *Dobbs* breathes new life into the argument, rejected in *Roe v. Wade*,⁶ that fetuses (or zygotes and embryos) are persons protected by the Fourteenth Amendment of the Constitution. Although Justice Alito declined to address Prenatal Personhood in *Dobbs*, just a few months after the decision, two pregnant women and Catholics for Life filed a petition for certiorari asking the Court to determine whether "unborn" fetuses are persons entitled to protection under the Due Process and Equal Protection clauses of the Constitution.⁷ The Court declined to take the case,⁸ but Prenatal Personhood claims are unlikely to go away.

It is important to note that when activists have put Prenatal Personhood directly before the electorate, voters reject state personhood

3. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___, 142 S. Ct. 2228 (2022).

4. *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

5. *See, e.g.*, KAN. STAT. ANN. § 65-6732 (West 2013) (stating that "unborn children" have the same rights as other persons, provided the application of these rights does not violate the Constitution of the United States or decisions of the U.S. Supreme Court).

6. *Roe*, 410 U.S. at 158 (holding that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn").

7. Petition for a Writ of Certiorari at *i, *Doe as Next Friend Doe v. McKee*, No. 22-201, 143 S. Ct. 309 (2022),.

8. *Doe as Next Friend Doe v. McKee*, 143 S. Ct. 309 (2022) (denying the petition for writ of certiorari).

amendments.⁹ Proposed federal constitutional amendments¹⁰ and personhood statutes also have failed.¹¹ Although states have not granted full legal personhood to the unborn, there are a significant number of state laws and policies that recognize Prenatal Personhood *in specific contexts*. In addition to legislative findings and expressions of policy, these include judicial decisions¹² and statutory provisions defining the zygote-embryo-fetus as a person or child for purposes of criminal homicide, child protection laws, and wrongful death statutes.¹³ In addition, at least six states have general personhood provisions defining the zygote-embryo-fetus as a person that purport to apply to all of the state's laws.¹⁴ Prior to *Dobbs*, courts and legislatures limited application of the general personhood provisions to recognize the constitutional right to abortion. Many courts also refused to apply the provisions based on vagueness and lenity concerns in the criminal context.¹⁵ In a 1989 case, the Supreme Court rejected a facial challenge to Missouri's general personhood provision holding that it would be premature for the Court to strike down the provision since Missouri courts could apply it in a manner that did not violate the right to abortion.¹⁶

This essay considers current claims for Prenatal Personhood. Part I considers how the *Dobbs* decision unnecessarily adopts a binary view of prenatal life, suggesting that the only option for courts and legislatures is to recognize Prenatal Personhood or deny protection for prenatal life, ignoring popular understandings that certain laws can and should protect prenatal life, especially where criminal or tortious actions are concerned, but not grant full legal personhood. The *Dobbs* decision also refuses to draw meaningful lines about the value of prenatal life in different stages of development, giving states vast power to infringe on the rights of

9. See *infra* Section II(A)(2).

10. See, e.g., Joint Resolution Proposing an Amendment to the Constitution of the United States Guaranteeing the Right to Life to the Unborn, the Ill, the Aged, or the Incapacitated. H.R.J. Res. 261, 93rd Cong. (1973).

11. See, e.g., Sanctity of Human Life Act, H.R. 212, 112th Cong. § 2(1)(b) (2011) (stating that "[t]he life of each human being begins with fertilization, cloning, or its functional equivalent, irrespective of sex, health, function or disability, defect, stage of biological development, or condition of dependency, at which time every human being shall have all the legal and constitutional attributes and privileges of personhood."); Life at Conception Act of 2021, S. 99, 117th Cong. (2021).

12. See *infra* Section II(B).

13. See *infra* Section II(B).

14. MO. ANN. STAT. § 1.205 (West 1986); KY. REV. STAT. ANN. § 311.720 (West 2017); 18 PA. STAT. AND CONS. STAT. ANN. § 3202 (West 1982); KAN. STAT. ANN. § 65-6732 (West 2013); GA. CODE ANN. § 1-2-1 (West 2020); ARIZ. REV. STAT. ANN. § 1-219 (West 2021).

15. See *infra* note 150 and accompanying text; *but see* note 153 and accompanying text.

16. Webster v. Reprod. Health Servs., 492 U.S. 490, 506 (1989).

people who are or may become pregnant beginning at fertilization. The decision also invites reconsideration of the Court’s prior holding that the zygote-embryo-fetus is not a legal person protected by the Constitution and invokes natural and human rights language to support the broader project of the Prenatal Personhood movement. Part II describes the history of Prenatal Personhood in the U.S., considering failed Personhood Amendments and the places where recognition of limited Prenatal Personhood has made inroads in the shadow of *Roe v. Wade*. Part III examines and critiques current arguments for expansion of Prenatal Personhood.

I. THE *DOBBS* DECISION AND PRENATAL PERSONHOOD

Overturing 49 years of precedent, the *Dobbs* decision held that there is no constitutionally protected right to abortion and, in line with the traditional conservative position on abortion, it leaves the issue of abortion to state governments to decide.¹⁷ Post-*Dobbs*, states seeking to ban abortion need only satisfy the Court’s rational-basis review.¹⁸ This makes arguments about the status of prenatal life largely irrelevant since any legitimate state interest would be sufficient to restrict or ban abortion. Indeed, Justice Alito writes that his opinion “is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth.”¹⁹ Yet, Justice Alito’s decision includes a discussion about when “personhood” begins, illustrating how Personhood claims have become part of legal discussions without making critical distinctions about how the term is being used or the broader implications of claiming wholesale Personhood for the zygote-embryo-fetus.²⁰

Prior to *Dobbs*, the Supreme Court recognized a constitutionally protected right to abortion. As a result, in *Roe v. Wade* and *Planned Parenthood v. Casey*, the Court was forced to consider whether and when a state’s interest in protecting prenatal life became compelling enough to

17. *Dobbs*, 142 S. Ct. at 2243. Justice Kavanaugh explicitly stakes out this position in his concurrence. Although he does not use the term personhood, he rejects arguments that the “Constitution *outlaws* abortion” and instead “leaves the question of abortion for the people and their elected representatives. . . .” *Id.* at 2305 (Kavanaugh, J. concurring). This is the traditional conservative position espoused by Justice Scalia. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979, *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (Scalia J., concurring and dissenting) (“States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so.”).

18. *Dobbs*, 142 St. Ct. at 2283-84.

19. *Id.* at 2261.

20. *See, e.g., id.* at 2269.

justify state denial of a constitutional right.²¹ In *Dobbs*, Justice Alito criticizes *Roe* and *Casey* for identifying viability as the point at which a state's interest in protecting prenatal life became compelling enough to outweigh the pregnant person's right to personal liberty and bodily autonomy.²² Justice Alito's criticism is notable because it conflates the question of Prenatal Personhood and a constitutionally compelling interest in prenatal life, and because it refuses to identify when constitutionally compelling life begins. Further, even as the *Dobbs* decision invokes human rights claims on behalf of the fetus, it actually expands state power at the expense of the human rights of individual pregnant people.

A. *Conflating the State's Interest in Prenatal Life and Personhood*

Justice Alito's critique of the viability line ignores the distinction between a state's interest in protecting prenatal life and Prenatal Personhood. He writes that "[s]ome have argued that a fetus should not be entitled to legal protection until it acquires the characteristics that they regard as defining what it means to be a 'person.'"²³ It is unclear to whom Justice Alito is referring to here since it has never been the case that legal protection for prenatal life required recognition of Personhood. *Roe* and *Casey* allowed the state to prohibit abortion after viability without recognizing the post-viability fetus as a person, and *Casey* allowed the state to pass regulations to protect prenatal life from the beginning of pregnancy as long as the protections did not impose an undue burden.²⁴ In an earlier section of the *Dobbs* decision, Justice Alito chides the dissent because its adherence to the *Roe/Casey* viability line "would impose on the people a particular theory about when the *rights of personhood* begin."²⁵ As *Roe* and *Casey* recognized, prenatal life does not need to be recognized as a legal person in order for the state to enact legislation to protect it,²⁶ and after *Dobbs*, a state need only identify a legitimate state

21. See *Roe*, 410 U.S. at 162-64, and *Casey*, 505 U.S. 833, 869-73, *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

22. *Dobbs*, 142 S. Ct. at 2268.

23. *Id.* at 2269.

24. *Casey* allowed the state to adopt measures to further the state's interest in potential life from the beginning of a pregnancy, including measures designed to persuade the pregnant person to choose childbirth as long as the measures did not impose an undue burden. 505 U.S. at 878.

25. *Dobbs*, 142 S. Ct. at 2261 (emphasis added).

26. See *Roe*, 410 U.S. at 158, 162 (stating that the Fourteenth Amendment does not recognize prenatal life as a person but that the state does have a compelling interest in protecting potential life), and *Casey*, 505 U.S. at 914 (Stevens, J., concurring in part) ("as discussed above, the state interest in potential human life is not an interest *in loco parentis*, for the fetus is not a person").

interest under rational basis review in order to ban abortion.²⁷ However, Justice Alito purposefully adopts personhood rhetoric and, without any explanation, jettisons the language of prior Supreme Court decisions discussing the state's interest in promoting or protecting prenatal life.

Justice Alito's conflation of the state's interest in prenatal life with recognition of Prenatal Personhood reflects a binary conception of prenatal life in which a zygote-embryo-fetus is either a person with full rights or is treated as a blob of cells devoid of legal protection.²⁸ This binary conception forecloses a nuanced, contextual analysis of the status of prenatal life that affords protection to prenatal life in certain contexts without recognizing full personhood. It also promotes the view that a zygote, embryo or fetus is a "person" with the same moral status as a pregnant person. This binary view also turns the state's interest in prenatal life into a rights claim. This is fundamentally different than the traditional conservative view, reflected in Justice Scalia's concurrences and dissents that the issue of abortion should be left to legislatures.²⁹ Personhood advocates assert that rather than leaving the issue of abortion to state legislatures and Congress, Prenatal Personhood *requires* the state to act to protect the unborn and ban abortion.³⁰

B. Refusing to Draw a Line and Expanding State Power

Justice Alito's decision declines to identify the point when legally meaningful life or "the rights of personhood begin,"³¹ asserting instead that states rather than courts should draw the line.³² He conveniently ignores that by denying constitutional protection for abortion and leaving it to states to define legally meaningful life or Personhood, *Dobbs* empowers the *state to impose its theory* of life and Personhood on

27. *Dobbs*, 142 S. Ct. at 2284.

28. *See id.* at 2304 (Kavanaugh, J., dissenting) ("When it comes to abortion, one interest must prevail over the other at any given point in pregnancy.").

29. *Casey*, 505 U.S. at 979 (Scalia J., concurring and dissenting) ("States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so.").

30. Brief for Illinois Right to Life as Amici Curiae & Dr. Steve Jacobs, J.D., Ph.D., in Support of Petitioners at 22, *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). *See also* Brief for Illinois Right to Life as Amici Curiae in Support of Petitioners on Petition for A Writ of Certiorari at 23, *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) (arguing that "[t]he Court has a constitutional duty to recognize the right of human fetuses to legal protections as persons.").

31. *Dobbs*, 142 S. Ct. at 2261.

32. Conservative scholars have argued that states should have this power. *See, e.g.*, Brief for Professors Mary Ann Glendon and O. Carter Snead as Amici Curiae in Support of Petitioners at 8, *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) (criticizing *Roe v. Wade* for preventing states from "treating the unborn as persons").

individual pregnant people. Justice Alito’s concern about limitations on the power of states rather than the rights of people is reflected in his decision. He specifically finds *Roe*’s viability line objectionable because it gave “the *States* less freedom to regulate abortion than the majority of western democracies enjoy.”³³

Justice Alito also employs a bait and switch to give states staggering power to recognize Personhood from fertilization. His decision discusses possible attributes of personhood that some have associated with viability.³⁴ His main critique of viability is that it is not a “hard-and-fast line” because it moved from 28 weeks to 23-24 weeks between when *Roe* and *Casey* were decided and currently depends on the quality of medical facilities.³⁵ Nowhere in the decision does Justice Alito make an argument justifying the recognition of personhood prior to 23 weeks. Yet the decision opens the door for states to declare that zygotes-embryos-fetuses are legal persons and ban abortion from fertilization. Chief Justice Roberts’ concurrence calls out this power grab on behalf of the states, as well as the decision’s failure to recognize distinctions between stages of development. He expresses doubts that “a ban on terminating a pregnancy from the moment of conception must be treated the same under the Constitution as a ban after fifteen weeks.”³⁶

C. *Reopening the Question of Constitutional Personhood?*

Given that the Supreme Court has already considered and rejected constitutional personhood for fetuses, Justice Alito’s declaration that his decision “is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth”³⁷ was unnecessary. Moreover, this statement can be viewed as inviting a direct challenge to *Roe*’s holding that the zygote-embryo-fetus is not a person under the Constitution. Personhood advocates explicitly made this argument in amici briefs in *Dobbs*, arguing that states and the Court have a constitutional duty to provide equal protection and protect the life of human fetuses.³⁸ In his concurrence, Justice Kavanaugh specifically

33. *Dobbs*, 142 S. Ct. at 2270 (emphasis added).

34. *Id.* at 2269.

35. *Id.* at 2269-70.

36. *Id.* at 2316-17 (Roberts, C.J., concurring).

37. *Id.* at 2261.

38. *Dobbs* Amicus Brief for Illinois Right to Life, *supra* note 30, at 22. See also *Dobbs* Cert Brief for Illinois Right to Life, *supra* note 30, at 21 (arguing that “The Fourteenth Amendment covers . . . preborn humans, and guarantees the due process right to life and equal protection”).

rejects the argument that the Constitution requires that abortion be outlawed.³⁹ Justice Alito does not do so.

D. “Human Rights” Claims

Justice Alito employs other language that goes further than suggesting that constitutional Personhood is an open question. In a convoluted sentence, he chides the dissent for adopting a standard that prevents the State from regarding the fetus as having “even the most basic *human right*—to live—at least until an arbitrary point in pregnancy has passed.”⁴⁰ Here, Justice Alito does not just say states should be able to decide whether to make abortion illegal or even that they should have the ability to bestow personhood rights. Instead, he laments states’ inability to regard the fetus as having a “basic human right.” By using human rights language, he invokes natural rights claims on behalf of prenatal life that attach irrespective of whether those rights are currently recognized under U.S. law.

Personhood advocates make similar misguided “human rights” claims⁴¹ and attempt to associate Personhood for zygote-embryo-fetuses with pre-Civil War claims to recognize legal personhood of enslaved Black people. For instance, the amicus brief filed by Illinois Right to Life in support of Mississippi’s 15-week abortion ban argued that upholding a constitutional right to abortion would have incorrectly established that “not all human beings are persons within the meaning of the Fourteenth Amendment.”⁴² The brief then contends that if zygotes, embryos and fetuses are not recognized as persons under the Fourteenth Amendment, then “the specter of Dred Scott would again walk the land.”⁴³ These “human rights” arguments are routinely made by Personhood advocates in other settings including legislative findings for extreme abortion bans.⁴⁴ For instance, in an Alabama bill, legislative findings invoke the

39. *Dobbs*, 142 S. Ct. at 2305-06 (Kavanaugh, J., concurring).

40. *Dobbs*, 142 S. Ct. at 2261 (emphasis added).

41. S.B. 6, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021) (arguing that abortion constitutes a crime against humanity defined “as when a government withdraws legal protection from a class of *human beings*, resulting in severe deprivation of their rights, up to and including death.”); H.B. 314, Reg. Sess. (Ala. 2019) (equating abortion to murders and executions during the holocaust, Soviet gulags, China’s Great Leap Forward, the Khmer Rouge, and the Rwandan genocide).

42. *Dobbs* Amicus Brief for Illinois Right to Life, *supra* note 30, at 22.

43. *Id.*

44. See, e.g., S.B. 6, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021) (contending that *Roe v. Wade* was akin to the *Dred Scott* decision which “den[ie]d personhood to a class of human beings, African-Americans” and *Plessy v. Ferguson* “which withdrew legal protection from a class of human beings who were persons under the United States Constitution.”).

Declaration of Independence for the natural law principle that “all men are created equal” to support Personhood and anti-abortion claims.⁴⁵ Making human rights claims to justify normative demands for rights not recognized in the Constitution or existing law is a common strategy for human rights lawyers and advocates,⁴⁶ but it seems out of character for a conservative Justice.

It should be noted that despite the assertions of Personhood advocates, it is well settled that international human rights law does not recognize a fetus or embryo as a legal person endowed with human rights.⁴⁷ Personhood advocates typically rely on language in just two human rights treaties that reference legal protection before birth.⁴⁸ However, the drafting history and authoritative interpretation of the two treaties reject the argument that embryos and fetuses are protected persons under the treaties.⁴⁹

45. H.B. 314, Reg. Sess. (Ala. 2019).

46. Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 *FORDHAM L. REV.* 459, 462 (2008).

47. CEDAW, *Report of the Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland Under Article 8 of the Optional Protocol of the Convention on the Elimination of All Forms of Discrimination Against Women*, ¶ 48, U.N. Doc. CEDAW/C/OP.8/GBR/1 (Mar. 6, 2018) (“[u]nder international law, analyses of major international human rights treaties on the right to life confirm that it does not extend to fetuses.”); Artavia Murillo, et al. (“In Vitro Fertilization”) v. Costa Rica, Judgment, Preliminary Objections, Merits, Reparations and Costs, ¶ 244 (Inter-Am. Ct. H.R. Nov. 28, 2012), https://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf (reviewing international and regional human rights standards and concluding that they also did not support treating an embryo as a person).

48. The Preamble to the Convention on the Rights of the Child recognizes that a prior declaration on the rights of the child states that the child “needs special safeguards and care, including appropriate legal protection, *before as well as after birth*. . . .” Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3, Art. 1 (emphasis added). Article 4(1) of the American Convention on Human Rights states that “[The] right [to life] shall be protected by law and, in general, from the moment of *conception*. American Convention on Human Rights, art. 4(1), 22 Nov. 1969, 17955 U.N.T.S. 144 (entered into force July 18, 1978) (emphasis added), <https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf>.

49. The drafting history of the Convention on the Rights of the Child is clear that the language in the Preamble does not alter the interpretation of “human being” under the age of 18 protected by the Convention. Artavia Murillo, et al. (“In Vitro Fertilization”) v. Costa Rica, Judgment, Preliminary Objections, Merits, Reparations and Costs, ¶ 232 (Inter-Am. Ct. H.R. Nov. 28, 2012), https://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf (stating that “the preparatory work made it clear that the preamble would not determine the interpretation of Article 1 of the Convention”). In the 2012 case *Murillo, et al. v. Costa Rica*, the Inter-American Court of Human Rights specifically rejected the argument that embryos should be deemed persons protected under Article 4(1) of the American Convention on Human Rights stating that “the historic and systemic interpretation of precedents that exist in the inter-American system confirms that it is not admissible to grant the status of a person to an embryo.” *Id.* at ¶¶ 223, 264 (stating that “the embryo cannot be understood to be a person for purposes of Article 4(1)”).

II. PRENATAL PERSONHOOD

While Prenatal Personhood claims have been associated with the anti-abortion movement, it is important to recognize that the two movements are not co-extensive. People may oppose abortion and seek to restrict it without believing that a zygote, embryo, or fetus should be accorded full legal rights. Further, while a major aim of the Prenatal Personhood movement has been to ban abortion, its claims and implications go beyond the legality of abortion. Not only do Personhood adherents believe that abortion is wrong, they also assert that the zygote-embryo-fetus has a right to life and “deserve[s] the same rights as living people.”⁵⁰ Because of these beliefs, Prenatal Personhood has been used to support restrictions on IVF⁵¹ and contraception,⁵² and has been used by prosecutors to justify the imposition of criminal penalties and severe restrictions on the liberty of pregnant people under the guise of protecting embryos and fetuses.⁵³

A. History

1. Supreme Court Rejection of Prenatal Personhood

Arguments that a fetus should be recognized as a person with legal rights go back at least as far as the 1970s.⁵⁴ In *Roe v. Wade*, Justice Blackmun’s opinion explicitly rejected Texas’ claim that the Constitution

50. Greer Gaddie, *The Personhood Movement’s Effect on Assisted Reproductive Technology: Balancing Interests Under a Presumption of Embryonic Personhood*, 96 TEXAS L. REV. 1293, 1294-95 (2018).

51. See Henry T. Greely, *The Death of Roe and the Future of Ex Vivo Embryos*, J. L. AND THE BIOSCIENCES, Jul.-Dec. 2022, at 12-13, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9252173/pdf/lsac019.pdf>; see, e.g., LA. STAT. ANN. § 9:129 (“A viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person.”).

52. Attacks on contraception like intrauterine devices (IUDs) and emergency contraceptives are based on claims that they prevent implantation of fertilized eggs. However, they primarily work by interfering with sperm transport and preventing fertilization. PREGNANCY JUSTICE, WHO DO FETAL HOMICIDE LAWS PROTECT? AN ANALYSIS FOR A POST-ROE AMERICA 6-7 (2022), <https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/fetal-homicide-brief-with-appendix-UPDATED.pdf>.

53. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH, POL., POL’Y, & L. 299, 322-23 (2013) (stating that in almost all cases of pregnancy criminalization examined in this study, the underlying legal theory for prosecution was that “the fertilized egg, embryo, or fetus should be treated as if it were completely legally separate from the pregnant woman herself.”).

54. See MARY ZIEGLER, DOLLARS FOR LIFE 13 (2022) (stating that pro-life lawyers started bringing personhood arguments to court in the early 1970s).

recognizes the unborn as a “person” with rights protected under the Fourteenth Amendment.⁵⁵ In reaching his holding, Justice Blackmun considered the language of the Fourteenth Amendment as well as historic understandings of the word person.⁵⁶ Justice Blackmun noted that “the law has been reluctant to . . . accord legal right to the unborn except in narrowly defined situations and except when the rights are contingent upon [live] birth” and that the “unborn have never been recognized in the law as persons in the whole sense.”⁵⁷ In dicta, Justice Blackmun added that if fetuses were recognized as people, their right to life would be guaranteed by the Fourteenth Amendment, and there would be no right to an abortion.⁵⁸

2. Personhood Amendments and Ballot Initiatives

Immediately after *Roe* was decided anti-abortion groups unsuccessfully attempted to amend the Constitution to overturn *Roe*.⁵⁹ These attempts included “Personhood Amendments” proposed in the 1970s that sought to recognize embryos and fetuses as protected persons under the Constitution.⁶⁰ In the 1980s, anti-abortion groups turned their attention to federal Personhood legislation which also has been unsuccessful.⁶¹

55. *Roe*, 410 U.S. at 158 (“the word ‘person’ as under in the Fourteenth Amendment, does not include the unborn”).

56. *Id.* at 156-58.

57. *Id.* at 161-62.

58. *Id.* at 156-57.

59. ZIEGLER, *supra* note 54, at 22.

60. The first “Personhood Amendment” was proposed by Rep. Larry Hogan of Maryland on January 30, 1973 (“Hogan Amendment”). It states: “Neither the United States nor any State shall deprive any human being, from the moment of conception, of life without due process of law; nor deny any human being, from the moment of conception, within its jurisdiction, the equal protection of its laws.” Joint Resolution Proposing an Amendment to the Constitution of the United States Guaranteeing the Right to Life to the Unborn, the Ill, the Aged, or the Incapacitated, H.R.J. Res. 261, 93rd Cong. (1973). A second Personhood Amendment introduced by Rep. James Burke of Massachusetts provided that the word “person” used in the Fifth and Fourteenth Amendments includes “unborn offspring at every stage of their biological development, irrespective of age, health, function, or condition of dependency.” Joint Resolution Proposing an Amendment to the Constitution of the United States for the Protection of Unborn Children and Other Persons, H.R.J. Res. 769, 93rd Cong. (1973).

61. ZIEGLER, *supra* note 54, at 45 (discussing Jesse Helm’s introduction of the Human Life Bill in January 1981). Federal Personhood statutes continue to be introduced in Congress. *See* Sanctity of Life Act of 1995, H.R. 2087, 104th Cong. (1995) (declaring that for the purposes of the Fourteenth Amendment “human life shall be deemed to exist from conception”); Life at Conception Act, S. 2190, 108th Cong. (2004) (declaring that “the right to life guaranteed by the Constitution is vested in each human being” and that human being includes “each and every member of the homo sapiens species at all stages of life, including but not limited to, the moment of fertilization, cloning, and other moment

Prenatal Personhood advocates have also been active at the state level. In 2008, Coloradans considered a ballot initiative that would have amended the state constitution to define person to “include any human being from the moment of fertilization.”⁶² The initiative was defeated by a wide margin.⁶³ A subsequent ballot initiative failed in 2010,⁶⁴ as well as a more limited 2014 ballot measure that would have amended the definition of “person” in the Colorado Criminal Code and Wrongful Death Act.⁶⁵ In 2011 and in 2014, Prenatal Personhood ballot initiatives also failed in Mississippi⁶⁶ and North Dakota,⁶⁷ respectively. Polls indicated

at which an individual comes into being.”); Sanctity of Human Life Act, H.R. 4157, 110th Cong. (2007) (declaring that human life “begins with fertilization, cloning, or its functional equivalent . . . , at which time every human has all legal and constitutional attributes and privileges of personhood.”).

62. Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 AM. J.L. & MED. 573, 580 (2013).

63. *Id.* at 580.

64. *Colorado Initiative 62, Definition of Person Amendment (2010)*, BALLOTEDIA, [https://ballotpedia.org/Colorado_Initiative_62_Definition_of_Person_Amendment_\(2010\)](https://ballotpedia.org/Colorado_Initiative_62_Definition_of_Person_Amendment_(2010)) (last visited Jan. 8, 2023); Electa Draper, “Personhood” Amendment Fails by 3-to-1 Margin, DENVER POST, Nov. 2, 2010.

65. *Colorado Amendment 67, Definition of Person Initiative (2014)*, BALLOTEDIA, [https://ballotpedia.org/Colorado_Amendment_67_Definition_of_Person_Initiative_\(2014\)](https://ballotpedia.org/Colorado_Amendment_67_Definition_of_Person_Initiative_(2014)) (last visited Jan. 8, 2023); Amendment 67, Definition of Person and Child (Colo. 2014), [https://www.leg.state.co.us/LCS/Initiative%20Referendum/1314initrefr.nsf/b74b3fc5d676cdc987257ad8005bce6a/d31e5a7cb62d156d87257cbb006dd9db/\\$FILE/Amendment%2067%20-%20Definition%20of%20Person%20and%20Child.pdf](https://www.leg.state.co.us/LCS/Initiative%20Referendum/1314initrefr.nsf/b74b3fc5d676cdc987257ad8005bce6a/d31e5a7cb62d156d87257cbb006dd9db/$FILE/Amendment%2067%20-%20Definition%20of%20Person%20and%20Child.pdf); Jason Salzman, *Colorado’s Personhood Amendment Defeated by Wide Margin*, REWIRE (Nov. 5, 2014), <https://rewirenewsgroup.com/2014/11/05/colorados-personhood-amendment-defeated-wide-margin/>.

66. In 2011, Mississippi voters rejected Amendment 26 that sought to redefine person in the Mississippi Constitution to include “every human being from the moment of fertilization.” *Mississippi Initiative 26, Definition of Person Amendment (2011)*, BALLOTEDIA, [https://ballotpedia.org/Mississippi_Initiative_26_Definition_of_Person_Amendment_\(2011\)](https://ballotpedia.org/Mississippi_Initiative_26_Definition_of_Person_Amendment_(2011)) (last visited Jan. 8, 2023); DELBERT HOSEMANN, INITIATIVE #26 DEFINITION OF “PERSON,” sos.ms.gov/content/documents/elections/Definition%20of%20Person-PW%20Revised.pdf (last visited Dec. 31, 2022); Frank James, *Mississippi Voters Reject Personhood Amendment by Wide Margin*, NPR (Nov. 8, 2011), <https://www.npr.org/sections/itsallpolitics/2011/11/08/142159280/mississippi-voters-reject-personhood-amendment> (“Mississippi voters soundly rejected the constitutional amendment, with 58 percent voting ‘no’ and only 41 percent voting ‘yes.’”).

67. In 2014, North Dakota voters rejected Measure 1, which sought to grant an “inalienable right to life” to “every human being at any stage of development”. Constitutional Measure No. 1, S. Concurrent R. No. 4009 (N.D. 2014), <https://vip.sos.nd.gov/pdfs/measures%20Info/2014%20General/Full%20Text%20Measure%201.pdf>; *North Dakota Measure 1, Right to Life of Human at Any Stage of Development (2014)*, BALLOTEDIA, [https://ballotpedia.org/North_Dakota_Measure_1_Right_to_Life_of_Humans_at_Any_Stage_of_Development_Amendm ent_\(2014\)](https://ballotpedia.org/North_Dakota_Measure_1_Right_to_Life_of_Humans_at_Any_Stage_of_Development_Amendm ent_(2014)) (last visited Jan. 8, 2023); Talcott Camp, *Red State Myth Busting: North Dakota Voters Resoundingly Reject Restrictions on Abortion and Other Health Care*, AM. CIV. LIBERTIES UNION (Nov. 6, 2014), <https://www.aclu.org/news/reproductive-freedom/red-state-myth-busting-north-dakota-voters-resoundingly-reject-restrictions-abortion>.

that voters in Mississippi were concerned about the implications for medical treatment for pregnant people and the impact on IVF.⁶⁸

B. State Recognition of Prenatal Personhood in Specific Contexts

While Prenatal Personhood Amendments have failed, many states have defined a person to include zygotes, embryos, or fetuses for the purposes of specific laws. Some state legislatures have adopted findings describing the zygote-embryo-fetus as a person or human being with rights or have declared it state policy to recognize and protect Prenatal Personhood rights. Other states have enacted “General Prenatal Personhood” provisions that purport to impact the interpretation of the word “person” or “human being” for the entire code. Finally, legislatures and some courts have defined “person,” “human being” and “child” to include zygotes, embryos, and fetuses for the purposes of specific laws, including abortion, wrongful death, child protection, criminal homicide laws, and laws regulating in vitro fertilization.

Prenatal Personhood adherents typically cite to laws recognizing limited Prenatal Personhood in specific settings to support expansion of personhood to other legal contexts or to argue for full legal personhood.⁶⁹ These arguments contend that there is a trend towards recognizing Prenatal Personhood or that limited recognition of Prenatal Personhood supports the argument that the “plain meaning” of person includes zygotes, embryos, and fetuses. These arguments incorrectly assume that “the granting of fetal rights [is] an all-or-nothing proposition”⁷⁰ and fail to recognize which specific contexts and policy considerations may make recognition of limited Prenatal Personhood appropriate in some contexts and not others. Prenatal Personhood arguments also obscure that many laws passed since the 1990s reflect the deliberate strategy of anti-abortion activists to develop the concept of Prenatal Personhood rather than a natural progression of the law.⁷¹

68. Will, *supra* note 62, at 584-85.

69. See Steven Andrew Jacobs, *The Future of Roe v. Wade: Do Abortion Rights End When a Human’s Life Begins*, 87 TENN. L. REV. 769, 847 (2020). See, e.g., C’zar Bernstein, *Fetal Personhood and the Original Meanings of “Person,”* 26 TEX. REV. OF L. & POLITICS 485, 510-511 (2022) (inferring, using “public-meaning originalism,” that the Constitution’s definition of person “includes the unborn” since tort law and criminal recognize injuries to fetuses).

70. Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L. J. 599, 609 (1986).

71. See *infra* notes 101-08 and accompanying text.

1. Homicide and Wrongful Death Statutes: Recognition of Limited Personhood Consistent with the Rights and Interests of Pregnant People

Historically, laws that bestowed rights on embryos or fetuses under tort or inheritance law made these rights contingent upon being born alive.⁷² According to Professor Dawn E. Johnsen, this limited recognition of Prenatal Personhood reflected unified interests between the pregnant person and the fetus.⁷³ These laws “took legal cognizance” of the pregnancy and the fetus to “protect the interests of both the subsequently born child and [their] parent.”⁷⁴ While the laws “acknowledged a child’s prior existence as a fetus in [their] mother’s womb,” the fetus only acquired legal rights *against third parties* when it became a separate entity upon birth, avoiding conflict between the fetus and the pregnant person.⁷⁵ Beginning in the 1950s, courts and state legislatures began to relax the born alive rule and allow wrongful death claims,⁷⁶ and later homicide prosecutions, to punish wrongful conduct by third parties against pregnant people resulting in stillbirths and pregnancy loss. While these laws provided fetuses some protections accorded to persons in limited and specific circumstances, they do so in contexts that protect the rights and interests of pregnant people and do not support the idea that zygotes, embryos, and fetuses are distinct, rights holding legal persons.

Starting in 1949, some states began to relax the born alive rule and allow wrongful death claims for tortious actions that resulted in post-viability stillbirths.⁷⁷ These changes sought to address a claimed defect in the born alive rule because it allowed recovery for tortious conduct that caused prenatal injuries to a fetus who was later born alive, but not for conduct that resulted in a stillbirth.⁷⁸ Several courts allowed parental recovery for stillbirths by interpreting the deceased “person” in the wrongful death statute to include a viable fetus.⁷⁹ States also began to

72. Johnsen, *supra* note 70, at 601-02; *Roe*, 410 U.S. at 161 (noting changes in state law allowing recovery for prenatal tort injuries for fetuses born alive and that inheritance rights have generally been contingent on live birth).

73. Johnsen, *supra* note 70, at 600-01.

74. *Id.* at 602.

75. *Id.*

76. See generally Jill Wieber Lens, *Children, Wrongful Death, and Punitive Damages*, 100 BOSTON U. L. REV. 437 (2020).

77. *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis.2d 14, 18-19 (1967) (noting that between 1949 and 1967, 12 jurisdictions indicated that they would allow wrongful death suits in cases of stillbirth of a viable fetus); Lens, *Wrongful Death*, *supra* note 76, at 448, 448 n.55.

78. Lens, *Wrongful Death*, *supra* note 76, at 449; *Kwaterski*, 34 Wis.2d at 20.

79. Lens, *Wrongful Death*, *supra* note 76, at 448.

amend wrongful death statutes to allow recovery for stillbirths.⁸⁰ Currently, at least 40 states recognize a wrongful death claim for the loss of an unborn child.⁸¹

While many wrongful death statutes define the deceased person to include prenatal life, the statutes do not create separate legal rights for the fetus, but in general give the parent the right to recover.⁸² In *Roe v. Wade*, Justice Blackmun emphasized this distinction noting that wrongful death recovery for a fetus, “vindicat[ed] the parents’ interest and thus [was] consistent with the view that the fetus, at most, represents only the potentiality of life,” and not a legal person.⁸³

Many states also have abandoned the born alive rule for purposes of homicide laws, but here too the laws can be viewed as protecting the interests of pregnant people, rather than recognizing prenatal life as an independent person and rights holder. In 1984, state Supreme Courts in Massachusetts and South Carolina overturned the born alive rule to allow viable fetuses to be treated as homicide victims.⁸⁴ Other state courts declined to judicially expand the definition of “person” for homicide statutes,⁸⁵ but state legislatures began passing laws recognizing unique homicide crimes against unborn children or expanding the definition of person or victim under existing homicide laws.⁸⁶ These laws were

80. *Id.*

81. Jill Wieber Lens, *Tort Law’s Devaluation of Stillbirth*, 19 NEV. L. J. 955, 969 n. 97 (2019); PREGNANCY JUSTICE, WHEN FETUSES GAIN PERSONHOOD: UNDERSTANDING THE IMPACT ON IVF, CONTRACEPTION, MEDICAL TREATMENT, CRIMINAL LAW, CHILD SUPPORT, AND BEYOND 16 n.137 (Aug. 17, 2022) (listing states that allow recovery for fetal death), at <https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/fetal-personhood-with-appendix-UPDATED-1.pdf>.

82. See Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 VAND. L. REV. 1649, 1688 (2022) (“A wrongful death claim creates no legal rights for the fetus.”); Lens, *Stillbirth*, *supra* note 81, at 1009-10.

83. *Roe*, 410 U.S. at 162 (1973).

84. *Commonwealth v. Cass*, 467 N.E.2d 1324, 1330 (Mass. 1984) (holding that a viable fetus is a person for purposes of the vehicular homicide statute); *State v. Home*, 282 S.C. 444, 446 (1984) (involving a defendant who attacked his pregnant wife, who was more than nine months pregnant with a knife). Kentucky and Oklahoma courts also have held that a viable fetus can be the victim of vehicular homicide in cases involving post-viability fetuses who were either at or very near full term. *Com v. Morris*, 142 S.W.3d 654 (Ky. 2004) (involving a truck driver who hit the car of couple on their way to the hospital to give birth); *Hughes v. State*, 868 P.2d 730 (Okla. 1994) (involving a drunk driver who collided into a car driven by a pregnant woman who was due to deliver in 4 days).

85. Jennifer A. Brobst, *The Prospect of Enacting an Unborn Victims of Violence Act in North Carolina*, 28 N.C. CENT. L.J. 127, 135-136 (2006) (“Most state courts have declined to define even a viable fetus as a human being for the purpose of murder, manslaughter, and vehicular homicide crimes without express statutory authority. The courts have argued that to do so would exceed judicial power and deny defendants their due process rights.”).

86. Brobst, *supra* note 85, at 136. See, e.g., IDAHO CODE ANN. § 18-4001 (West 2022) (including an embryo and a fetus as a possible victim of murder); CAL. PENAL CODE § 187 (West

understood and portrayed to the public as protecting pregnant people from, and punishing criminal actors for, physical attacks that resulted in the loss of pregnancies.⁸⁷

Currently 38 states create separate criminal penalties for causing the “death” of “unborn children.”⁸⁸ Consistent with the idea that these laws protect pregnant people, some states explicitly criminalize causing the unlawful termination of another’s pregnancy.⁸⁹ Others recognize the specific crime of “feticide” or designate a separate chapter of the criminal code for “offenses against unborn children.”⁹⁰ Although these crimes define the criminal conduct as causing the death of an “unborn child” rather than causing pregnancy loss, they do recognize that the death of an “unborn child” is distinct from the death of a person. Only states that have redefined the terms “person,” “human being” or “another” who are victims of homicide crimes to include a zygote, embryo, or fetus⁹¹ should be viewed as recognizing limited Prenatal Personhood.

For the most part, legislatures have expanded homicide laws in a manner that reflects an intent to protect pregnant people from third party violence rather than an understanding that zygotes, embryos, and fetuses are separate legal persons. Almost all of the homicide laws explicitly preclude application to cases that would result in charges against a pregnant person with respect to the loss or termination of their own pregnancy.⁹² Because of *Roe v. Wade*, the majority of the laws also have

2022) (defining murder as the unlawful killing of human being or a fetus); GA. CODE ANN. § 16-5-80 (2006) (defining feticide as the illegal killing of an unborn child, defined as “a member of the species homo sapiens at any stage of development who is carried in the womb”).

87. Johnsen, *supra* note 70, at 603; Brobst, *supra* note 85, at 136-37 (stating that the breadth of fetal homicide statutes was “directly related to increased attention to domestic violence” against pregnant women).

88. Thirty-eight states have laws authorizing homicide charges for causing pregnancy loss. In 21 of these states, the criminal codes include expanded definitions of homicide victims (or victims of crimes similar to homicide) to include zygotes, embryos, or fetuses. PREGNANCY JUSTICE, FETAL HOMICIDE LAWS, *supra* note 52, at 2.

89. *Id. See, e.g.*, OHIO REV. CODE ANN. §§ 2903.01-2903.08 (West 2022).

90. PREGNANCY JUSTICE, FETAL HOMICIDE LAWS, *supra* note 52, at 3. *See, e.g.*, LA. STAT. ANN. §§ 32.5-32.8 (2022) (creating a separate chapter in the Louisiana criminal code for feticide, the “killing of an unborn child”); N.D. CENT. CODE ANN. §§ 12.1-17.1-02 – 12.1.17.1-04.

91. PREGNANCY JUSTICE, FETAL HOMICIDE LAWS, *supra* note 52, at 2-3. *See, e.g.*, N.H. REV. STAT. ANN. §§ 630:1-a-630:3 (including a fetus in its definition of “another” in its murder, manslaughter and negligent criminal homicide statutes).

92. According to Pregnancy Justice, 30 of the 38 state homicide laws have explicit or implied exceptions precluding charges against pregnant people in relation to their own pregnancies. PREGNANCY JUSTICE, FETAL HOMICIDE LAWS, *supra* note 52, at 3.

explicit exceptions for abortion or legal medical care.⁹³ However post-*Dobbs*, several states with homicide provisions have banned abortions, and therefore statutory exceptions for legal abortions no longer apply and individuals performing illegal abortions could be charged with homicide crimes.⁹⁴ Consistent with the view that fertilized eggs are not legal persons, many homicide laws include exceptions for the destruction of fertilized eggs as part of the IVF process,⁹⁵ and some laws include specific provisions preventing the application of fetal homicide laws to contraception.⁹⁶

Many wrongful death statutes include similar exceptions for actions against a pregnant person, lawful abortions, IVF procedures, and contraception.⁹⁷ In addition, wrongful death suits on behalf of a fetus against a pregnant person for unintentional conduct should also be barred by the common law parental immunity doctrine.⁹⁸

2. Anti-Abortion Strategy to Establish and Expand Prenatal Personhood

In 1986 when states began to pass wrongful death and homicide provisions, Professor Dawn Johnsen warned that the legitimate impulse to protect pregnant people or compensate them for third party actions that resulted in the loss of wanted pregnancies often resulted in a “dangerous

93. PREGNANCY JUSTICE, FETAL HOMICIDE LAWS, *supra* note 52, at 4-5 (noting that 21 states have exceptions for abortions in laws criminalizing pregnancy loss, 14 states have exceptions for legal abortions, and 4 states have exceptions for legal medical care).

94. PREGNANCY JUSTICE, FETAL HOMICIDE LAWS, *supra* note 52, at 5.

95. To avoid the expense and inconvenience of harvesting ova in the IVF process, clinicians typically retrieve and fertilize multiple eggs at once and discard pre-embryos that are unused or are identified “abnormal” or not robust. *See Will, supra* note 62, at 602-10. Most statutes that define zygotes as homicide victims prevent application of the statutes to the destruction of pre-embryos created as part of the IVF process by defining “person” or homicide victim to apply to fertilized eggs in the womb or in utero, and a few states have explicit exceptions for IVF and fertility treatment. PREGNANCY JUSTICE, FETAL HOMICIDE LAWS, *supra* note 52, at 5-6.

96. Some of the laws also recognize exceptions for contraception and legal medical procedures or dispensation of medication. PREGNANCY JUSTICE, FETAL HOMICIDE LAWS, *supra* note 52, at 7.

97. *See, e.g.,* ARK. CODE ANN. § 16-62-102(a)(3) (2013) (providing exceptions for abortion, fault of the pregnant person, assisted reproduction procedures, IVF, and contraception use); 740 ILL. COMP. STAT. 180/2.2 (2022) (providing explicit exception for legal abortion only); NEB. REV. STAT. ANN. § 30-809(2) (2022) (providing explicit exceptions for the “mother of the unborn child,” for a health provider if the death was the intended result of a medical procedure performed with consent and legal dispensation of a drug or device); OKLA. STAT. tit. 12, § 1053 (F)(2) & (5) (2020) (providing explicit exception for “mother of unborn person” unless she committed a crime that caused the death and exception for abortions that meet specific criteria).

98. *See Carpenter v. Bishop*, 720 S.W.2d 299, 300 (1986) (holding that a parent is immune from suit for unintentional injury to their child in a wrongful death case brought against a pregnant woman for negligent driving that allegedly caused her death and the death of her viable fetus).

conceptual move” where legislatures and courts “identif[ied] the fetus rather than the woman as the locus of the right when there is no live birth.”⁹⁹ As courts and legislatures began to move away from the born alive rule, Professor Johnsen warned about the potential to undermine the rights of pregnant persons. At the time, she noted that the threat resulted from careless lawmaking rather an intentional attack based on the erroneous assumption that “the granting of fetal rights [is] an all-or-nothing proposition” as well as a failure to consider alternative ways to achieve the goal of protecting pregnant people and the appropriateness of applying the legal status of a fetus in one context to another.¹⁰⁰

In the 1990s and 2000s, anti-abortion activists actively worked to promote the “dangerous conceptual move” by promoting the recognition of prenatal life as persons or children in as many legal contexts as possible in order to build the concept of Prenatal Personhood as a legal and moral argument against abortion.¹⁰¹ Some strategies like the expansion of CHIP, a federal health insurance program for low income children, to include “unborn children,” actually benefited pregnant people, who gained access to prenatal care through CHIP, and did not face as intense opposition as might be expected.¹⁰²

One particularly effective strategy was using public anger around highly publicized criminal acts of violence against pregnant people to push for the adoption of fetal homicide statutes.¹⁰³ During this period, while the laws were often presented as protecting and recognizing losses suffered by pregnant people and their families, conservative legislators

99. Johnsen, *supra* note 70, at 603-04.

100. *Id.* at 609-10. For instance, judges have criticized reliance upon the recognition of Prenatal Personhood for purposes of wrongful death statutes to expand the definition for criminal homicide cases. See *Commonwealth v. Cass*, 467 N.E.2d 1324, 1330 (Mass. 1984) (Wilkins, J., dissenting) (criticizing the Massachusetts Supreme Court decision to expand the definition of person for purposes of vehicular homicide statute to include a viable fetus stating that “the development of civil liability for injuries to a fetus is ‘quite distinguishable from the criminal law’”). See, e.g., *State v. Dickerson*, 275 N.E.2d 599, 602 (Ohio 1971) (holding that a viable fetus was not within a statute making it a felony to cause the death of another through the operation of a vehicle noting that “the definition of a word in a civil statute does not necessarily import the same meaning to the same word in interpreting a criminal statute”); *People v. Guthrie*, 293 N.W.2d 775, 777-78 (Mich. 1980) (rejecting arguments to expand negligent homicide statute based on the expansion of wrongful death claims and the definition of child in abortion statutes because criminal statutes should only be expanded by the legislature).

101. Lens, *Wrongful Death*, *supra* note 76, at 449-50.

102. Hailey Cleek, *Borders Across Bodies: Assessing the Balance of Expanding CHIP Coverage at the Expense of Advancing Fetal Personhood*, 34 BERKLEY J. GENDER, L. & JUST. 1, 18 (2019).

103. Brobst, *supra* note 85, at 136-37 (2006) (describing how the federal Unborn Victims of Violence Act and state statutes reflected increased attention to domestic violence in the 1990s and 2000s and an increased public desire to protect pregnant women).

actively resisted attempts to create additional criminal liability that did not define prenatal life as a person.¹⁰⁴ Conservative legislators also purposefully pushed an expansive definition of person. Although most of the crimes spurring homicide legislation involved the loss of a late-stage pregnancy, conservative lawmakers drafted laws recognizing Prenatal Personhood beginning from fertilization.¹⁰⁵ Similarly, although most states condition wrongful death recovery on fetal viability,¹⁰⁶ legislators in at least four state explicitly amended wrongful death claims to allow recovery from fertilization.¹⁰⁷

While some states recognize limited Prenatal Personhood for purposes of homicide and wrongful death statutes, most laws make it clear that rights claims on behalf of zygotes, embryos, or fetuses should not be invoked against pregnant people. However, this has not stopped attempts to use expanded homicide and wrongful death provisions against them. Many state homicide laws have been misused to criminally prosecute pregnant people for the loss of their own pregnancies.¹⁰⁸ Wrongful death actions have been stretched as well.¹⁰⁹ Recently, probate courts in

104. Caitlin E. Borgmann, *The Meaning of "Life": Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 560 (2009); April A. Alongi, *The Unborn Victims of Violence Act and Its Impact on Reproductive Rights*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 285, 289 (2008); PREGNANCY JUSTICE, FETAL HOMICIDE LAWS, *supra* note 5252, at 1 (describing how anti-abortion groups have used tragic cases where a person experienced pregnancy loss as a result another's actions to normalize the concept of fetal personhood).

105. PREGNANCY JUSTICE, FETAL HOMICIDE LAWS, *supra* note 52, at 4 (noting that 29 of the 38 state statutes authorizing homicide charges for causing pregnancy loss apply at fertilization or an equally early stage of pregnancy).

106. Lens, *Stillbirth*, *supra* note 81, at 1004 n.369. Professor Lens argues that a wrongful death claim should be recognized for all stillbirths (pregnancy loss after 20 weeks). *Id.* at 1005. According to Lens, the viability line focuses on the argument that the "unborn baby" is a separate individual whereas a 20-week cutoff would focus on the reasonableness of an unborn child-parent bond. *Id.* at 1005. Some states allow wrongful death recovery between fertilization and viability. *See* Porter v. Lassiter, 87 S.E.2d 100 (Ga. Ct. App. 1955) (holding feticide applies to a "quick" fetus).

107. Donley & Lens, *supra* note 82, at 1685 n.256 (citing ARK. CODE ANN. § 16-62-102 (2022), 740 ILL. COMP. STAT. 180/2.2 (2022), NEB REV. STAT. § 30-809(1) (2022), OKLA STAT tit. 12, § 1053 (F)(1) (2022)). *See also* Mack v. Carmack, 79 So.3d 597, 609, 611 (Ala. 2011) (holding that Alabama's wrongful death statute applies to a pre-viable fetus relying in part on the expanded statutory definition of person under Alabama's homicide laws).

108. PREGNANCY JUSTICE, FETAL HOMICIDE LAWS, *supra* note 52, at 1, 1 n. 6.

109. One Wisconsin court allowed the father of a viable fetus to bring a wrongful death action against a pregnant person's insurer based on the claim that her negligent driving caused a stillbirth. *Tesar v. Anderson*, 789 N.W.2d 351 (Wis. Ct. App. 2010). However, the court emphasized that the pregnant woman was not a defendant, and that the decision should not be read as the court's "weighing in on whether women should be held liable for other negligent acts that harm fetuses." *Id.* at 361.

Alabama¹¹⁰ and Arizona¹¹¹ allowed “fathers” of embryos to bring wrongful death claims against abortion clinics in cases where they disagreed with their former girlfriend and spouse’s decision to terminate a pregnancy. The Alabama case was dismissed for failure to comply with the requirements for appellate briefs.¹¹² Nevertheless, the cases illustrate the potential for third parties to use Prenatal Personhood to assert rights on behalf of a zygote-embryo-fetus to control or restrict the behavior of a pregnant person.

3. Child Protection Laws: Recognition of Limited Personhood to Prosecute or Control Pregnant People

At least three states have gone farther than homicide and wrongful death statutes and have expanded the definition of child to include viable fetuses under criminal child abuse statutes.¹¹³ However, several state courts have declined to allow criminal prosecutions under child abuse and child endangerment statutes based on maternal conduct prior to birth.¹¹⁴ In a Massachusetts case cited by the South Carolina Supreme Court, a trial court held that a viable fetus was not “a person under the age of eighteen” for purposes of a statute prohibiting the delivery of controlled substances to a person under 18.¹¹⁵ The Massachusetts trial court emphasized the distinction between recognizing limited Prenatal Personhood under wrongful death and homicide laws, which accord some legal protections to the unborn to vindicate the mother’s or parents’ interests in the

110. In 2019, Ryan Magers petitioned an Alabama Probate Court to be able to sue a reproductive health care provider for his ex-girlfriend’s abortion on behalf of an embryo at six weeks gestation. The Probate Court granted Magers’ request to be appointed the embryo’s personal representative for a wrongful death suit. The Madison Circuit Court dismissed the case, and the Supreme Court of Alabama affirmed the judgment. *Magers v. Alabama Women’s Ctr. Reprod. Alternatives*, L.L.C., 325 So. 3d 788 (Ala. 2020); *Alabama Court Refuses to Reinstate Man’s Suit Over Abortion*, FED. NEWS NETWORK (Oct. 30, 2020), <https://federalnewsnetwork.com/government-news/2020/10/alabama-court-refuses-to-reinstate-mans-suit-over-abortion/>; Nicole Santa Cruz, *Her Ex-Husband Is Suing a Clinic Over the Abortion She Had Four Years Ago*, PROPUBLICA (July 15, 2022), <https://www.propublica.org/article/arizona-abortion-father-lawsuit-wrongful-death>.

111. Santa Cruz, *supra* note 110.

112. *Magers*, 325 So.3d 788. The Arizona case appears to still be pending. Tessa Stuart, *She Wanted an Abortion. Now the Embryo Is Suing Her Doctors*, JEZEBEL (Sept. 23, 2022), <https://www.rollingstone.com/politics/politics-features/abortion-arizona-personhood-roe-wade-1234598516/>.

113. PREGNANCY JUSTICE, WHEN FETUSES GAIN PERSONHOOD, *supra* note 81, at 13.

114. *Id.* at 13, 13 n.121, 15 n.136. See *Whitner v. State*, 492 S.E.2d 777, 782-83 (S.C. 1997) (citing cases declining to allow prosecution for the conduct of pregnant persons before the birth of their child under child abuse and endangerment or drug distribution statutes).

115. *Commonwealth v. Pellegrini*, No. 87970, at 11 (Mass. Super. Ct. Oct. 15, 1990) (cited in *Whitner v. State*, 492 S.E.2d 777, 782-83 (S.C. 1997)).

potentiality of life, and criminal child abuse laws in which Prenatal Personhood conflicts with the rights of a pregnant person.¹¹⁶

However, courts in at least three states, Alabama, Oklahoma, and South Carolina, relied on cases recognizing limited Prenatal Personhood in other contexts to judicially expand the reach of criminal child abuse and endangerment statutes to the actions of pregnant people by defining “child” to include fetuses.¹¹⁷ The courts also asserted that the plain meaning of person or child includes viable fetuses.¹¹⁸ Rather than focusing on whether recognition of Prenatal Personhood furthered or at least accommodated the rights and interests of pregnant people, the courts focused on the state’s interest in protecting a viable fetus.¹¹⁹ The Oklahoma court wrote that “the clear trajectory that Oklahoma law has been on for at least the past quarter century . . . is to protect children, born and unborn, from potential harm because they cannot protect themselves.”¹²⁰ The South Carolina Supreme Court distinguished the reasoning in the Massachusetts trial court case, emphasizing that “the rationale underlying our body of law-protecting of the viable fetus-is radically different from that underlying the law of Massachusetts.”¹²¹

In addition to criminal law, according to Pregnancy Justice, courts in at least eleven states have stretched civil child welfare laws to apply to fetuses.¹²² In addition, 24 states consider substance use during pregnancy child abuse under civil child protection statutes.¹²³ Wisconsin law authorizes juvenile courts to treat a fertilized egg, embryo, or fetus at any stage as a child in need of protection or services if a pregnant person “habitually lacks self-control in use of alcohol . . . , [or] controlled substances”¹²⁴ This Wisconsin law has been used to take pregnant women into custody of child protective services and to force them into in

116. *Whitner*, 492 S.E.2d at 783 (discussing the reasoning in *Pellegrini*).

117. *Id.* at 780 (stating it “would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse.”); *State v. Green*, 474 P.3d 886, 890 (Okla. Crim. Ct. App. 2020) (noting that an unborn viable fetus was a human being for purpose of Oklahoma’s homicide statutes); *Ex parte Ankrom*, 152 So. 3d 397, 411 (Ala. 2013) (noting that the state has interpreted child to include a viable fetus in other contexts.)

118. *Whitner*, 492 S.E.2d at 780, 784; *Green*, 474 P.3d at 891; *Ex parte Ankrom*, 152 So. 3d at 411.

119. *Whitner*, 492 S.E. 2d at 781-783.

120. *Green*, 474 P.3d at 891.

121. *Whitner*, 492 S.E.2d at 783.

122. PREGNANCY JUSTICE, WHEN FETUSES GAIN PERSONHOOD, *supra* note 81, at 14.

123. *Id.*

124. WIS. STAT Ann. § 48.133 (2016). This statute was ruled unconstitutional in *Loertscher v. Anderson*, 259 F. Supp. 3d 902 (W.D. Wis. 2017), *vacated*, 893 F.3d 386 (7th Cir. 2018). However, the decision was vacated because *Loertscher* voluntarily left Wisconsin. *Id.*

patient drug treatment.¹²⁵ Other states consider substance use by pregnant people as a grounds for involuntary civil commitment.¹²⁶

4. IVF: Personhood Claims for Pre-Embryos?

As discussed above, most state homicide laws have been drafted to prevent their application to IVF by explicitly excluding IVF procedures or by limiting the definition of homicide victims to fertilized eggs *in the womb* or *in utero*.¹²⁷ However, Prenatal Personhood arguments are made in disputes around the treatment and disposition of pre-embryos during IVF.

In a case rejecting personhood, a Missouri appellate court emphasized the distinction between cases involving criminal and civil liability against third parties for causing the death of a fetus in utero (homicide and wrongful death cases) and disputes over the disposition of frozen pre-embryos in vitro.¹²⁸ In *McQueen v. Gadberry*, the Missouri court rejected the argument that Missouri's general personhood provision required that frozen pre-embryos be accorded "all the rights, privileges, and immunities available to other persons" (which McQueen argued would require granting the pre-embryos to her because she wished to implant them and Gadberry did not).¹²⁹ The court declined to recognize pre-embryos as persons because it would violate Gadberry's constitutionally protected right not to procreate.¹³⁰ Notably, the court engaged in a lengthy discussion of the constitutional right to privacy, citing *Roe v. Wade*,¹³¹ raising the question of whether the right not to procreate remains constitutionally protected after *Dobbs*.

Even prior to *Dobbs*, some states recognized limited personhood for pre-embryos, limiting gamete providers' control over their disposition and treatment. In 1986, Louisiana passed a law regulating IVF, which

125. CYNTHIA SOOHOO & RISA KAUFMAN, THE DETENTION AND FORCED MEDICAL TREATMENT OF PREGNANT WOMEN: A HUMAN RIGHTS PERSPECTIVE 2-3 (2018), https://www.acslaw.org/wp-content/uploads/2018/04/The_Detention_and_Forced_Medical_Treatment_of_Pregnant_Women_1.pdf.

126. SOOHOO & KAUFMAN, *supra* note 125, at 3 & 3 nn.18 & 19 (citing statutes from Minnesota, South Dakota, Oklahoma, and North Dakota).

127. *See supra* note 95.

128. *McQueen v. Gadberry*, 507 S.W.3d 127 (Mo. Ct. App. E.D. 2016).

129. *Id.* at 135.

130. *Id.* at 144-45, 147. The Missouri General Personhood provision explicitly provides that it is subject to the U.S. Constitution and the decisional authority of the Supreme Court. MO. REV. STAT. § 1.205.2 (West).

131. *See id.* at 143-144.

recognizes “in vitro fertilized human ovum” as juridical persons¹³² giving them the right to sue and be sued. The statute also prohibits intentional destruction of pre-embryos if they are viable (pre-embryos are deemed nonviable if they fail to develop after 36 hours when unfrozen).¹³³ The statute requires that a pre-embryo be recognized as “a biological human being” and not property,¹³⁴ and that in disputes between their “parents”, pre-embryos must be given many of the protections accorded to children.¹³⁵

In 2018, Arizona passed a law regulating pre-embryos created via IVF.¹³⁶ Under the law, in divorce proceedings, pre-embryos must be given to the party that intends to develop them to birth.¹³⁷

5. General Personhood Provisions

In addition to laws recognizing limited Prenatal Personhood for purposes of specific laws, six states, Kentucky,¹³⁸ Pennsylvania,¹³⁹ Missouri,¹⁴⁰ Kansas,¹⁴¹ Georgia,¹⁴² and Arizona,¹⁴³ have General Personhood provisions. These General Personhood provisions purport to require that all laws of the state be interpreted to include a zygote-embryo-fetus in the definition of a person or human being, or they require that the unborn enjoy equal protection under the law. In addition, in 2018, Alabama voters passed a ballot initiative amending the state constitution making it public policy to “recognize and support . . . the *rights of unborn children*, including the right to life” and to “*ensure the protection of the*

132. LA. STAT. ANN. § 9:125; LA. STAT. ANN. § 9:130.

133. LA. STAT. ANN. § 9:129.

134. LA. STAT. ANN. § 9:126; LA. STAT. ANN. § 9:130.

135. LA. STAT. ANN. § 9:131 (requiring that the “best interests” standard be applied for the pre-embryo).

136. ARIZ. REV. STAT. ANN. § 25-318.03 (2018).

137. *Id.* at (A)(1).

138. KY. REV. STAT. ANN. § 311.720 (West 2017).

139. 18 PA. STAT. AND CONS. STAT. ANN. § 3202 (West) (“In every relevant civil or criminal proceeding in which it is possible to do so without violating the Federal Constitution, the common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the law . . .”).

140. MO. REV. STAT. § 1.205 (West).

141. KAN. STAT. ANN. § 65-6732 (West 2013).

142. GA. CODE ANN. § 1-2-1 (West 2020). The Georgia provision was passed as part of broader act that also amended tax, child support and wrongful death statutes and population based determinations to define child and dependent minor to include an “unborn child with a detectable human heartbeat,” which occurs at about 6 weeks. GA. CODE ANN. § 3 (population based determinations); § 5 (amending Section 19-6-15)(child support); § 6 (amending Section 19-7-1)(wrongful death); §12 (amending Section 48-7-26)(tax).

143. ARIZ. REV. STAT. ANN. § 1-219 (2021).

rights of the unborn child in all manners and measures lawfully appropriate.”¹⁴⁴ Because the provision is a policy statement, it should not be viewed as self-executing.¹⁴⁵ However, litigants and the state legislature have relied on the policy statement to support personhood arguments.¹⁴⁶

Like the limited Prenatal Personhood provisions, most of the general provisions include limiting language,¹⁴⁷ including that they are subject to the U.S. Constitution, the decisional authority of the Supreme Court, and contrary provisions in their state constitutions and statutes.¹⁴⁸ The Missouri, Kansas, and Arizona provisions specifically prohibit interpretations that would “create a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.”¹⁴⁹ Although the Pennsylvania, Kentucky, and Kansas General Personhood provisions purport to apply to all the laws in their respective states, state courts have declined to apply them to expand the reach of criminal statutes without explicit authorization from the legislature.¹⁵⁰

144. *Alabama Amendment 2, State Abortion Policy Amendment (2018)* BALLOTEDIA, [https://ballotpedia.org/Alabama_Amendment_2,_State_Abortion_Policy_Amendment_\(2018\)](https://ballotpedia.org/Alabama_Amendment_2,_State_Abortion_Policy_Amendment_(2018)) (last visited Jan. 9, 2023). Art. I, § 36.06 / AL. CONST. amend. No. 930 (emphasis added).

145. Arkansas has a more limited constitutional provision that does not weigh in on whether unborn children have rights but does declare that it is state public policy “to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution.” ARK. CONST. amend. 68, § 2. The Arkansas Supreme Court has held that the provision is not self-executing. *Knowlton v. Ward*, 889 S.W.2d 721, 726 (Ark. 1994) (holding that a statement of public policy to “protect the life of every unborn child from conception until birth” in the state constitution was not self-executing).

146. *See, e.g., Magers*, 325 So. 3d at 789, 789, n. 1; H.B. 314, Reg. Sess., Section 2(b) (Ala 2019).

147. Pennsylvania specifies that the definition can only be applied to “every relevant civil or criminal proceeding.” 18 PA. STAT. AND CONS. STAT. ANN. § 3202 (West). Kentucky includes “unless the context otherwise requires” as a limitation. KY. REV. STAT. ANN. § 311.720 (West 2017).

148. 18 PA. STAT. AND CONS. STAT. ANN. § 3202(c) (West); MO. REV. STAT. § 1.205.2 (West); KAN. STAT. ANN. § 65-6732(b) (West 2013.); ARIZ. REV. STAT. ANN. § 1-219 (2021).

149. MO. REV. STAT. § 1.205.4 (West); KAN. STAT. ANN. § 65-6732(d) (West 2013); ARIZ. REV. STAT. ANN. § 1-219 (2021).

150. *Com. v. Booth*, 766 A.2d 843, 852-53 (Pa. 2001) (rejecting argument that 18 Pa. C. S. § 3202(c), Pennsylvania’s Personhood provision included in the Abortion Control Act, altered the “born alive” requirement for homicide by vehicle/DUI); *State v. Wells-Lee*, 356 P.3d 436 (Table), 2015 WL 5458526, at *9 (Kan. Ct. App. 2015) (declining to use the General Personhood provision to calculate victim’s age in statutory rape case because the “legislature must be clear and specific . . . to make such a sweeping change to the full range of criminal laws . . . [concerning age.]”); *Com v. Morris*, 142 S.W.3d 654, 660-661 (Ky. 2004) (holding that applying the General Personhood provision to a state homicide law violated a provision in the state constitution requiring that the subject of laws be expressed in the title). However, in the same case the court held that “a viable fetus” is a human being for purpose of Kentucky homicide statutes because in cases involving viable fetuses the rationale for the common law “born alive” rule no longer exists. *Id.* at 659-60.

In a 1989 Supreme Court case, petitioners argued that Missouri's General Personhood provision violated the right to abortion. In *Webster v. Reproductive Health Services*, the Court declined to rule on the provision's constitutionality noting that the provision could be interpreted to protect unborn children in tort and probate law without violating the right to abortion and it was premature to rule on the provision's constitutionality before Missouri courts determined how to apply it.¹⁵¹ Following *Webster*, Missouri courts have used the provision as a "canon of interpretation" to interpret "person" to include fetuses for purposes of wrongful death¹⁵² and homicide statutes,¹⁵³ but Missouri courts have declined to apply the provision to a child endangerment statute in a case against a pregnant woman¹⁵⁴ or to recognize personhood for frozen pre-embryos in a divorce case.¹⁵⁵

The Arizona and Georgia provisions are of more recent vintage and vagueness challenges have had mixed results. After *Dobbs*, a district court granted a limited preliminary injunction that prevented defendants from using the Arizona provision to punish otherwise legal abortion care.¹⁵⁶ Although a district court initially enjoined the Georgia provision in 2020, after the *Dobbs* decision, the Eleventh Circuit reversed and vacated the injunction holding that the provision's definition of natural person was not void on its face and challenges to specific applications to the Georgia code must be made in "as applied" challenges.¹⁵⁷

151. *Webster*, 492 U.S. at 506.

152. *Connor v. Monkem Co., Inc.*, 898 S.W.2d 89, 92 (Mo. 1995) (holding that a non-viable fetus is a person for purposes of a wrongful death claim).

153. *State v. Knapp*, 843 S.W.2d 345, 347-48 (Mo. 1992) (citing MO. ANN. STAT. § 565.024 (holding that Section 1.205's definition of person, which includes "unborn children", applied to Missouri's involuntary manslaughter statute prohibiting causing the death of "any person"); *State v. Holcomb*, 956 S.W.2d 286, 290 (Mo. Ct. App. 1997) (holding that an "unborn child" is a person for the purposes of Missouri's first degree murder statute); *State v. Rollen*, 133 S.W.3d 57, 63 (Mo. Ct. App. 2003) (holding that an "unborn child" is a person for purposes of Missouri's felony murder statute); *Bailey v. State*, 191 S.W.3d 52, 55 (Mo. Ct. App. 2005) (holding that the first degree murder statute applied to an non-viable fetus, which the court defines as an "unborn child").

154. *State v. Wade*, 232 S.W.3d 663, 665 (Mo. Ct. App. 2007). Despite *State v. Wade*, prosecutors in Missouri continue to bring criminal charges against pregnant people for actions that are perceived to create risks to their pregnancy and the majority of women charged have felt compelled to accept plea deals rather than risk prosecution in Missouri courts. PREGNANCY JUSTICE, WHEN FETUSES GAIN PERSONHOOD, *supra* note 81, at 13-14.

155. *McQueen v. Gadberry*, 507 S.W.3d 127, 147 (Mo. Ct. App. 2016).

156. *Isaacson v. Brnovich*, No. CV-21-01417-PHX-DLR, 2022 WL 2665932, at *4 (D. Ariz. July 11, 2022).

157. *SisterSong Women of Color Reprod. Just. Collective v. Governor of Georgia*, 40 F.4th 1320, 1328 (11th Cir. 2022).

III. CURRENT ARGUMENTS TO EXPAND PRENATAL PERSONHOOD AND CRITIQUES

A. *Personhood Arguments*

Arguments to recognize or expand Prenatal Personhood continue to be made at the state and federal level, including arguments that zygotes, embryos, and fetuses should be recognized as persons protected by the Fourteenth Amendment of the Constitution. Despite the fact that the common law born alive rule prevailed when the Fourteenth Amendment was ratified,¹⁵⁸ some conservative scholars and commentators argue that originalism *supports* constitutional Prenatal Personhood.¹⁵⁹ These arguments rest on the assertion that the original public meaning of “person” under the Fourteenth Amendment applied to all members of the human species and then asserting that zygotes, embryos, and fetuses are now recognized as members of the human species.¹⁶⁰ Personhood adherents who are not tied to originalism also argue that viewing prenatal life as human beings and persons is supported by changes in tort and criminal law, specifically citing the abandonment of common law born alive rule in many jurisdictions under wrongful death and homicide laws.¹⁶¹

Often Prenatal Personhood arguments are expressed in language that reflect religious beliefs about the sanctity of prenatal life. However, in legal settings, Personhood advocates try to cast their arguments in scientific rather than religious terms.¹⁶² They often quote the language in *Roe v. Wade* where the Court declines to answer “the difficult question of when life begins” because “[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary . . . is not in a position to speculate as to the

158. Bernstein, *supra* note 69, at 518-19 (concluding that the “[o]riginal [c]ommon-[l]aw [m]eaning of ‘[p]erson’ [e]xcludes [f]etuses”).

159. *Id.* at 489 (arguing that originalism turns on which originalist methodology one adopts and that the “public-meaning originalism” supports Personhood and while the “original *legal*” meaning does not).

160. See, e.g., Joshua Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL’Y 539, 547-548 (2017) (arguing that it does not matter whether states believed that prenatal life were members of the human species at the time the Fourteenth Amendment was ratified as long as they believed that all human beings were persons); Bernstein, *supra* note 69, at 507 (“If the original meaning of ‘person’ is the original ordinary meaning of ‘person,’ the only question is whether the unborn are living members of the human species.”).

161. Bernstein, *supra* note 69, at 510-11.

162. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 325 (1992).

answer.”¹⁶³ In response, Prenatal Personhood advocates assert that it is a scientific fact that human life begins at fertilization. An amicus brief filed by Illinois Right to Life in *Dobbs* discussed “scientific consensus” that “a human life begins at fertilization” because “fertilization marks the point at which an organism with a human genome first comes into physical existence and begins developing in the human life cycle” and that “human zygotes, embryos, and fetuses are, from a biological perspective, humans. . . .”¹⁶⁴ The brief then jumps to the conclusion that “Each human zygote, embryo, and fetus is a weak and helpless *human being*, and therefore a person guaranteed the right to life and to equal protection of the laws under the Fourteenth Amendment.”¹⁶⁵ But the fact that a zygote, embryo, or fetus is a form of human life does not resolve the question of whether they are legal persons endowed with constitutional rights or human rights.¹⁶⁶

The reasoning in the Illinois Right to Life brief illustrates how the Prenatal Personhood movement adopts what commentators have called a “thin” biological definition of life to justify broader claims for Personhood.¹⁶⁷ Professor Caitlin Borgmann notes that this “minimal assertion” that “a blastocyst, or embryo, or fetus, is a human organism that is in the process of developing into a full person” “does nothing to clarify the debate over abortion” or Personhood.¹⁶⁸ Anti-abortion and Prenatal Personhood activists often confuse or exploit this ambiguity to suggest that because the zygote-embryo-fetus is a form of human life, it must also be an independent human being and a person entitled to legal rights.¹⁶⁹

163. *Roe*, 410 U.S. at 159.

164. *Dobbs* Amicus Brief for Illinois Right to Life, *supra* note 30, at 12-14. The fact that a fertilized egg is a living entity with a unique set of genetic material was known when *Roe* was decided, and it can be assumed that Justice Blackmun was not using the term “life” in the literal sense and was instead describing the more difficult question of when meaningful life begins. See, e.g., Brief for Appellee at 32, *Roe v. Wade*, 410 U.S. 113 (1973) (stating that “[a]t fertilization a new and unique being is created which, although receiving one-half of its chromosomes from each [parent], it is really unlike either,” and describing the stages of development).

165. *Dobbs* Amicus Brief for Illinois Right to Life, *supra* note 30, at 24 (emphasis added).

166. Professor Caitlin Borgmann has noted that the “term ‘life’ and its variants ‘human life’ or ‘human being’ are slippery terms” and that “[t]he *biological* fact that an embryo or fetus is human does not answer the *moral* (or legal) question of whether and when it is to be accorded some or all of the rights of a person.” Borgmann, *supra* note 1044, at 592.

167. *Id.*; Will, *supra* note 62, at 583. See, e.g., Rita Lowery Gitchell, *Should Legal Precedent Based on Old, Flawed, Scientific Analysis Regarding When Life Begins, Continue to Apply to Parental Disputes Over the Fate of Frozen Embryos, When There are Now Scientifically Known and Observed Facts Proving Life Begins at Fertilization?*, 20 DEPAUL J. HEALTH CARE L. 1 (2018) (arguing that pre-embryos are human beings based on the science of embryonic development)

168. Borgmann, *supra* note 104, at 592.

169. *Id.* at 586-87.

Prenatal Personhood arguments also overstate the significance of limited Prenatal Personhood provisions, ignoring that wrongful death and homicide laws must be viewed and applied within their designated contexts and cannot be construed to support full recognition of the zygote-embryo-fetus as a legal person. Judicial expansion of the definition of legal person under homicide and wrongful death statutes typically has been limited to cases involving viable fetuses. While state legislatures have expanded homicide laws to criminalize causing the death of an “unborn child,” many have done so by creating distinct crimes for feticide or offenses against unborn children, recognizing that an “unborn child” is not the same as a legal person. Homicide laws also typically provide exceptions for acts or omissions committed by pregnant people, legal abortions, IVF and contraception, exceptions that would not make sense if zygotes, embryos, and fetuses were recognized as legal persons.

Scholars have articulated alternatives to the all-or-nothing approach to Prenatal Personhood that reflect inherent values and assumptions in existing law.

B. Alternative Ways to Understand Prenatal Life

1. Gradualist View of Prenatal Life

There are alternative ways to recognize the value of prenatal life without bestowing legal personhood at every stage of development. Professor Borgmann writes that “[a]cknowledging that a fetus is not the moral equivalent of a person does not necessarily entail viewing the embryo or fetus as a morally insignificant ‘lump of tissue.’”¹⁷⁰ She contends that rather than adopting an absolutist view of zygote-embryonic-fetal personhood, it would be more appropriate to adopt a “gradualist view of human life” that recognizes that “[a]t the earliest stages, human life is morally significant, but not sufficiently so to outweigh other important moral interests.”¹⁷¹ Under a gradualist view, the state’s ability to regulate the protection of prenatal life does not depend on whether or when it is deemed a legal person and protections accorded to zygotes, embryos, and fetuses should be different depending on their developmental stage. The gradualist view is consistent with distinctions current state laws make based on developmental markers like quickening and viability.

170. *Id.* at 585.

171. *Id.* at 602.

2. Subjective Personhood

Professors Greer Donley and Jill Wieber Lens also reject the “hegemonic binary of ‘baby’ or ‘clump of cells’” dichotomy that precludes more nuanced views about the value of prenatal life.¹⁷² Rather than valuing prenatal life based on a fixed stage in development, they argue that the law should “emphasize the pregnant person and their subjective relationship with the pregnancy [which is] not based on any fixed or immutable characteristics of the fetus.”¹⁷³ The conceptualization of the fetus as a potential person will vary depending on the social and moral beliefs of the pregnant person.¹⁷⁴ They maintain that the “fetus does not innately have any personhood value—someone must draw that out . . . [i]t must be called into personhood by other persons.”¹⁷⁵ Although others may be attached to the pregnancy, Donley and Lens argue that the one who “calls the fetus into personhood” must be the pregnant person because they most likely have the strongest attachment and are growing the zygote-embryo-fetus in their body.¹⁷⁶

Under this theory, fetal value is not fixed by a biological stage, instead it created by and dependent on the views and attachment of the pregnant person.¹⁷⁷ Donley and Lens argue that tort law and in particular, wrongful death recovery for stillbirths, reflect subjective personhood concepts because, under tort law, the pregnant person determines whether to bring a cause of action and damages will depend on the subjective value of their loss.¹⁷⁸ Many states limit wrongful death claims to post-viability stillbirths reflecting that a pregnant person’s attachment and expectation that a pregnancy will end in a live birth is greatest at the later stages of pregnancy.¹⁷⁹

Donley and Lens note that while state homicide laws were originally created to vindicate a pregnant person’s loss like tort law, the current construction of state homicide laws is more consistent with a fixed conception of prenatal life than a subjective, relational understanding of fetal value.¹⁸⁰ They note that enforcement of criminal law, unlike tort law, is controlled by the state and that 29 states allow homicide prosecutions

172. Donley & Lens, *supra* note 82, at 1661.

173. *Id.* at 1684.

174. *Id.*

175. *Id.* at 1691.

176. *Id.* at 1692, 1692 n.307.

177. *Id.* at 1694.

178. *Id.* at 1684, 1694.

179. *Id.* at 1684-85.

180. *Id.* at 1695.

at any stage of pregnancy even if the pregnant person has little or no attachment to the pregnancy.¹⁸¹ These homicide laws ignore and erase the relationship between prenatal life and the pregnant person, treating prenatal life as a separate entity and focusing on the state's interest in protecting the "unborn."

C. Critiques of Prenatal "Rights" Claims

1. Prenatal Personhood Claims Are Not True "Rights" Claims

While the Prenatal Personhood movement claims to seek to protect the right of zygotes-embryos-fetuses, in fact Prenatal Personhood claims are not true "rights" claims because the claims are asserted on behalf of a potential person rather than a person in being. Prenatal Personhood advocates claim that the term person under the Fourteenth Amendment was meant to be a term of "inclusion, not of limitation" and should be interpreted to protect all conceivable humans.¹⁸² They claim that a broad understanding of "person" supports recognition of zygotes, embryos, and fetuses as persons. But Prenatal Personhood is fundamentally different than the proper expansion of legal personhood to include formerly enslaved Black Americans and children. Recognizing Prenatal Personhood does not promote individual autonomy or protect individuals from government overreach. Instead, because of the relationship between pregnant people and prenatal life, Prenatal Personhood expands, rather than limits, state power to violate the rights of individuals. By invoking the "rights" of prenatal life, the state justifies taking away the rights of pregnant people (prohibiting abortion) and those who seek to become parents (prohibiting and restricting IVF), or those who seek to avoid becoming parents (prohibiting forms of contraceptives).

2. The Zygote-Embryo-Fetus Is Not a Separate Human Being

Personhood adherents often rely on ultrasounds and other images of prenatal life to depict a fetus as a separate human being.¹⁸³ But the images distort reality. As Professor Reva Siegel explains, the images render

181. *Id.* at 1695-96.

182. Petition for a Writ of Certiorari at *17, *Doe as Next Friend Doe v. McKee*, 143 S. Ct. 309 (2022), 2022 WL 4096782; *Dobbs* Amicus Brief for Illinois Right to Life, *supra* note 30, at 24 (emphasis added).

183. See Carol Sanger, *Seeing is Believing: Mandatory Ultrasound and the Path to Protected Choice*, 56 UCLA L. REV. 351, 356, 363 (2008) (discussing how the "ultrasonic fetal image and its production have so profoundly, openly, and permanently altered our relationship to the fetus.").

invisible the “physical and social work of reproduction women perform.”¹⁸⁴ They erase the pregnant person. We look through her, and in doing so fail to recognize that a fetus (and certainly a zygote or embryo) is not a separate person. The zygote-embryo-fetus lives within a pregnant person’s body. The pregnant person carries, sustains, and nurtures the fetus, and until viability the fetus is completely dependent on the pregnant person and cannot live independently.

3. Conferring Rights to the Zygote-Embryo-Fetus Diminishes the Rights of Pregnant People

Not only is the zygote-embryo-fetus not a separate person because of the maternal-fetal relationship, “[f]etal personhood and pregnant people’s personhood cannot coexist.”¹⁸⁵ If a zygote-embryo-fetus is granted full legal rights, it “fundamentally change[s] the legal rights and status of pregnant women” and “forces them to ‘forfeit’ their own personhood.”¹⁸⁶ Particularly troubling are laws that create “an adversarial relationship between the woman and her fetus, [which provide the state] with a powerful means for controlling women’s behavior during pregnancy.”¹⁸⁷ When the state or third parties assert rights on behalf of a zygote-embryo-fetus, the claims are used to justify incursions into the bodies of the lives of pregnant people and diminish their rights to privacy, liberty, autonomy, dignity and health.

4. Personhood Claims Are Really an Expansion of State Power to Control Individuals

When states purport to bestow or recognize Prenatal Personhood, they are not furthering individual autonomy. There is no attempt to recognize or facilitate decision-making by zygotes, embryos, or fetuses. While Prenatal Personhood advocates claim that the zygote-embryo-fetus should be recognized as a legal person, the reality of its total dependance on the pregnant person prevents it from functioning as a legal person or rights holder. In fact, Prenatal Personhood’s main objective is not the recognition of prenatal life as a full person or rights holder but rather the recognition that prenatal life has a right to life,¹⁸⁸ which can be used to

184. Siegel, *supra* note 162, at 290.

185. PREGNANCY JUSTICE, WHEN FETUSES GAIN PERSONHOOD, *supra* note 81, at 1.

186. *Id.*

187. Johnsen, *supra* note 70, at 600.

188. This rights claim sits uncomfortably in the U.S. context. While constitutions in other countries impose both positive and negative rights obligations on the government, the U.S. legal

justify or compel state action to prohibit abortions, ban the use of contraception that interferes with implantation of fertilized embryos, and prohibit the destruction of embryos during the IVF process. Similarly, personhood has been used by “fathers” of embryos in order to challenge the decision of pregnant people to have an abortion.¹⁸⁹ Here too the rights claimed on behalf of prenatal life are asserted by a third-party and used to control the actions of a pregnant person.

In instances where a pregnant person has decided to carry a pregnancy to term, recognition of Prenatal Personhood is used to treat the zygote, embryo, or fetus like a child in need of protection to encourage and justify violation of the pregnant person’s right to make medical decisions around the pregnancy¹⁹⁰ and unleash the broad power of the child regulation¹⁹¹ and criminal justice¹⁹² systems into the pregnant person’s life. In essence, the state substitutes its decision-making for the pregnant person’s, asserting authority over the pregnant person’s body in the name of protecting the “child,” or punishing pregnant parents for behavior the state deems harmful to the embryo or fetus.¹⁹³ This underscores that “rights” claims on behalf of prenatal life are not true rights claims, but rather means for the state to assert its power to protect prenatal life.

IV. CONCLUSION

After conservative justices attained a majority on the Supreme Court and the Court issued its decision in *Dobbs v. Jackson Women’s Health Organization*, the Prenatal Personhood movement became emboldened in its to push for recognition of personhood for zygotes, embryos and fetuses. Assertions about Prenatal Personhood have moved from policy statements and legislative findings in anti-abortion bills to operative provisions in legislation requiring that state laws define a person or human

system typically does not require that the government act to protect or promote rights, even the “right to life.”

189. *Magers*, 325 So. 3d 788; *Santa Cruz*, *supra* note 110.

190. See Elizabeth Kukura, *Birth Conflicts: Leveraging State Power to Coerce Health Care Decision-Making*, 47 U. BALT. L. REV. 247, 251 (2018) (describing how the specter of state involvement already coercively impacts maternity care decision-making when doctors can threaten to invoke the power of the state through judicially compelled treatment or child welfare involvement); see generally Farah Diaz-Tello, *Invisible Wounds: Obstetric Violence in the United States*, 24 REPROD. HEALTH MATTERS 56 (2016).

191. See *supra* notes 122-27 and accompanying text.

192. See *supra* note 117 and accompanying text.

193. Priscilla A. Ocen, *Birthing Injustice: Pregnancy as A Status Offense*, 85 GEO. WASH. L. REV. 1163 (2017).

being to include zygotes, embryos, and fetuses. Arguments about Prenatal Personhood have jumped from amicus briefs to legal claims. It is unclear how courts will interpret and apply state personhood provisions post-*Dobbs*, but legal claims for judicial recognition of Prenatal Personhood are not supported by the law or popular understandings of prenatal life and personhood. The Supreme Court rejected Prenatal Personhood in *Roe v. Wade* emphasizing that the law has never recognized prenatal life as a person in the “whole sense.” Although *Dobbs* invited challenges to this holding, it did not overrule it. Further, when the electorate has directly considered the issue in ballot initiatives, voters have resoundingly rejected recognizing prenatal life as legal persons. Efforts to amend the Constitution and pass a federal Prenatal Personhood law also have been unsuccessful.

Yet, Prenatal Personhood advocates continue to assert that zygotes, embryos and fetuses should be recognized as legal persons. Their views are reflected in legislation and litigation attempting to ban all abortions from fertilization without exception, prevent the destruction and require the development of all pre-embryos created during IVF, prohibit some forms of contraception, and regulate and criminalize the conduct of pregnant people to protect the embryo or fetus they carry. Prenatal Personhood also has been used to support criminal punishment for people who have abortions. The majority of Americans reject the extreme implications of the absolutist views of the Prenatal Personhood movement. The movement’s positions are also at odds with many abortion opponents who favor restrictions on abortion but do not support total bans or criminal penalties. Prenatal Personhood activists also reject the traditional conservative position that regulation of abortion should be left to the states. Based on their belief that prenatal life should be recognized as persons, they argue that the Constitution compels the state to ban abortion to protect the right to life of zygotes, embryos and fetuses.

Prior to *Dobbs*, the traditional conservative and the extreme Prenatal Personhood position could co-exist. Conservative legislators interested in burnishing their anti-abortion credentials invoked personhood rhetoric and voted for anti-abortion legislation that included personhood language because *Roe* imposed guiderails that prevented the full implications of personhood provisions from taking effect. Now that *Roe* has been overturned, courts and legislatures will be forced to directly address the extent to which zygotes-embryos-fetuses can and should be recognized as legal persons.

Legislatures and courts should emphatically reject attempts to create or recognize Prenatal Personhood. Post-*Dobbs*, legislatures seeking to

regulate or ban abortion need only satisfy the Court's rational basis test to restrict or ban abortion. Because the state's interest in protecting prenatal life will likely be sufficient for states to justify anti-abortion legislation, there is no need for legislatures or courts to recognize Prenatal Personhood and doing so will impose great harm to our legal system. As Justice Blackmun recognized in *Roe v. Wade*, the law has never recognized zygotes, embryos, and fetuses as legal persons and suddenly recognizing them as such will create confusion and instability in the law. Further recognizing prenatal life as a legal person is at odds with basic concepts of personhood and rights. Recognizing personhood for zygotes, embryos, and fetuses does not promote individual autonomy or shield individuals from governmental overreach. Instead, it provides an opportunity for the *state* to assert a single right, the right to life, *on behalf of prenatal life*. Essentially the state's police power is repackaged as a rights claim that the zygote-embryo-fetus does not (and cannot) assert on its own behalf that is used to override the decisions of a pregnant person about their body and the prenatal life inside them.

Further, Prenatal Personhood advocates contend that recognizing personhood would *require* states to ban abortion to protect the right to life of fetuses, embryos, and zygotes. States would no longer determine the legality of abortion. Instead, if Prenatal Personhood advocates successfully convince a court that the zygote-embryo-fetus is a person, their minority views imposed by the sleight of hand of a rights claim made on behalf of prenatal life would be imposed on bodies of pregnant people forcing them to continue a pregnancy in violation of their own personhood and rights to dignity, liberty and autonomy. This result would be accomplished by judicial fiat even if the majority of the public and the state legislature determine that abortions should be legal.

Prenatal Personhood advocates argue that state recognition of Prenatal Personhood for purposes of specific statutes supports general personhood claims. Courts and policy makers should reject the binary, absolutist claims made by Prenatal Personhood advocates in favor of a more complex and nuanced attitude towards prenatal life. Contrary to arguments made by personhood supporters, just because state law recognizes prenatal personhood for purposes of a specific statute, it does not follow that courts or legislatures must or should do so in other contexts. State laws illustrate that context matters. In determining whether to recognize limited personhood or apply general personhood provisions to specific statutes, state courts and legislatures have typically considered multiple factors including: the stage of development of prenatal life (making distinctions including whether a fertilized egg is in utero or

whether the fetus is viable), the type of law at issue (tort verses criminal), the impact of the law on the pregnant person (whether the recognition of personhood would vindicate the pregnant person's interests or conflict with their rights), and the purpose of the statute (whether the purpose of the statute is to vindicate the interests of the pregnant person or the state's interest in protecting a child or viable fetus) to determine whether to recognize personhood for purposes of specific laws and if personhood is recognized what limitations should be imposed. Many state courts have also emphasized the need to exercise restraint when asked to judicially expand the scope of statutes to include malfeasance impacting prenatal life, especially in the criminal context.