WE SHOULDN'T NEED ROE

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Abstract

In the face of state-by-state attacks on the right to choose, which result in regular challenges to *Roe v. Wade* in the U.S. Supreme Court, this essay asks whether *Roe* is needed at all. Decades of state law encroachments have caused *Roe* to fail to properly protect the right to choose. Building on prior works that challenge the premise of fetal personhood and highlighting the status of *Roe*-based rights after decades of challenges, this essay proposes an alternative solution to *Roe*. Federal legislative and executive efforts, including the Women's Health Protection Act, are necessary to ensure the right to choose remains accessible to all pregnant persons.[1]

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1. This essay uses the gender neutral term "pregnant persons" and women interchangeably. This essay uses woman primarily where the term was used historically, in case law or other cited materials. This essay acknowledges that people of all genders may become pregnant and seek abortion services. *See, e.g.*, Reprod. Health Servs. v. Strange, 3 F.4th 1240, 1246 (11th Cir. 2021).

Introduction

In May of 2019, I wrote a tweet that has proven to be evergreen.[2] It states:

> If a fetus is a person at 6 weeks pregnant, is that when the child support starts? Is that also when you can't deport the mother because she's carrying a US citizen? Can I insure a 6-week fetus and collect if I miscarry? Just figuring if we're going here we should go all in.[3]

The tweet asks that if a fetus is a person, as many of the recent laws banning abortion suggest, then why don't we give fetuses full access to things ancillary to personhood—including the rights of citizenship that flow from being born in America?[4] The premise

2. *See, e.g.*, Christopher C. Cuomo (@ChrisCuomo), Twitter (Sept. 1, 2021, 12:12 PM), https://twitter.com/ChrisCuomo/status/1433145774381191181 [https://perma.cc/TD7K-NHYB] (shared following the enactment of Texas's S.B. 8 in September 2021); Occupy Democrats, Facebook (May 17, 2021, 1:09 PM), https://www.facebook.com/346937065399354/photos/a.347907068635687/5132960580130288 [perma.cc/RFU7-59NB] (shared following the passage of Texas's S.B. 8 in May 2021).

3. Carliss Chatman (@carlissc), Twitter (May 9, 2019, 3:59 AM), https://twitter.com/carlissc/status/1126441510063542272 [https://perma.cc/H2SF-ECSV] (posted following the Alabama personhood bill in May 2019).

4. One of the major rights ancillary to personhood is the constitutional guarantee of equal protection. *See* U.S. Const. amend. XIV, § 1 ("[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws"). *See also* Zoë Robinson, *Constitutional Personhood*, 84 Geo. Wash. L. Rev. 605, 611–13 (2016) (constitutional personhood refers to a specific form of legal personhood that denotes a legal status as a constitutional rights holder, entitled to the protection under the U.S. Constitution. The Constitution extends protections to a variety of groups of classification including both "persons" and "citizens." The legal distinction between these two groups lies in what types of rights they may vindicate). Although all persons are guaranteed equal protection under the law, there are some rights that flow from citizenship. The Fourteenth Amendment asserts the principle of birthright citizenship. For the framers, citizenship was a matter of race, not birth, and legal personhood was a matter of race, birth, and gender. For historical and contemporary definitions of citizenship, *see, e.g.*, Jon Feere, Birthright Citizenship in the United States: A Global Comparison, Ctr. for Immigr. Stud. (Aug. 2010), https://cis.org/sites/cis.org/files/birthright-final.pdf [https://perma.cc/BH5Q-55XF]; 8 U.S.C. § 1101(a)(3) (the term "alien" means any person not a citizen or national of the United States); 8 U.S.C. § 1101(a)(23) ("The term 'naturalization' means the conferring of nationality of a state upon a person after birth, by any means whatsoever"); United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898); Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (1790) (restricting immigration to free white persons and limiting citizenship to white men); Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254 (1870) (amending the Naturalization Act to include African Americans after the Civil War, but excluding non-white immigrants); Dred Scott v. Sandford, 60 U.S. 393 (1857) (holding that people of African descent were not American citizens—and never could become citizens, even through an act of

of the tweet and my subsequent publications[5] is simple: persons and citizens have constitutional guarantees that should not vary state-by-state.[6] Thus, if a fetus is given personhood status, it is owed equal protection under the law.[7] States with fetal personhood laws

Congress. Chief Justice Robert B. Taney wrote, "[Black people were] regarded [by Whites] as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect"); Chinese Exclusion Act, ch. 126, § 14, 22 Stat. 58 (1882) (repealed by Pub. L. No. 78-199, 57 Stat. 600 (1943)) (prohibited Chinese people from becoming U.S. citizens); Hudgins v. Wright, 11 Va. 134, 137 (Va. 1806); Guyer's Lessee v. Smith, 22 Md. 239 (Md. 1864) (denying citizenship to the foreign-born children of a Black father and white mother because foreign born illegitimate children cannot be citizens); Daniel v. Guy, 19 Ark. 121, 131–32 (Ark. 1857) (noting the application of the one drop rule follows the maternal line, therefore to be free one must be born of a free woman); ch. 71, § 2, 10 Stat. 604 (1855) (a woman's legal existence is suspended during marriage, such that a foreign woman who is eligible for citizenship—namely, a white woman—who marries an American man is an American).

5. *See* Carliss N. Chatman, *If a Fetus Is a Person, It Should Get Child Support, Due Process, and Citizenship*, 76 Wash. & Lee L. Rev. Online 91 (2020); BBC World News, *Discussion of Texas's 6Week Abortion Ban*, YouTube (May 20, 2021), https://www.youtube.com/watch?v=D6mdSLFGi1k; Ipse Dixit, *Carliss Chatman and Anthony Kreis on Reproductive Rights*, (May 4, 2020), https://shows.acast.com/ipse-dixit/episodes/carliss-chatman-anthony-kreis-on-reproductive-rights; Josiah Bates, *An Alabama Woman Was Charged After Someone Else Killed Her Fetus. Critics Say New Laws Are 'Criminalizing Pregnancy*,' Time (last updated July 3, 2019, 4:37 PM), https://time.com/5616371/alabama-woman-charged-criminalizing-pregnancy [https://perma.cc/P93V-YP7E]; Carliss Chatman, *Why Draconian Anti-Abortion Laws Are Likely Doomed*, CNN (May 29, 2019, 6:13 AM), https://www.cnn.com/2019/05/29/opinions/supreme-court-abortion-fight-chatman/index.html [https://perma.cc/PLB9-EE5Q]; CBS News, *Abortion Bans Create New Legal Issues Regarding Rights of Unborn Children*, YouTube (May 21, 2019), https://youtu.be/DakjzejFA-s; Carliss Chatman, *If a Fetus Is a Person, It Should Get Child Support, Due Process, and Citizenship*, Wash. Post (May 17, 2019), https://www.washingtonpost.com/outlook/if-a-fetus-is-a-person-it-should-get-child-support-due-process-and-citizenship/2019/05/17/7280ae30-78ac-11e9-b3f5-5673edf2d127_story.html [https://perma.cc/3V3L-5FU8]; Carliss Chatman, *What's Behind the Absurd Gamble on Women's Rights and Health*, CNN (May 14, 2019, 8:46 AM), https://www.cnn.com/2019/05/13/opinions/georgia-alabama-abortion-bills-carliss-chatman/index.htmlfbclid=IwAR05SDQNc6sK7SxHvRByvAHxLAlyeb886SkD0NaUCWL-Z6E4xFviRQ7725vs [https://perma.cc/Z9DF-H8UT].

6. *See supra* note 4*; see also* U.S. Const. art. VI (providing that the Constitution is the supreme law of the land); *see also* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (reasoning that Article VI of the Constitution makes the Constitution the 'supreme law of the land,' and state legislatures are bound by orders of the U.S. Supreme Court based on its interpretation of the Constitution).

7. For an analysis of the Equal Protection Clause, see generally Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 Conn. L. Rev. 1059 (2011); Deborah Hellman, *The Expressive*

create a legal fiction wherein both the fetus and the pregnant person have full equal protection rights simultaneously. In reality, if there is conflict, those laws will prioritize the life of the fetus in all contexts, even if the life of the pregnant person is at risk.[8] In addition, fetal personhood may not end at the borders of the states with these laws because the idea that fetal personhood in one state requires equal protection in all states for those fetuses is supported by the U.S. Constitution and its jurisprudence.[9] In other words, fetal personhood in one state is a slippery slope towards fetal personhood in all states; thus it requires consideration of the full scope its consequences.

Personhood is the status required to gain access to rights under the law. Human beings gain their personhood naturally, by simply being born. Other legal persons gain personhood rights

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Dimension of Equal Protection, 85 MINN. L. REV. 1 (2000); Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753 (2001). For an analysis of the Fourteenth Amendment and personhood, see generally Vincent J. Samar, *Personhood Under the Fourteenth Amendment*, 101 MARQ. L. REV. 287 (2017) (explaining that debate regarding the definition of personhood is one of conflicting values that often spans a variety of religious traditions. Samar promotes a normative framework that eschews religious beliefs in favor of a pluralistic outcome); Julie A. Nice, *The Gendered Jurisprudence of the Fourteenth Amendment*, *in* RSCH. HANDBOOK ON FEMINIST JURISPRUDENCE 343 (Robin West & Cynthia Grant Bowman eds., 2019) (explaining the role of the Equal Protection Clause in the process of women gaining personhood rights).

8. Nice, *supra* note 7, at 343. *See also* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. REV. 375 (1985); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

9. *See* U.S. CONST. art. IV, § 1. This conundrum is illustrated by the development of same-sex marriage laws. *See* Joanna L. Grossman, *Civil Rites: The Gay Marriage Controversy in Historical Perspective*, *in* LAW, SOC'Y & HIST.: THEMES IN THE LEGAL SOC'Y & LEGAL HIST. OF LAWRENCE M. FREIDMAN (Robert Gordon ed., 2011) (explaining how the Defense of Marriage Act allowed for varying state laws on gay marriage and served as a work-around for the full faith and credit clause). While the petitioners briefed the court on the issue of full faith and credit under Article IV, Section 1 of the Constitution, the Supreme Court legalized same-sex marriage in *Obergefell v. Hodges*, 576 U.S. 644 (2015) on Fourteenth Amendment equal protection and due process grounds. Prior to *Obergefell*, a network of states legalized same-sex marriage, while other states refused to legalize those marriages or to recognize the marriages performed in other states, which appears to be in direct violation of the full faith and credit clause. *See also* V.L. v. E.L., 577 U.S. 404 (2016) (holding that under the full faith and credit clause, the state of Alabama did not have the authority to overrule *Obergefell*).

from the state—this is how corporations,[10] artificial intelligence, and recently, even animals have gained personhood rights.[11] By passing statutes based on fetal personhood, right to life advocates are creating a hybrid situation. If one need not be born to be a person, is that an attempt to redefine natural, human personhood? Or is the fetus a new artificial person that is a creature of the state, with rights defined wholly by the state's laws? Viewed either way, the concept of fetal personhood is flawed. With regard to the former interpretation, the Fourteenth Amendment declares that the federal government,[12] not the states, define the personhood and citizenship of natural persons.[13] Moreover, the language of the

10. *See* Samar, *supra* note 7; Robinson, *supra* note 4; Nice, *supra* note 7. *See also* Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819) (expressing the artificial entity theory, under which corporations are artificial beings and mere creatures of law to whom materialization and rights are conferred when corporations enumerate their raison d'être in their charter—the state's requirement to gain access to rights under the law).

11. *See* Amy Cheng, *Pablo Escobar's 'Cocaine Hippos' are Legally People, U.S. Court Rules*, Wash. Post (Oct. 26, 2021, 3:31 AM), https://www.washingtonpost.com/world/2021/10/26/pablo-escobar-cocaine-hippos-colombia [https://perma.cc/RHB9-NBSL]; Carliss N. Chatman, *The Corporate Personhood Two-Step*, 18 Nev. L.J. 811, 818–19 (2018) ("As early as the 1800s, three distinct theories of the corporation could be found in American jurisprudence. Chief Justice John Marshall acknowledged corporate personhood rights under the artificial entity/concession theory, aggregate theory, and real entity theory") [hereinafter Chatman, *Two-Step*]; Carliss N. Chatman, *Judgment Without Notice: The Unconstitutionality of Constructive Notice Following Citizens United*, 105 Ky. L.J. 49, 63 (2016) (highlighting due process limitations that protect the rights of corporations) [hereinafter Chatman, *Judgment Without Notice*]; Saru M. Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 Duke J. Gender L. & Pol'y 45, 52–53, 57–64 (2012) (providing a summary of the personhood of fetuses and other non-humans); Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. Marshall L. Rev. 717, 724 (2011) ("[T]his [tiered personhood] process of granting personhood categorizes and makes separate levels of legal personhood by excluding some, giving others some rights, and giving the most privileged full rights—or full political personhood").

12. The federal judiciary has also played a role in defining personhood. *See* Khiara M. Bridges, *A Reflection on Personhood and "Life,"* 81 Supra 91, 93 (2011) (noting that the Court in *Roe v. Wade* explicitly found that the fetus was not a "person" in the constitutional sense and rejected a construction of the fetus as a "life." By accepting the fetus as a "life" in subsequent cases, including *Gonzales v. Carhart*, the Court did not overturn *Roe*'s finding that the fetus is not a constitutional person but nonetheless leaves room for personhood bills and the illegality of abortion. *See* Gonzales v. Carhart, 550 U.S. 124 (2007).

13. *See* U.S. Const. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws"); *see* Barnes & Chemerinsky, *supra* note 7; Hellman, *supra* note 7; Harris, *supra* note 7. Following the end of slavery, the application of the Fourteenth Amendment has been based in nativist notions and stereotypes of the gendered roles of parents

Constitution clearly contemplates that personhood begins at birth, not a heartbeat in utero.[14] If fetal personhood statutes intend to alter the definition of being born and not to create a new artificial legal entity, they are an improper exercise of state power. As for the artificial entity theory, if a fetus is analogous to a corporation, it can only act through its agents. While agents act on behalf of their principals, they cannot disregard the law while serving in that role. Any agent acting on behalf of the fetus must weigh those actions against the rights of the natural person whom the fetus relies upon for its life—the mother.

As any consideration of the agency relationship between a pregnant person and their fetus—or the rights of a pregnant person vis-à-vis their fetus—shows, those proposing fetal personhood work to actively deny pregnant persons equal rights.[15] The

and the superiority of white people. *See* Page Act of 1875, Sect. 14, 18 Stat. 477, 3 March 1875, Pub. L. 43–141 (limiting entry of Chinese women because they were presumed to be prostitutes); *see also* Roger Daniels, Asian America: Chinese And Japanese In the United States Since 1850 44 (1990) (quoting President Grant's 1874 annual address: "I call the attention of Congress to a generally conceded fact—that the great proportion of the Chinese immigrants who come to our shores do not come voluntarily, to make their homes with us and their labor productive of general prosperity, but come under contracts with headmen, who own them absolutely. In a worse form does this apply to Chinese women. Hardly a perceptible percentage of them perform any honorable labor, but they are brought for shameful purposes, to the disgrace of communities where settled and to the great demoralization of the youth of those localities. If this evil practice can be legislated against, it will be my pleasure as well as my duty to enforce any regulation to secure so desirable an end."); *see* Ozawa v. US, 260 U.S. 178 (1922) (holding that Japanese citizens were ineligible for U.S. citizenship under the naturalization laws because the law was limited to "free white persons and to aliens of African nativity and to persons of African descent."); *see also* US v. Thind, 261 U.S. 204 (1923) (cancelling the defendant's certificate of naturalization because although he was high caste Hindu, he was not a white person); Dow v. U.S., 226 F. 145 (4th Cir. 1915) (classifying some Asian people, including Syrians, as white persons free to immigrate to the United States); 8 U.S.C. §§ 1401(g), 2409(a) (to secure citizenship for nonmarital foreign-born children born after November 14, 1968, a father must provide proof of paternity and proof of financial support before age eighteen); Nationality Act of 1940, ch. 876 §§ 201–5, 54 stat. 1137, 1138–40 (1940) (establishing citizenship, immigration, and naturalization rules); 8 U.S.C. § 1409(c) (mother of non-marital foreign-born child need only be in the United States for one year at any point in her life to obtain citizenship); Nguyen v. Immigr. & Naturalization Serv., 533 U.S. 53, 56–57 (2001) (espousing a biological justification for disparate immigration and naturalization policies).

14. *See supra* notes 4 and 12. *See also* U.S. Const. amend. XIV, § 1 (recognizing birthright citizenship where the Constitution confers personhood status and thus grants citizenship rights once the person in question is born on U.S. soil).

15. *See, e.g.*, Dorothy Roberts, Killing the Black Body: Race,

state-by-state campaign for fetal personhood is simply the latest attempt to deny pregnant persons the right to choose, because it is impossible to give a fetus autonomy without eliminating the autonomy of the person carrying that fetus.[16] The fetus is the strawman in a movement of oppression that has attempted to roll back the rights recognized in *Roe v. Wade* for nearly a half-century. The outcome of the anti-abortion movement is not equal protection for fetuses, particularly since concern for their well-being seems to end at their birth.[17] The goal of fetal personhood advocates is superior protection for fetuses in exchange for unequal protection for mothers.

The rights acknowledged by the Fourteenth Amendment have, thus far, prevented a total ban on abortion. The Fourteenth Amendment mandates that no state shall deprive any *person* of life, liberty, or property without due process of law.[18] In other words, states no longer have the right to define my personhood.[19] Instead,

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Reproduction and the Meaning of Liberty (1997); Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 Tex. L. Rev. 1189 (2017) (noting the Court's outright indifference to interests of poor and working class women in obtaining abortion access); Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 Yale L.J. 1270 (2018); Shaakirrah R. Sanders, *Fetal Equality*, 76 Wash. & Lee L. Rev. 123 (2020); Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 Harv. L. Rev. 2025, 2046–47 (2021) (discussing the enforcement of moral offenses and infringements on rights of pregnant women of color).

16. Michele Goodwin, *Pregnancy and the New Jane Crow*, 53 Conn. L. Rev. 543 (2021) (arguing that protecting fetal health justifies a broader political agenda, including antiabortion laws such as Texas's S.B. 8 and criminal punishments for stillbirths and miscarriages, whose targets are no longer confined to poor Black women. Instead, the state's historical targeting of that population is now the precedent on which broader political and policing agendas are built. Today, fetal protection-related punishments materialize in cases of miscarriages, stillbirths, refusal for end-of-life care, and even in instances wherein pregnant patients refuse cesarean operations); Khiara M. Bridges, "*Life" in the Balance: Judicial Review of Abortion Regulations*, 46 U.C. Davis L. Rev. 1285, 1334 (2013) ("Essentially, the protection of fetal 'life' will defeat a woman's interest in terminating a pregnancy under all balancing tests, from the undue burden standard to strict scrutiny. 'Life,' as culturally constructed, is such a weighty proposition that it necessarily outweighs any individual right or liberty.").

17. Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 Yale L.J. 1694, 1706 (2008) (observing that the anti-abortion movement opposed protecting women's right to choose).

18. U.S. Const. amend. XIV, § 1.

19. *See supra* note 10; *see also* Chatman, *Judgment Without Notice*, *supra* note 11, at 63 (showing that granting corporations personhood status also offers protections like due process under the Constitution, which requires states to develop regulations to ensure that corporations receive notice of suit reasonably calculated so that they are allowed an opportunity to present objections). *See also* Garrett Epps, *Interpreting the Fourteenth Amendment: Two Don'ts and*

my equality is constitutionally guaranteed.[20] Equal protection means equal protection for all legal persons—such that an artificial person's rights are not superior to a natural person's, a man's rights are not greater than a woman's, and a white person's rights are not stronger than a Black person's.[21] Although fetal personhood laws defy this premise, the current composition of the courts all but assures that at least one of the latest attempts to rollback reproductive rights will succeed.[22]

In this Essay I suggest that for all persons to avail themselves of the right to choose, the current paradigm calls for action at the federal level. Notably, the only federal actions on abortion so far have infringed on the right to choose through measures such as the Hyde Amendment and the Partial Birth Abortion Ban.[23] Building on prior works that challenge the premise of fetal personhood and highlighting the status of *Roe*-based rights after decades of challenges, this Essay proposes an alternative to *Roe*.[24] The Supreme

Three Dos, 16 Wm. & Mary Bill Rts. J. 433 (2007) (explaining how the use of words like "person" rather than "citizen" allowed the Fourteenth Amendment to proliferate robust protections extending to African Americans, women, and immigrants); Joel K. Goldstein, *Teaching the Transformative Fourteenth Amendment*, 62 St. Louis Univ. L.J. 581 (2018) (explaining that the Fourteenth Amendment altered the constitutional legal structure by extending rights enshrined in the Bill of Rights to protect individuals.).

20. *See supra* notes 9–11; *see also* Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 Am. U.L. Rev. 351 (1997); Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232, 237 (1965).

21. *See* Angela Onwuachi-Willig, *From* Loving v. Virginia *to* Washington v. Davis*: The Erosion of the Supreme Court's Equal Protection Intent Analysis*, 25 Va. J. Soc. Pol'y & L. 303 (2018); Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection*, 98 Geo. L.J. 967 (2010).

22. S.B. 2116, 2019 Leg., Reg. Sess. (Miss. 2019) (prohibiting abortion of fetus with detectable heartbeat); H.B. 314, 2019 Leg., Res. Sess. (Ala. 2019) (making abortion into a felony offense with a few exceptions in Alabama).

23. *See* Hyde Amendment, Pub. L. No. 96–123, § 109, 93 Stat. 923 (1979); Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108–105, 117 Stat. 1201, 18 U.S.C. § 1531; Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding the Partial Birth Abortion Ban Act of 2003 on the grounds that it did not impose an undue burden on the due process rights of women to obtain an abortion under *Roe* and *Casey*. Justice Ginsberg's dissent advocates for basing abortion jurisprudence in personal autonomy and equal citizenship instead of privacy).

24. Many scholars have addressed the shortcomings of basing reproductive rights on *Roe*. *See, e.g.*, Noya Rimalt, *When Rights Don't Talk: Abortion Law and the Politics of Compromise*, 28 Yale J.L. & Feminism 327, 363–64 (2017); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 Yale L.J. 1394, 1397, 1400 (2009); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 385–86 (1985).

Court should not need to be swayed by proponents of the right to choose.[25] The time has passed for lobbying individual state legislatures and hoping and praying that favorable justices retire at the right time or survive until the next Democratic administration. Instead, the other branches of the federal government should provide the protection required by the Fourteenth Amendment.

I. Courts and States as Unreliable Allies in the Fight for Reproductive Choice

At the heart of the issue is how to apply the Fourteenth Amendment's definitions of personhood and citizenship to state attempts to define fetal personhood. Our system of government has allowed states to define the personhood of unnatural creatures—such as corporations—from very early in our nation's history.[26] In exchange for this freedom, states are not permitted to go back on their deal.[27] In other words, once personhood rights are granted, a state may not deny the entity life, liberty, or property without due process, nor may a state deny equal protection under the law. On the other hand, since the passage of the Fourteenth Amendment, states have not had the right to define the personhood of natural people. This is a subject—determined either by place of birth or by complying with immigration and naturalization requirements—for the Constitution and federal law. State grants of natural personhood to fetuses challenge this norm. No state has clarified whether their fetal personhood statute creates a new artificial entity or changes the definition of what it means to be a naturally occurring person, but that distinction could impact the constitutionality of fetal personhood laws.

Currently, a pregnant person's personhood rights change when they cross state lines, because in every state with a fetal personhood law, their personhood is inferior to the personhood of a fetus.[28] In direct violation of the equal protection guaranteed by the

25. Anthony Michael Kreis, *Under Ten Eyes*, 76 Wash. & Lee L. Rev. 107 (2020); Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. Rev. 61, 106–07 (noting how the Court selectively disregards precedent in abortion cases); Murray, *supra* note 15 at 2075–77 (noting Thomas's denouncement of stare decisis). *See, e.g.*, Nat'l Inst. of Fam. & Life Advs. v. Becerra, 138 S. Ct. 2361 (2018) (declaring unconstitutional a law meant to ensure women are provided accurate information regarding reproductive health services).

26. *See* Chatman, *TwoStep*, *supra* note 11, at 818–19.

27. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819).

28. Michelle Ye Hee Lee, *Setting the Record Straight on Measuring Fetal*

Fourteenth Amendment, states with fetal personhood laws make a comparative personhood decision by prioritizing the fetus over the mother; this decision is not only a deprivation of the mother's liberty, but can at times result in the end of her life.[29]

While all women have personhood and the corresponding rights acknowledged by the Fourteenth Amendment, the Constitution does not guarantee female autonomy.[30] Instead, the idea that women have the legal agency and capacity to make all decisions, be they financial or regarding their own health care, has developed incrementally over centuries.[31] The current status of full legal autonomy, in which a woman has the right to take an active and definitive role in her own well-being, free from the control of a husband or other patriarch, the right to a workplace free of discrimination, and even the right to be protected from violence developed far later than most people realize.[32]

In 1973, *Roe* established a constitutional right to abortion based in a right to privacy, which is an outgrowth of the due process

Age and the '20-Week Abortion,' Wash. Post (May 26, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/05/26/setting-the-record-straight-on-measuring-fetal-age-and-the-20-week-abortion [https://perma.cc/J57E-QH8T].

29. Between 4.7-13.2 percent of maternal deaths are caused by a lack of access to abortion. Lale Say, Doris Chou, Alison Gemmill, Özge Tunçalp, Ann-Beth Moller, Jane Daniels, A. Metin Gülmezoglu, Marleen Temmerman, and Leontine Alkema, *Global Causes of Maternal Death: A WHO Systematic Analysis;* 2 Lancet Glob. Health 323, 326 (2014).

30. *See* Reed v. Reed, 404 U.S. 71 (1971); *see also*, *e.g.*, Nice, *supra* note 7; Anna Julia Cooper, A Voice From the South 134 (1892); Murray & Eastwood, *supra* note 20; Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment (2nd ed., 1999) (describing a "matrix of domination" structured along multiple axes including race, class, and gender, on multiple levels); Roberts, *supra* note 15.

31. *See* Slaughter-House Cases, 83 U.S. 36 (1872) (holding that there is no protection to practice trade, privileges and immunities does not apply the Bill of Rights to the states, and equal protection only applies to race); Bradwell v. Illinois, 83 U.S. 130 (1872) (holding that women may be excluded from the practice of law because doing so is not a privilege of citizenship); Civil Rights Cases, 109 U.S. 3 (1883) (holding that the private sphere is protected from congressional enforcement of the Fourteenth Amendment); Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 553 (1923), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (holding that there is no constitutional right to a minimum wage); Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (holding that women may not work as bartenders unless the bar is owned by their husband or father); Muller v. Oregon, 208 U.S. 412, 422 (1908) (upholding a maximum hour law for women). In these decisions, the mere possibility of motherhood was weaponized to exclude women from full and equal participation in the workforce.

32. *See* Kreis, *supra*, note 25 (discussing the Supreme Court's ongoing failure to recognize female autonomy). *See also* note 30 (discussing the same).

protection of liberty found in the Fourteenth Amendment. *Planned Parenthood v. Casey* refined and clarified *Roe*, holding that abortion restrictions are unconstitutional when they place an undue burden on a woman seeking an abortion of a nonviable fetus.[33] Many anti-abortion laws rely on fetal heartbeats and fetal personhood as a means of redefining when viability (and life) begins, with the hopes of coming within the parameters of *Casey*. The *Casey* undue burden standard has given states the ability to impose restrictions that target providers and impose waiting periods and diagnostic testing that are not medically necessary, all under the guise of protecting the health of mothers and the unborn.[34] In the twenty-three states with such targeted restrictions on abortion providers (TRAP) laws that have reduced or eliminated access to abortion, pregnant persons live in a world without the protection of *Roe* for a procedure that, at times, is essential healthcare needed to preserve their life.[35] This risk of death is just one illustration of how the so-called pro-life movement is not about the sanctity of life generally.

In states with restrictive TRAP laws, the right to an abortion, as it currently stands, fails to encompass the personhood and autonomy of women, resulting in a reversal of developments that required generations to gain. If the Supreme Court overturns *Roe*, female personhood and autonomy will return to the not-so-distant past, and a variation of the two-tiered system of permissive and restrictive abortion states that exists today would be solidified. Should a Black woman on Medicare in Mississippi find herself faced with an unplanned pregnancy, the state will infringe upon her Fourteenth Amendment right to privacy and her human right to autonomy. Meanwhile, a similarly situated Black woman in California has the constitutional rights she deserves as a free and competent human being.

In an amicus brief by the Howard University School of Law Human and Civil Rights Clinic in support of the respondents in

33. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992); *see also supra* note 25.

34. *See* John A. Robertson, Whole Woman's Health v. Hellerstedt *and the Future of Abortion Regulation*, 7 U.C. Irvine L. Rev. 623 (2017); *see also supra* notes 25 and 30.

35. *See An Overview of Abortion Laws*, Guttmacher Inst. (Mar. 1, 2022), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws?gclid=CjwKCAiA8bqOBhANEiwA-sIlN9iS-7nJqt0XCi3lpJKPMHT1jK2RMwfO9nR2QEcuveqJ0SonHAQkOBoCB6MQAvD_BwE [https://perma.cc/GZU7-TENS] (thirty-six states require an abortion to be performed by a licensed physician; nineteen states require an abortion to be performed in a hospital after a specified point in the pregnancy; and seventeen states require the involvement of a second physician after a specified point).

Dobbs v. Jackson Women's Health Organization, an abortion case the Supreme Court heard in its 2021–2022 term, the clinic highlights the impact of states' historical medical and legal regulation of Black women's reproduction.[36] The brief profiles the legacy of reproductive control from forced reproduction during enslavement, to sexual terrorism during Reconstruction, to the movements for compulsory sterilization at the turn of the twentieth century, to the modern era featuring disproportionate access to birth control and other forms of reproductive freedom.[37] Because the impacts of systemic racism result in Black women's greater need for public assistance for health care and have prevented Black women from gaining full access to reproductive freedom, state measures to eliminate the right to choose also disproportionately impact Black women.[38] When combined with the failures of the health care system that result in disproportionate infant and maternal mortality rates, the state laws highlighted below operate as a death sentence for some pregnant persons.[39] Forty-eight years of leaving this debate to the whims of the states and the courts has resulted in a system that disproportionately subjects the poor, women in rural areas, and women of color to the negative consequences of a lack of access to health care, including access to abortion care.[40]

Even if the pro-choice movement is successful in *Dobbs* and the Texas S.B. 8 litigation, states will not stop attempting to overturn *Roe* outright, or at least to continue with incremental infringements on the right to choose.[41] *Dobbs* is a case regarding Mississippi's law that bans abortion at fifteen weeks of pregnancy,[42] which falls far short of the viability timeframe imposed by *Casey*.[43] There are

36. Brief for How. Univ. Sch. L. Hum. & C.R. Clinic as Amicus Curiae Supporting Respondents, Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021) (No. 19-1392).

37. *Id. See also* Mallori D. Thompson, *The Scales of Reproductive Justice:* Casey*'s Failure to Rebalance Liberty Interests in the Racially Disparate State of Maternal Medicine*, 26 Mich. J. Race & L. 241 (2020); *supra* notes 15–16.

38. Brief for How. Univ. Sch. L. Hum. & C.R. Clinic*, supra* note 37; *see also* Thompson, *supra* note 38; *supra* notes 15–16.

39. Brief for How. Univ. Sch. L. Hum & C.R. Clinic*, supra* note 37; *see also* Thompson, *supra* note 38; *supra* notes 15–16.

40. *See, e.g.*, Mary Tuma, *Most Extreme Abortion Law in US Takes Effect in Texas*, Guardian (Sept. 1, 2021), https://www.theguardian.com/us-news/2021/sep/01/texas-abortion-law-supreme-court [https://perma.cc/G9E9-X53A]; Thompson, *supra* note 37; *see also* sources cited *supra* notes 22, 50–54 and accompanying text.

41. *See* sources cited *supra* note 20 and accompanying text.

42. Miss. Code Ann. § 41-41-191(4) (2022).

43. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

no exceptions for incest or rape.[44] To obtain an abortion after fifteen weeks, a pregnant person would have to be facing a medical emergency that causes substantial impairment or endangers their life, or a doctor would have to determine that a fetus carried to term would not survive. In its July 22, 2021 brief, Mississippi was finally direct in its request—the state explicitly asked the Court to overturn *Roe*.

This is not Mississippi's first attempt to restrict abortion access nor its first attempt to overturn *Roe*. In 2019, Mississippi passed House Bill 529, a fetal heartbeat bill.[45] Like all previous state fetal heartbeat bills, it did not survive. U.S. District Judge Carlton Reeves, who is also responsible for blocking the fifteen-week ban that is the focus of *Dobbs*, ruled that the fetal heartbeat bill unequivocally violated a woman's constitutional rights, as it "disregards the Fourteenth Amendment guarantee of autonomy for women desiring to control their own reproductive health." In the face of clear Supreme Court precedent, and despite countless failed attempts, states persist in trying to roll back abortion access.[46] We cannot stop the war on women's rights in the courts. State legislatures have been waiting for this moment, in which the right administration could fill the Supreme Court with at least five justices willing to overturn clear precedent.[47]

Other states are also undeterred by previous court losses. A Texas TRAP law was challenged in *Whole Woman's Health v. Hellerstedt*, a 2017 Supreme Court decision.[48] *Hellerstedt* held that House Bill 2 from Texas's 2013 legislative session, which required abortion providers to have admitting privileges a hospital within thirty miles and abortion facilities to meet the same standards as ambulatory surgery centers or a hospital room, created an undue burden for women seeking an abortion. Yet, in each session since *Hellerstedt*, eliminating the right to choose has remained a priority for the Texas legislature.

During Texas's 2021 legislative session, anti-choice legislators introduced numerous bills designed to restrict abortion. On May 19, 2021, Texas Governor Greg Abbott signed the Texas Heartbeat Act (S.B. 8), a fetal heartbeat ban that bans abortions as early as six weeks.[49] S.B. 8 intentionally takes a unique approach meant

44. *See* Miss. Code Ann. § 41-41-191 (2022).

45. Fetal heartbeat bills seek to ban abortion as early as six weeks, when a fetal heartbeat may first be detected.

46. *See* sources cited *supra* note 22 and accompanying text.

47. *Id.*

48. *See* Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016).

49. Tex. Health & Safety Code § 171.201.

as an end run around the current undue burden standard. It is not enforced by the state Attorney General, as most laws are. It is instead enforced by any private individual, including those outside of Texas, who may sue an abortion provider or anyone else who helps someone get an abortion, and receive as much as $10,000 from each defendant. Even a cab or ride share driver who transports someone to get an abortion could be included in a lawsuit. Notably, the onus is on the accused to prove they did not assist a pregnant person in obtaining an abortion—the law in essence provides for litigation by gossip.

On July 13, 2021, abortion rights organizations filed a class action suit for declaratory and injunctive relief under to block S.B. 8.[50] The petitioners include nonprofits such as Planned Parenthood Center for Choice, Center for Reproductive Rights, and Whole Women's Health. The petitioners' alleged that S.B. 8 "flagrantly violates" the constitutional protections for Texans seeking abortions on several grounds.[51] Citing the clear precedent that establishes that a state may not prohibit abortion before viability, the complaint calls out the procedural trickery, noting that in all situations the right to choose belongs to the individual.[52] In addition, the suit challenged the new fee shifting penalty for legal challenges to abortion restrictions.[53]

Unfortunately, the procedural complexity of S.B. 8 enabled Texas to take advantage of the current composition of the Supreme Court to implement a de facto ban on abortion. As a result of the 5–4 decision issued by the Court on September 1, 2021, the law is in effect. An unsigned opinion from a majority comprised of Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett stated that the petitioners failed to address the complex and novel antecedent procedural questions.[54] The majority relied on procedure to allow S.B. 8 to go into effect without any consideration of the impact of the law or whether it is constitutional. Justice Sonia Sotomayor's dissent, joined by

50. Heidi Pérez-Moreno, *Twenty Abortion Providers Sue Texas Officials Over Law That Bans Abortions as Early as Six Weeks*, Tex. Tribune (Jul. 13, 2021), https://www.texastribune.org/2021/07/13/texas-heartbeat-bill-lawsuit [https://perma.cc/5VSU-BA2H].

51. Complaint for Declaratory & Injunctive Relief, Whole Woman's Health v. Jackson, 556 F. Supp. 3d. 595 (2021) (No. 21-cv-00616-RP), 2021 WL 2945846, at *2.

52. *Id.*

53. *Id.* at 5 (arguing that imposing the fee-shifting penalty would deter any challenges, including meritorious challenges, to state and local abortion restrictions).

54. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021).

Justices Stephen Breyer and Elena Kagan, emphasizes the reality of the legislation. Justice Sonia Sotomayor notes that the legislature accomplished its goal of deputizing private citizens to act as bounty hunters and eliminating state action to create a complicated legal morass that is difficult to challenge.[55] Since it was enacted and throughout the litigation surrounding its constitutionality, S.B. 8 has almost completely eliminated the right to choose in Texas, as most women are not even aware that they are pregnant at six weeks.

While Texas's bill clearly violates *Roe*, the procedural complexity allowed it to persist. The Department of Justice (DOJ) filed for a temporary injunction to block enforcement of the bill.[56] At a hearing on October 1, 2021, lawyers for the Texas Attorney General's Office (Texas AG) acknowledged the law's deliberate and intentional inconvenience to women. However, the Texas AG noted the need to travel to Oklahoma, New Mexico, and even states further away results in a net positive, as it increases interstate commerce. The Texas AG also doubled down on the procedural complexity, claiming that not even the DOJ could proceed in an action intended to be enforced by private citizens.

In a 113 page opinion, District Court Judge Robert Pitman granted the DOJ's request to stop enforcement of S.B. 8, declaring in his opinion, yet again, that *Roe* and the right to choose is the law of the land and that a law that infringes on constitutional rights should not be allowed to stand without review.[57] Unfortunately, the Fifth Circuit, like the Supreme Court, is unmoved by these infringements. Just two days after Judge Pitman's order, a three-judge panel of the Fifth Circuit granted a stay of the order pending the outcome of the State of Texas's appeal. During the two days of relief between Judge Pitman's order and the Fifth Circuit's stay of that order, only a handful of the twenty-four abortion clinics in Texas began providing services again, as most were not sure what would happen if they performed abortions on those days but were later faced with a reinstatement of the law.

This chaos and confusion, which leaves women unsure of their rights while the parties battle in court, is a scenario desired by some states because it effectively halts abortions. By late September 2021, Representative Webster Barnaby introduced a similar bill in

55. *Id.* at 2498.

56. Press Release, Merrick B. Garland, Att'y Gen., Statement from Attorney General Merrick B. Garland Regarding Texas SB 8 (Sept. 6, 2021), https://www.justice.gov/opa/pr/statement-attorney-general-merrick-b-garland-regarding-texas-sb8-0 [https://perma.cc/KV46-BNUT].

57. U.S. v. Texas, No. 1:21-CV-796-RP, 2021 WL 4593319, at *29 (W.D. Tex. Oct. 6, 2021).

Florida's state legislature. John Seago, the Legislative Director of Texas Right to Life, the group that helped to draft S.B. 8, announced that he was working with at least three other states to draft similar laws. Officials in Arkansas, South Carolina, and South Dakota have all suggested they will attempt to follow Texas's example.[58]

Given Alabama's previous efforts to restrict abortion, they may be the next to take the Texas approach. Around the time I wrote the tweet in 2019, Alabama joined the growing number of states determined to overturn *Roe* by banning abortion from conception forward.[59] The Alabama Human Life Protection Act, which at the time was the most restrictive abortion law in the country, subjected a doctor who performs an abortion to as many as ninety-nine years in prison. The law had no exceptions for rape or incest. It redefined an "unborn child, child or person" as "[a] human being, specifically including an unborn child in utero at any stage of development, regardless of viability." This Alabama law redefined personhood, potentially extending the protections of the Fourteenth Amendment to fetuses in the state. On October 29, 2019, Judge Myron Thompson prevented the ban from going into effect, holding that "Alabama's abortion ban contravenes clear Supreme Court precedent. It violates the right of individual privacy, to make choices central to personal dignity and autonomy. It diminishes the capacity of women to act in society, and to make reproductive decisions. It defies the United States Constitution."[60] Courts to date have agreed with Judges Thompson and Reeves, yet anti-choice legislators have persisted, operating as if a reversal of *Roe* in the courts is a fait accompli.[61] Texas's procedural end run may allow states to give force to draconian measures that have been unsuccessful to date in light of *Roe*.

In addition to the statutes described above, many states stand ready for the Supreme Court to reverse *Roe*. Trigger laws will automatically ban abortions in the first and second trimesters of pregnancy if the Supreme Court overturns *Roe*. Trigger laws will either reinstate pre-*Roe* laws or implement new ones, including many of the laws discussed above. Twelve states have enacted these measures: Arkansas, Idaho, Kentucky, Louisiana, Mississippi,

58. Meryl Kornfield, Caroline Anders & Audra Heinrichs, *Texas Created a Blueprint for Abortion Restrictions. Republican-Controlled States May Follow Suit*, Wash. Post (Sept. 3, 2021, 8:08 PM), https://www.washingtonpost.com/nation/2021/09/03/texas-abortion-ban-states [https://perma.cc/5VSU-BA2H].

59. The Alabama Human Life Protection Act, Ala. Code § 2623H1 (2019).

60. Robinson v. Marshall, 415 F.Supp.3d 1053, 1059 (M.D. Ala. 2019).

61. *See, e.g.*, *supra* note 24.

Missouri, North Dakota, South Dakota, Tennessee, Texas, and Utah. Eight states never repealed their pre-*Roe* abortion bans, and it can be assumed that those bans will also go into effect should the case fall. Those states include Alabama, Arizona, Arkansas, Michigan, Mississippi, Oklahoma, West Virginia, and Wisconsin.[62]

The right of women to control their bodies has for decades depended on the composition of the Supreme Court and individual state legislatures.[63] Since *Roe*, states have tested the limits of the viability line, and since *Casey*, they have tested the definition of an undue burden. The cycle of legislation followed by litigation creates a period of uncertainty in which a woman's right to choose is in flux or eliminated by the amount of time it takes to challenge a bill in court.[64] Even when the measures fail, the period of limbo has a chilling effect on abortion access that is, in many instances, insurmountable. As state legislators play a game each session that they have, up until recently, been sure to lose, they force abortion providers to close, impose additional restrictions, or engage in the weighty task of educating the public that they are still operating. The current composition of the Court ensures that the incremental attacks on the right to choose will persist, and, in the meantime, fewer women will have access to abortion services.

62. Elizabeth Nash & Lauren Cross, *26 States Are Certain or Likely to Ban Abortion Without Roe: Here's Which Ones and Why*, Guttmacher Inst. (Oct. 28, 2021), https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why [https://perma.cc/MWY9-AY4Z].

63. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983) (striking down an abortion law requiring a 24-hour waiting period and mandatory requirements for patient disclosures); Thornburgh v. Am. College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (striking down the Pennsylvania Abortion Control Act of 1982); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (holding that federal and state governments can deny funding for abortion even if funding is provided for child birth); Gonzalez v. Carhart, 550 U.S. 124 (2007) (upholding the Partial Birth Abortion Ban Act of 2003 on the grounds that it did not impose an undue burden on the due process rights of women to obtain an abortion under *Roe* and *Casey*. Justice Ginsberg's dissent advocates for basing abortion jurisprudence in personal autonomy and equal citizenship instead of privacy); Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016) (ruling that Texas could not place some TRAP restrictions on abortion providers).

64. Alexandra Svokos, *How Unprecedented the Texas Abortion Law Is in Scope of History*, ABC News (Sept. 3, 2021, 2:00 AM), https://abcnews.go.com/US/unprecedented-texas-abortion-law-scope-history/story?id=79793375 [https://perma.cc/RVQ3-7SR5].

II. A Federal Solution

America has a persisting equality problem.[65] At no time in our nation's history has a movement for national equal protection under the law been successful at the state level alone.[66] The fight for the right to choose is no exception. Just as federal action was necessary to protect constitutionally mandated civil rights and voting rights and to make these rights uniform across the country, federal action is now required to protect the personhood rights of women.[67]

Decades of a vicious cycle of abortion ban followed by litigation and an incremental infringement on the right to choose proves that a state-by-state, court-by-court solution is not the answer.[68] It will be detrimental to women's health if the Supreme Court allows any of the statutes described in the previous Part to stand. And it will be even more detrimental if Congress does not see the writing on the wall and use its current composition to preserve and restore these protections.

Reproductive rights are as important as other rights that have compelled Congress to act in the face of state infringement. Yet, over the years Congress has either ignored the right to choose or restricted access with measures such as the Hyde Amendment, a provision that received bipartisan support.[69] The Hyde Amendment

65. Carliss Chatman, *Citizens United Rewritten*, Feminist Judgments (forthcoming 2022) (on file with author) (arguing that America has a matrix of domination that affects all women in different ways depending on their race, class, sexuality, and marital status); Minor v. Happersett, 88 U.S. 162 (1874) (holding that the privileges and immunities clause does not give women the right to vote); Civil Rights Cases, 109 U.S. 3 (1883) (holding that the private sphere is protected from Congressional enforcement of the Fourteenth Amendment). *See also, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896); Muller v. Oregon, 208 U.S. 412, 422 (1908); Radice v. New York, 264 U.S. 292 (1924); West Coast Hotel Co. v. Parish, 300 U.S. 379 (1937).

66. *See supra* notes 4, 12, 21 and accompanying text.

67. Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 437 (a 1965 law aimed at alleviating discriminatory barriers to voting access to African Americans at the state level); Civil Rights Act of 1964, P.L. 88–353, 78 Stat. 241 (1964) (strengthening the enforcement of voting rights as well as facilitated the desegregation of schools. The Act barred discrimination on the basis of race, color, religion, sex, or national origin).

68. *See, e.g.*, Doe v. Bolton, 410 US 179 (1973); *see supra* notes 29–41 and accompanying text.

69. *See* Harris v. McRae, 448 U.S. 297 (1980) (upholding measures by Congress denying public funding for abortion); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (holding that federal and state governments can deny funding for abortion even if funding is provided for child birth); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Gonalez v. Carhart, 550 U.S. 124 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003 on the grounds that it did not impose an undue

prohibits federal funds from covering abortion services for people enrolled in Medicaid, Medicare, and the Children's Health Insurance Program (CHIP).[70] Due to the demographics of the women most likely to need these federal assistance programs, it acts as an intersectional discriminatory measure that disproportionately impacts women of color.[71] Abortion services are health care, and the right to choose is constitutionally protected, but the politicization of abortion has meant that even members of Congress who claim to support the right to choose have done nothing to prevent its erosion in the states and the courts.[72] Decades of federal legislators' moderation and neutrality have only aided the movement to eliminate abortion access.[73] For the women in Texas, Mississippi, and other states with restrictive abortion laws, Congress's procedural requirements—such as the maneuvers necessary to overcome a filibuster—and political calculations leave them to face irreparable harm.

When states define natural personhood with the goal of overturning *Roe*,[74] they are inadvertently creating a system with two-tiered fetal citizenship.[75] In some states, fetuses are persons subject to protection by the Fourteenth Amendment, while in other states the law does not acknowledge fetuses as separate legal entities. Yet, as noted in the previous Part, in no state is there clarification as to whether the law intends the fetal person to be a shift in the definition of natural personhood or the creation of a new artificial legal person. The holdings of *Roe* and *Casey* help create this two-tiered system because they establish a federal floor for access to the right to choose—a rule that some ability to abort a fetus exists in the United States before viability—but the cases do not guarantee access to abortion without any state-created limits.

Because of the structure of our government, if the Supreme Court overturns these cases, that eliminates only the federal right to abortion access. Overturning *Roe* would not prohibit a state from continuing to allow access. In a post*Roe* world, in states such as New York that ensure the right to choose through their constitutions and statutes, citizenship will begin at birth.[76] In states that

burden on the due process rights of women to obtain an abortion under *Roe* and *Casey*); *see also* Rimalt, *supra* note 24, at 267–73.

70. *See* Hyde Amendment, Pub. L. No. 96–123, § 109, 93 Stat. 923 (1979).
71. *See supra* notes 36–39.
72. *See e.g.*, Complaint for Declaratory & Injunctive Relief, *supra* note 51.
73. *Id.*
74. Roe v. Wade, 410 U.S. 113 (1973).
75. *See supra* notes 7–11.
76. N.Y. Pub. Health Law, § 2599aa (McKinney 2019).

move the line to define life as early as conception, personhood and citizenship will begin as soon as a person knows they are pregnant. To solidify the federal floor and raise it so that all persons have the right to choose, Congress can act to provide much needed clarity and eliminate the ability of states to infringe upon a constitutionally guaranteed autonomy and equal citizenship rights. These rights are so fundamental, that it should not be possible for the Supreme Court to eliminate them by simply overturning *Roe* and *Casey*.

The Constitution does not intend for equal protection to be state-dependent or subjective. Even in a federalist structure, constitutional protections should be consistent. States are government actors who do not have the right to redefine what it means to be a person or citizen. A pregnant person's rights should not be determined by whether a legislature has a grasp on science. Not when the language of the Constitution clearly states that personhood begins at birth, not a heartbeat in utero.[77] Through fetal personhood laws, states have invoked a system of comparative personhood that places a fetus above a pregnant woman—a paradigm that is patently unconstitutional as a matter of equal protection. Defining citizenship and personhood based on the laws of each state, as proposed by the numerous measures to eliminate the right to choose, creates some farfetched and even ridiculous scenarios as outlined in my tweet. If we allow this to persist without federal legislative intervention, we will tie our Constitution into a knot no court can untangle. Fortunately, there is a solution that can avoid these absurd consequences.

The Women's Health Protection Act (WHPA) ensures equal access to abortion for all women in all states.[78] The measure, first introduced in 2013, is the work of the Pro-Choice Caucus. Representative Judy Chu (D-CA) has introduced the WHPA every session since 2013, and it was reintroduced in the 117th Congress with 176 supporters in the House and 48 in the U.S. Senate. WHPA ensures the right to choose even if the Supreme Court overturns *Roe*. On September 24, 2021, the WHPA passed in the U.S. House of Representatives. The Senate blocked the bill on February 28, 2022, with a 46–48 Yea-Nay vote.[79] If the Senate gets rid of the filibuster, WHPA could pass with a simple majority instead of 60-vote threshold.[80] If

77. *See supra* notes 7–11.

78. Women's Health Protection Act of 2019, S.1645, 116th Cong. (2019).

79. For the status of the WHPA, see Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. (1st Sess. 2021).

80. Alison Durkee, *Could the Senate Guarantee Abortion Rights Nationwide? Here's Why It's Still Unlikely*, Forbes (May 3, 2022, 4:44 PM) https://www.forbes.com/sites/alisondurkee/2022/05/03/could-the-senate-guarantee-abortion-rights-nationwide-heres-why-its-still-unlikely/?sh=3a5302484adf [https://perma.

the Senate passes the WHPA and the bill becomes law, the right to choose would survive even if the Supreme Court overturns *Roe*.[81] By passing one bill, Congress could undo the infringements of the past while also putting a stop to the harmful statutes and subsequent case law that weaken the intended impact of the Fourteenth Amendment. The rights of marginalized persons, even those that are foundational such as liberty, freedom, and autonomy, are not so clearly established that they can be left to the states. The right to an abortion requires reinforcement through congressional action.

Resolving this matter to protect the constitutional rights of women is not outside of the scope of congressional power. At many junctures in our nation's history, it has been evident that we cannot rely on states to provide equal protection. In fact, since the Thirteenth, Fourteenth, and Fifteenth Amendments realigned our government to instill the power of equal protection squarely within the domain of the federal government, it has always taken an act of Congress to guarantee any measure of equal protection under the law.[82] Congress has acknowledged state infringements on constitutional rights and provided a remedy in the past with measures such as the Voting Rights Act and the Civil Rights Act. Title VII of the Civil Rights Act, which prohibits employment discrimination, and Title IX of the Education Amendments of 1972, which protects people from discrimination on the basis of sex in education programs or activities that receive federal funds, are the result of Congress recognizing the need to intervene to ensure equal protection.[83]

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cc/LPN4-UAMG] (noting that it is unlikely that the WHPA could get a simple majority because Senators Joe Manchin (D-W. VA), and pro-abortion rights Republican senators Susan Collins (Maine) and Lisa Murkowski (Alaska) voted against it in February).

81. Ian Millhiser, *Democrats Have a High-Risk, High-Reward Plan to Save* Roe v. Wade*: The Women's Health Protection Act, Explained*, Vox (Sept. 8, 2021), https://www.vox.com/20930358/codify-roe-wade-womens-health-protection-act-supreme-court-nancy-pelosi-democrats [https://perma.cc/TC5B-QPJN].

82. *See supra* note 11.

83. *See* County of Washington v. Gunther, 452 U.S. 161, 180 (1981) (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13) ("In forbidding employers to discriminate against individuals because of their sex [under Title VII], Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes."); *see also* U.S. Dep't of Justice, Equal Access to Education: Forty Years of Title IX 2 (June 23, 2012) https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf [https://perma.cc/G5QL-77NE] ("Congress passed Title IX in response to the marked educational inequalities women faced prior to the 1970s.").

Although abortion is technically legal in all fifty states, many women are either geographically limited in their access[84] or face a procedural morass that in essence eliminates the right to choose.[85] The WHPA resolves this injustice. Should the WHPA become law, health care providers, individuals harmed by state abortion laws that infringe on the right to choose, and the DOJ all can enforce the rights enumerated in the WHPA in court. This is especially important in light of bills similar to S.B. 8, which creates a procedural bar to abortion through a private right of action. The WHPA establishes a statutory right for health care providers to provide, and their patients to receive, abortion care without medically unnecessary restrictions, limitations, and bans that delay—and at times, completely obstruct—access to abortion. Constitutionally, this would prevent the operation of S.B. 8 The doctrine of federal preemption, based on the Supremacy Clause, allows a federal act to stop state behavior that interferes or conflicts with federal law.[86] As the supreme law of the land, not only would the WHPA eliminate the need for *Roe*, but it would also enable parties to immediately challenge the state-level restrictions that currently exist.

There are also opportunities for the Executive Branch to act.[87] Yet, the Executive Branch seems to have chosen to leave the pregnant persons in Texas without access to abortion and the rights of other pregnant persons in limbo as we await a decision on the pending Mississippi case. Given the tenuous status of access to abortion, a failure to utilize all branches of the federal government to protect the right to an abortion is a declaration of a position. The Biden administration's failure to issue an executive order, and Congress's failure to pass legislation in the face of the current situation, is representative of an anti-choice position.

Joe Biden's position on the right to choose has evolved since his decades of support for the Hyde Amendment and vote in favor of the partial birth abortion ban.[88] In the past, Biden has stated

84. Jessie Hill, *The Geography of Abortion Rights*, 109 Geo. L.J. 1081, 1086 (2021) (arguing that abortion restrictions that interact with state borders reinforce inequality by limiting women's access to abortion in several states).

85. *See id.* at 1087–91.

86. U.S. Const. art. VI, § 2.

87. *See e.g.*, David S. Cohen, Greer Donley and Rachel Rebouché, *Joe Biden Can't Save* Roe v. Wade *Alone. But He Can Do This*, N.Y. Times (Dec. 30, 2021) https://www.nytimes.com/2021/12/30/opinion/abortion-pills-biden.html [https://perma.cc/AQ4R-567G] (proposing that the Biden administration advocate for a preemption argument or lease federal land to abortion providers).

88. Katie Glueck, *Joe Biden Denounces Hyde Amendment, Reversing His Position*, N.Y. Times (Jun. 6, 2019), https://www.nytimes.com/2019/06/06/us/politics/joe-biden-hyde-amendment.html [https://perma.cc/7F59-BRYP].

that he felt like the odd man out in the Democratic Party on the right to choose, stating that while he personally does not believe in abortion, he does not believe he has the right to impose his beliefs on others. The current inaction contradicts Biden's stated position that "reproductive rights are a constitutional right. And, in fact, every woman should have that right."[89] In line with these campaign statements, Biden took immediate action to confirm this belief in January of 2021, repealing by executive order Trump's global gag rule that restricted international health organizations receiving federal funds from providing abortions and information about abortions.[90] His current inaction feels like a return to past positions. A pro-choice administration would not leave the women of Texas to wait for a decision from the Court.

Additionally, Elie Mystal writes about the possibility of using federal health care providers, which are potentially protected by qualified immunity, to perform abortions in states with complete or partial bans.[91] Mystal's suggestion is a viable option in the present and can presumably work for any future bans that take advantage of the procedural complexity of S.B. 8. Because qualified immunity protects federal employees from private lawsuits arising out of the performance of their jobs, Mystal theorizes that through executive orders the Biden administration could provide pregnant persons with a federal option for abortion care even in states with bans.[92] Mystal states that Democrats must do something—but to date, the federal government has only passed the WHPA in the House and allowed it to linger in the Senate.[93] The Biden administration could use executive orders in ways beyond what Mystal contemplates. Over the years, Presidents have used executive orders to advance and reverse policies when Congress has failed to act on issues including immigration, public health, and national security.[94] The

89. *The October Democratic debate transcript*, Wash. Post (Oct. 16, 2020), https://www.washingtonpost.com/politics/2019/10/15/october-democratic-debate-transcript [https://perma.cc/5XEH-5TD2].

90. Press Release, FACT SHEET: President Biden to Sign Executive Orders Strengthening Americans' Access to Quality, Affordable Health Care (Jan. 28, 2021) https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/28/fact-sheet-president-biden-to-sign-executive-orders-strengthening-americans-access-to-quality-affordable-health-care [https://perma.cc/AJ3W-GHBL].

91. Elie Mystal, *What Can Democrats Do to Fight Texas's Abortion Ban? Lots*, Nation (Sept. 2, 2021) https://www.thenation.com/article/politics/texas-abortion-fight [https://perma.cc/9BFX-5K7D].

92. *See id.*

93. *See id.*

94. Exec. Order No. 13694, 80 Fed. Reg. 18,077 (Apr. 1, 2015) (recognizing

results of the exercise of executive power have been mixed in the courts, but the orders have, in the short term, provided immediate relief. If the right to choose is a part of the Biden Administration's policy, it could use the executive power to protect that right as Congress and the courts weigh the issue.

Conclusion

The danger of a state-by-state approach to personhood, in which some states grant personhood to fetuses and prioritize that fetal personhood above that of the mother, both frustrates the purpose of the Fourteenth Amendment and creates the potential for systemic absurdities that I highlight in my tweet.[95] The Fourteenth Amendment guarantees equal protection, thus when a state grants full personhood to a fetus, that personhood should apply equally.[96]

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the need to address cyber threats, President Obama issued an executive order to block the property of certain persons engaging in cyber-enabled activities); Exec. Order No. 13991, 86 Fed. Reg. 7045 (Jan. 20, 2021) (responding to health risks to federal workforce caused by the pandemic, President Biden issued an executive order requiring face masks); Exec. Order No. 14013, 86 Fed. Reg. 8839 (Feb. 4, 2021) (addressing the needs of immigrants displaced by climate change, President Biden issued an executive directing relevant agencies to enhance and review the refugee resettlement program).

95. Reese Oxner & Neelam Bohra, *U.S. Justice Department Sues Texas Over New Abortion Law That Attorney General Merrick Garland Calls Unconstitutional*, Tex. Trib. (Sept. 9, 2021, 5:00 PM), https://www.texastribune.org/2021/09/09/texas-abortion-ban-federal-challenge [https://perma.cc/9B-FX-5K7D] (citing Attorney General Merrick Garland's statement that the Texas statute is "invalid under the Supremacy Clause and the 14th Amendment, is preempted by federal law and violates the doctrine of intergovernmental immunity").

96. U.S. Const. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."). For an analysis of the Equal Protection Clause, see generally Barnes & Chemerinsky, *supra* note 7; Hellman, *supra* note 7; Harris, *supra* note 7. Although the equal protection clause now requires equal treatment of women, this has not always been the case. *See* Brief for Appellant, Reed v. Reed, 404 U.S. 71 (1971) (No. 70–4), 1971 WL 133596 at *10; Minor v. Happersett, 88 U.S. 162 (1874) (holding that the privileges and immunities clause does not give women the right to vote); In re Lockwood, 154 U.S. 116 (1894) (denying women the right to practice law); Bradwell v. Illinois 83 U.S. 130 (1872); Quong Wing v. Kirkendall, 233 U.S. 59, 63 (1912) (allowing discrimination in granting occupational licenses to women). Black women and Native American women have faced an intersectional denial of equal protection. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896) (instituting the separate but equal doctrine); Johnson v. M'Intosh, 21 U.S. 543 (1823) (discussing the property rights of Native Americans). Rights for these persons have been granted incrementally, through constitutional amendments and legislation. U.S. Const. amend. XIV; U.S. Const. amend. XIX; Civil Rights Act of 1964, P.L. 88–353, 78 Stat. 241 (1964).

A conundrum therefore arises, because it is impossible to protect the purported personhood of a fetus against the rights of a pregnant person without denying the latter's personhood and their right to equal protection under the law.

The simple truth is that the right to choose should not be dependent upon the opinion of five justices on the Supreme Court, or on whether a woman resides in a red or blue state. Instead, the other branches of the federal government should act. The message from those who oppose the right to choose is clear—they are determined to completely ban abortion.[97] And they are willing to do so even if it requires disrupting constitutional principles.[98] The federal government must intervene to ensure that all persons are given the rights and privileges afforded them through the constitution.[99] Equal access to abortion is healthcare and is fundamental to protecting the personhood of women. If we believe, as a society, that women are equal and deserving of all freedoms enumerated by our Constitution, then that is a belief that deserves protection through an act of Congress. We shouldn't need *Roe* to protect the right to choose.

97. Emma Green, *What Texas Abortion Foes Want Next*, ATLANTIC (Sept. 2, 2021), https://www.theatlantic.com/politics/archive/2021/09/texas-abortion-ban-supreme-court/619953 [https://perma.cc/GW84-TZXY].

98. *Id.* ("We want to pass legislation to show the Supreme Court that they need to tear down and rebuild the legal foundation they have relied upon when it comes to abortion legislation.").

99. Fresh Air, *The Supreme Court's Failure to Protect Civil Rights*, NPR (Feb. 24, 2011), https://www.npr.org/2011/02/24/133960082/the-supreme-courts-failure-to-protect-civil-rights.