



## THE CONSTITUTION, CONGRESS AND ABORTION

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### INTRODUCTION

Policy debates about abortion occur within a complex constitutional and legal framework largely created by the Supreme Court. In our federal system, States have traditionally been responsible for protecting individuals against acts of violence by passing and enforcing laws against assault and murder. In *Roe v. Wade* and its progeny, however, the Supreme Court greatly limited the authority of States to meaningfully regulate or limit violence against unborn human beings in an abortion procedure. In response, the United States Congress has in recent years passed national legislation – such as the Partial-Birth Abortion Ban Act of 2003 – that takes modest first steps toward rolling back the abortion license in the United States. In 2015, the House of Representatives passed the

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Pain-Capable Unborn Child Protection Act (PCUCPA), which proposed a federal ban on abortions after twenty weeks gestation, with exceptions for physically life-threatening conditions, rape, and incest with a minor. Although the PCUCPA did not pass in the Senate, the 115th Congress will likely continue to consider new national restrictions on abortion.

Debate about national congressional regulation of abortion presents an opportunity to think, on the level of first principles, about the source of Congress' authority to enact such legislation in the first place. Although there is room for legislators to debate the most prudent course of action in light of established norms and legal precedents, the Fourteenth Amendment's Equal Protection Clause provides the most historically plausible constitutional grant of authority for Congress to work toward legally protecting unborn children through national legislation. The issue of congressional power to legislate against abortion raises important and complex historical and theoretical questions at the very heart of the U.S. constitutional tradition, beginning with the bedrock principles of limited government, federalism, and the separation of powers.

In the following sections, I briefly introduce modern jurisprudence on abortion before evaluating three enumerated Congressional powers that might plausibly support Congressional authority to regulate abortion. Within this discussion, I engage debates about whether the original meaning of personhood includes the unborn, and whether Congress has authority to interpret the Constitution independent of Supreme Court precedents. I conclude that policy makers must make prudential judgments in a complex constitutional and legal landscape, but that the Equal Protection Clause of the Fourteenth Amendment provides the most plausible grant of authority for Congress to regulate abortion.

### I. MODERN JURISPRUDENCE ON ABORTION

In 1973, the Supreme Court of the United States announced its decision in the case of *Roe v. Wade*.<sup>1</sup> The controversy started several years prior when Jane Roe, a divorced and abandoned pregnant mother of three, filed a case against Dallas District Attorney Henry Wade. Roe's legal team challenged the constitutionality of Texas' century-old criminal abortion statute which allowed abortion only "by medical advice for the purpose of saving the life of the mother."<sup>2</sup> They argued that the Due Process Clause of the Fourteenth Amendment to the United States Constitution, ratified in 1868, protected Jane Roe's right to procure an abortion for any reason at any time during pregnancy.

In a seven to two decision, the Court declared that the Constitution prevents a State from criminalizing abortion during the first trimester of pregnancy while nonetheless acknowledging that the State's interest in protecting maternal health and preserving pre-natal human life allows some state regulation and even proscription of abortion during later stages of pregnancy.<sup>3</sup> The Court further held that any legal proscription of abortion during the second or third trimester must allow exceptions for abortion necessary to preserve the life or health of the mother.<sup>4</sup> A companion case decided the same day, however, hollowed out the regulatory framework articulated in the *Roe* decision. Whether an abortion procedure is necessary to preserve maternal health, the Court explained in *Doe v. Bolton*,<sup>5</sup> is a matter of "medical judgment [that] may be exercised in the light of

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<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> *Id.* at 164.

<sup>3</sup> *Id.* at 163-166.

<sup>4</sup> *Id.*

<sup>5</sup> 410 U.S. 179 (1973).

all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.”<sup>6</sup>

These sweeping decisions made no serious effort to wrestle with the text, logic, and structure of the Constitution. As the famous constitutional scholar and law professor John Hart Ely remarked at the time, the Court’s opinion in *Roe* “is not constitutional law and gives almost no sense of an obligation to try to be.”<sup>7</sup> Scholars and pundits on all sides of the abortion debate have since roundly criticized the official opinions of the Court in *Roe v. Wade* and *Doe v. Bolton*, both tendered by Nixon-appointed Harry Blackmun.<sup>8</sup>

There is indeed much to criticize in Blackmun’s opinions, and they have had a distorting effect on American constitutional politics for the last forty years. Significantly, the decisions nationalized the issue of abortion by inserting the federal government into a debate that had long been the exclusive province of state legislatures, while attempting to impose a national regulatory framework that was unprincipled and unworkable. We are now living with the disastrous results of a badly reasoned body of law that has greatly weakened the ability of the American people to work through their political institutions to decide whether, and if so, when and how to protect unborn human life.

In subsequent cases, the Court abandoned the original trimester framework from *Roe* and instead focused on the shifting marker of

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<sup>6</sup> *Id.* at 192.

<sup>7</sup> John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) (emphasis in original). The same could be said of the numerous Supreme Court decisions about abortion that have reaffirmed the central holding in *Roe v. Wade* that the Fourteenth Amendment confers a constitutional right to abortion. These cases include: *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Stenberg v. Carhart*, 530 U.S. 914 (2000); and *Gonzales v. Carhart*, 550 U.S. 124 (2007).

<sup>8</sup> See, e.g., WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION (Jack Balkin ed., 2007).

fetal viability, which changes along with advances in medical technology. In *Planned Parenthood v. Casey*,<sup>9</sup> the Supreme Court reaffirmed and clarified what it took to be “*Roe*’s central holding”:

First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.<sup>10</sup>

This, now, is the basic jurisprudential lens through which a majority of the Justices on the Supreme Court and many in the legal community view abortion. States may regulate abortion prior to viability so long as those regulations do not unduly interfere with access to abortion. After viability, States may proscribe abortion provided any legal proscription makes exceptions to protect maternal life and health (understood, following *Doe*, in light of all factors, including emotional or psychological wellbeing).<sup>11</sup> As a result, we continue to have a legal regime that a 1973 article in *Time* magazine first dubbed “abortion on demand.”<sup>12</sup> Today our abortion

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<sup>9</sup> 505 U.S. at 833.

<sup>10</sup> *Id.* at 846.

<sup>11</sup> *Doe*, 410 U.S. at 192.

<sup>12</sup> *The Sexes: Abortion on Demand*, TIME, Jan. 29, 1973, at 50-53.

laws are far less restrictive than almost anywhere else in the world, including most European countries. According to a recent study published by the Lozier Institute, the United States is one of only seven countries in the world that permit elective abortion after 20 weeks of gestation.<sup>13</sup>

## II. A CONGRESS OF ENUMERATED POWERS

In *Federalist* No. 45, James Madison explained the structure of the new government.<sup>14</sup> Opponents of the Constitution had argued that the new federal government would trample upon the dignity and authority of the States. While Madison championed a vigorous and energetic federal power as “essential to the happiness of America,” he insisted that the Constitution would not “derogate from the importance of the governments of the individual States.”<sup>15</sup> The powers of the new federal government were “few and defined” and principally concerned with *external* objects, such as “war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected.”<sup>16</sup> Meanwhile, the powers retained by the States are “numerous and indefinite” and “will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”<sup>17</sup> In other words, States would retain primary authority to legislate for the public good of their citizens. States have plenary powers to legislate

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<sup>13</sup> ANGELINA BAGLINI, CHARLOTTE LOZIER INSTITUTE, *GESTATIONAL LIMITS ON ABORTION IN THE UNITED STATES COMPARED TO INTERNATIONAL NORMS 3* (2014), <https://lozierinstitute.org/wp-content/uploads/2014/02/American-Reports-Series-INTERNATIONAL-ABORTION-NORMS.pdf>.

<sup>14</sup> THE FEDERALIST NO. 45 (James Madison).

<sup>15</sup> THE FEDERALIST NO. 45, at 285 (James Madison) (Clinton Rossiter ed., 2003).

<sup>16</sup> *Id.* at 289.

<sup>17</sup> *Id.* at 263.

for the health, safety, and morals of the community, while the federal government has limited, enumerated powers to advance a discrete set of national interests.

The classic model of limited, enumerated federal legislative power does, however, pose a challenge in the case of national laws banning particular methods of abortion or abortions performed at particular gestational ages, since the Constitution does not enumerate a specific congressional power to enact criminal statutes protecting life. The original model of limited federal power, of course, was modified by the Fourteenth Amendment's grant of a congressional power to protect citizens and persons against certain actions by the States. More importantly, however, the Founders' limited-government constitutionalism was largely abandoned over the past century. With the massive growth of the federal government enabled by progressive jurisprudence, the polity has come to an understanding of rights as privileges against an otherwise plenary federal power.<sup>18</sup> Whereas the Constitution envisaged a Congress that could only legislate when authorized to do so, Congress today, with the Court's blessing, has largely adopted the very opposite view, namely, that it may do whatever the Constitution does not expressly forbid it from doing. Much of this sea change in federal legislative power is the result of expansive new interpretations of the Commerce Clause in the twentieth century.

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<sup>18</sup> On this transformation of our understanding of federal power vis-à-vis individual rights, see RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004) and HADLEY ARKES, *BEYOND THE CONSTITUTION* (1992).

A. THE COMMERCE CLAUSE AND THE GROWTH OF FEDERAL POWER

One of Congress' enumerated powers is the power to regulate commerce among the several States.<sup>19</sup> In the late nineteenth and early twentieth centuries, Congress often expanded its power to combat various vices through innovative uses of the Commerce Clause. For example, the Federal Lottery Act of 1895 prohibited interstate trafficking in lottery tickets and the Mann Act of 1910 prohibited transporting women across state lines for "immoral purposes."<sup>20</sup>

The sea change in Commerce Clause doctrine, however, occurred during the New Deal and is perhaps most evident in the Court's willingness to uphold the Agricultural Adjustment Act of 1938.<sup>21</sup> The Act forbade private wheat farmers from growing in excess of a quota established by the national government. In *Wickard v. Filburn*,<sup>22</sup> the Supreme Court upheld this regulation as applied to Roscoe Filburn, an Ohio farmer who grew a dozen acres in excess of the quota *but never took his wheat to the market*. Congress in this instance regulated private production and consumption of wheat, and the Supreme Court upheld this exercise of power under the theory that production and consumption, taken in the aggregate, has a substantial effect on the interstate market in wheat.<sup>23</sup> On this logic, there is no individual or household activity that cannot in principle escape the power of Congress to regulate under the Commerce Clause. The logic of *Wickard* inaugurated a plenary model of federal

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<sup>19</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>20</sup> See *Hoke v. United States*, 227 U.S. 308, 326 (1913) (upholding the constitutionality of the Mann Act); *Champion v. Ames*, 188 U.S. 321, 363-64 (1902) (upholding the constitutionality of the Federal Lottery Act).

<sup>21</sup> Pub. L. 75-430, 52 Stat. 31 (1938) (codified as amended at 7 U.S.C. §§ 1281-1407 (2012)).

<sup>22</sup> 317 U.S. 111 (1942).

<sup>23</sup> *Id.* at 127-129.

power under the Commerce Clause, effectively eviscerating the distinction between local and national economic activity.<sup>24</sup>

The plenary model of Commerce Clause power provides the backdrop and part of the legal justification for recent attempts by Congress to pass national legislation against abortion. In 2003, Congress enacted, and the Supreme Court later sustained, the federal Partial-Birth Abortion Ban Act making it a federal criminal offense to perform any abortion that involves partially delivering a baby before intentionally killing the partially-born child.<sup>25</sup> Although the Partial-Birth Abortion Ban Act does *not* enact a blanket prohibition of abortion at any specific gestational age, it does prohibit a specific method of late-term abortion that is particularly controversial. The Act applies only to physicians “in or affecting interstate or foreign commerce” and is thus ostensibly an exercise of Congress’ power to regulate interstate and international commerce.<sup>26</sup>

The House of Representatives has also tested the limits of national legislation with the Pain-Capable Unborn Child Protection Act, a bill which would prohibit all abortions after 20 weeks gestation while also carving out exceptions for cases of rape and incest (but not maternal health).<sup>27</sup> According to the bill, Congress’ authority to “extend protection to pain-capable unborn children” comes from “the Supreme Court’s Commerce Clause precedents” and also “the Constitution’s grants of powers to Congress under the Equal Protection, Due Process, and Enforcement Clauses of the Fourteenth Amendment.”<sup>28</sup>

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<sup>24</sup> In recent years, the Court has been willing to draw a line between economic and non-economic activity in cases such as *United States v. Morrison*, 529 U.S. 598, 610 (2000) and *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2590 (2012).

<sup>25</sup> *Gonzales v. Carhart*, 550 U.S. 124, 132, 168 (2007) (citing 18 U.S.C. § 1531 (2012)).

<sup>26</sup> § 1531(a).

<sup>27</sup> H.R. 36, 114th Cong. § 3 (2015).

<sup>28</sup> *Id.* § 2.

Although Congress has specifically anchored its abortion legislation in the Court's Commerce Clause precedents, the terms of the Fourteenth Amendment provide a constitutional basis for national abortion regulation that is not wedded to modern Commerce Clause jurisprudence, which threatens to unravel the logic of limited, enumerated national legislative powers.

#### B. THE FOURTEENTH AMENDMENT

After the Civil War and the abolition of slavery, the Fourteenth Amendment to the Constitution put specific limitations on the police power of the States and enumerated an additional congressional power. Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>29</sup>

Section 5 then enumerates a congressional "power to enforce, by appropriate legislation, the provisions of this article."<sup>30</sup> The power of Congress to pass laws enforcing the Fourteenth Amendment's restrictions on state governments provides ample authority for Congress to legislate in this area while also maintaining a distinction between the States' plenary powers and the federal government's limited, enumerated powers. The Equal Protection Clause in

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<sup>29</sup> U.S. Const. amend. XIV, § 1.

<sup>30</sup> *Id.* § 5.

particular is a more textually and historically plausible source of congressional authority to legislate against abortion than either the Privileges or Immunities Clause or the Due Process Clause.

As Rep. John Bingham (R-OH), the principal legislative architect of the Fourteenth Amendment, noted before Congress in 1866, the “care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution is in the States, and not in the Federal Government.” As he insisted to his congressional colleagues, the Constitution of 1787:

Never conferred upon the Congress of the United States the power – sacred as life is, first as it is before all other rights which pertain to man on this side of the grave – to protect it in time of peace by the terrors of the penal code within organized states; and Congress has never attempted to do it. There never was a law upon the United States statute-book to punish the murderer for taking away in time of peace the life of the noblest, and the most unoffending, as well, of your citizens, within the limits of any State of the Union. The protection of the citizen in that respect was left to the respective States, and there the power is to-day.<sup>31</sup>

After the passage of the Fourteenth Amendment in 1868, open questions remained regarding how much of the traditional authority of the States had been transferred to the national government and to what extent the Fourteenth Amendment altered the Constitution’s framework of limited and enumerated congressional powers.

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<sup>31</sup> CONG. GLOBE, 39th Cong., 1st Sess. at 1291-93 (1866).

1. *The Privileges or Immunities Clause of the Fourteenth Amendment*

The open questions on the ramifications of the Fourteenth Amendment quickly came to the fore in litigation over the meaning of the Privileges or Immunities Clause. In the *Slaughter-House Cases*,<sup>32</sup> the Court had to decide whether the Fourteenth Amendment guaranteed a national charter of rights enforceable by the federal government against the States. After the Louisiana legislature granted an exclusive monopoly to the Crescent City Livestock Landing and Slaughter-House Company, several butchers complained that the State had abridged their fundamental right to practice a lawful vocation, which they alleged was one of the privileges of citizenship.

Justice Samuel Miller, writing for a majority of the Court, argued that such an expansive interpretation of the Privileges or Immunities Clause would effectively transfer responsibility for the protection of fundamental rights from the States to the federal government.<sup>33</sup> The consequences of this interpretation would be “so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions” that it would “fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character . . . .”<sup>34</sup> It would ultimately subvert “the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people . . . .”<sup>35</sup>

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<sup>32</sup> 83 U.S. 36 (1873).

<sup>33</sup> *Id.* at 77-78.

<sup>34</sup> *Id.* at 78.

<sup>35</sup> *Id.*

Miller's interpretation was less disruptive of antebellum American federalism. There is a distinction, he claimed, between those privileges and immunities guaranteed by state governments (in state constitutions and laws) and those guaranteed by the national government.<sup>36</sup> National privileges and immunities, he insisted, were those which "owe their existence to the Federal government, its National character, its Constitution, or its laws."<sup>37</sup> Miller offered as examples the right of citizens to run for federal office, to petition Congress for a redress of grievances, to use the navigable waters of the United States, and to "demand the care and protection of the federal government" when traveling on the high seas and in foreign jurisdictions.<sup>38</sup> Yet even after the passage of the Fourteenth Amendment, Miller argued, it remained the duty of state governments to protect fundamental rights to life, liberty, and property.<sup>39</sup> The effect of this decision in the long term, however, was not to preserve the authority of state governments over properly local objects. Rather, it was to render the Privileges or Immunities Clause a dead letter, and turn attention to the Due Process Clause as a possible vehicle for fundamental rights jurisprudence.

Rep. Bingham offered an alternative interpretation of the Privileges or Immunities Clause. Bingham sought precisely to ratify a national charter of fundamental rights that would apply the Bill of Rights against the States. Speaking on the floor of the House of Representatives in 1866, Bingham declared:

I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath [to support the Constitution, including restrictions on states in

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<sup>36</sup> *Id.* at 78-79.

<sup>37</sup> *Id.* at 79.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 82.

the Fourteenth Amendment], and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution.<sup>40</sup>

Bingham did not advocate the radical conception of the federal government subsuming the States that Justice Miller feared. Rather, he understood Congress' power to enforce the terms of the Fourteenth Amendment to be remedial. On this understanding, Congress had not appropriated to itself a general police power from the States, and States remained the primary caretakers of the objects internal to their jurisdictions, including the natural rights of citizens. But Congress was empowered to enforce the Fourteenth Amendment against egregious violations of fundamental rights by recalcitrant state actors.

Even so, Fourteenth Amendment privileges and immunities are specifically those of *citizens* of the United States. Properly understood, the right to be free from arbitrary violence is a natural right and not a right that depends on citizenship. As Hadley Arkes explains,

The visitor from Britain gets off a plane in New York, and he will not have to show his passport before the police will protect him from a lawless assault in the street. His 'right' not to suffer that kind of lawless attack does not depend at all on his citizenship, or his membership in this polity.<sup>41</sup>

A right to life is a right that one holds by virtue of being a person and not simply a citizen of a particular political community. The Privileges or Immunities Clause is practically a dead letter, but it also

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<sup>40</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1291-93 (1866).

<sup>41</sup> HADLEY ARKES, NATURAL RIGHTS AND THE RIGHT TO CHOOSE 13 (2002).

is theoretically a poor place to root congressional authority over abortion.

The decision in the *Slaughter-House Cases* largely put an end to any discussion about the Privileges or Immunities Clause as a guarantee of national fundamental rights of citizens against abridgment by state governments. This did not end discussion of fundamental rights in the Fourteenth Amendment, however. After *Slaughter-House*, fundamental rights claims centered on the Fourteenth Amendment's Due Process Clause. Unlike the Privileges or Immunities Clause, both the Due Process Clause and the Equal Protection Clause protect *persons* rather than citizens and therefore are not subject to the same difficulty. Invoking the Due Process Clause as a source of congressional power is, however, fraught with other historical and theoretical challenges.

## 2. *The Due Process Clause of the Fourteenth Amendment*

*Lochner v. New York*<sup>42</sup> is the most famous in a line of cases inaugurating a jurisprudence of what is known now as substantive due process. In *Lochner*, the Court struck down a New York statute regulating the working hours of bakers as an unconstitutional deprivation of liberty without due process of law. Regardless of the procedures followed by the legislative or executive branches, the Court insisted, the law's arbitrary interference with personal liberty to contract made it unconstitutional.<sup>43</sup> In other words, the Due Process Clause forbade the State from depriving any person of certain rights even if those rights are not specifically enumerated in the Constitution and even if the State follows correct procedures in enacting and enforcing the statute.

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<sup>42</sup> 198 U.S. 45 (1905).

<sup>43</sup> *Id.* at 64.

Through the 1920s, the Court then extended Fourteenth Amendment due process protections to families facing discriminatory education legislation, including laws that forbade the teaching of German in *Meyer v. Nebraska*<sup>44</sup> and laws that effectively outlawed attendance at Catholic schools in *Pierce v. Society of Sisters*.<sup>45</sup> While the Due Process Clause was a dubious means of constitutional relief in these cases, these judgments were tied to notions of liberty to contract and the primary responsibility of parents over the education of their children.

In the 1930s the Court moved away from economic substantive due process, but in the post-war era it expanded its substantive due process jurisprudence into a brave new world of contraception and abortion. From *Griswold v. Connecticut*<sup>46</sup> to *Roe v. Wade*<sup>47</sup> the Court found that the Fourteenth Amendment's Due Process Clause protected a right to privacy and shielded certain sex-related activities from state interference, including a fundamental constitutional right to procure an abortion. As the Court framed the abortion issue in *Roe*, the constitutional rights and interests of the mother had to be balanced against the state's interest in protecting "the potentiality of human life."<sup>48</sup> Gone is any notion of the bonds of familial duty or responsibility as the background for fundamental rights claims affecting the family, as it was in early cases such *Meyer* and *Pierce*. There is a clash of rights and interests that courts must now adjudicate and weigh using criteria put forth in *Roe* and revised in *Casey*.

Yet even if one were to find a substantive right to life in the Due Process Clause, the text only restrains the *State* from depriving

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<sup>44</sup> 262 U.S. 390 (1923).

<sup>45</sup> 268 U.S. 510 (1925).

<sup>46</sup> 381 U.S. 479 (1965).

<sup>47</sup> 410 U.S. 113 (1973).

<sup>48</sup> *Id.* at 164.

individuals of life, liberty, and property. It says nothing about private individuals depriving one another of life, liberty and property, for example, by committing acts of violence against each other. In the tragic case of *DeShaney v. Winnebago County*,<sup>49</sup> which involved an instance of severe child abuse, Chief Justice William Rehnquist correctly noted that the Fourteenth Amendment's Due Process Clause was written as a limitation on state government power.<sup>50</sup> "Its purpose was to protect the people from the State," Rehnquist wrote, "not to ensure that the State protected them from each other."<sup>51</sup> In order to make the case that the Due Process Clause empowers Congress to pass national laws protecting individuals against *private* acts of violence, one would need to demonstrate that the State was in some meaningful sense responsible for the violence perpetrated by one private individual against another. A more straightforward argument for congressional power is rooted in the terms of the Equal Protection Clause.

### 3. *The Equal Protection Clause of the Fourteenth Amendment*

Although neither the Privileges or Immunities Clause nor the Due Process Clause provide obvious warrant for congressional legislation in this area, there remains the Equal Protection Clause, which prohibits States from denying "to any person within its jurisdiction the equal protection of the laws."<sup>52</sup> As part of its Section 5 enforcement power, Congress could declare that States are not providing equal protection to unborn victims of violence and therefore enact remedial national legislation.

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<sup>49</sup> 489 U.S. 189 (1989).

<sup>50</sup> *Id.* at 195.

<sup>51</sup> *Id.* at 196.

<sup>52</sup> U.S. Const. amend. XIV, § 1.

The Equal Protection Clause argument for congressional power to regulate abortion therefore rests on two premises:

- (1) Unborn human beings are persons and
- (2) Under Section 5 of the Fourteenth Amendment, Congress has power – which it may or may not use – to enact remedial legislation protecting unborn persons when states fail to provide the equal protection of the law to unborn persons.

The Supreme Court's opinion in *Roe v. Wade* complicates the issue, of course, since the Court declared most state abortion laws on the books in the 1970s unconstitutional. The federal legislature would therefore be engaged in remedying a state failure to protect human life that was partly occasioned by the imposition of a regulatory framework by the federal courts. This would be done based on an independent legislative finding that unborn human beings are persons for the purposes of congressional enforcement of the Fourteenth Amendment.

The argument that the Equal Protection Clause—or any other clause in the Fourteenth Amendment—empowers Congress to pass national legislation outlawing abortion must address two serious questions. The first one is whether abortions performed without any state involvement would bring up a Fourteenth Amendment issue at all. The explicit terms of the Fourteenth Amendment (“no State shall”) apply to state actions—not to the actions of private actors within the States. While Congress therefore could invoke the Fourteenth Amendment to prohibit States from performing abortions themselves, in state-run hospitals and clinics, it would appear that, on originalist grounds, the Fourteenth Amendment does not empower Congress to legislate against private violence and assault within the jurisdiction of the States generally. What the Fourteenth Amendment's chief architect said of the Constitution prior to the Civil War remains true after the Reconstruction Amendments: “Our Constitution never conferred upon the Congress

of the United States the power—sacred as life is, first as it is before all other rights which pertain to man on this side of the grave—to protect it in time of peace by the terrors of the penal code within organized states.”<sup>53</sup>

It is important to consider the background context of the Equal Protection Clause before turning to the limits on state action in Equal Protection Clause jurisprudence and the appropriateness of legislation protecting the unborn. The Fourteenth Amendment was passed partly to shore up doubts about the constitutionality of the Civil Rights Act of 1866.<sup>54</sup> Significantly, that act protected a broad federal right for individuals to have the “full and equal benefit of all laws and proceedings for the security of person and property . . . and shall be subject to like punishment, pains, and penalties, and to none other” irrespective of race.<sup>55</sup> This immediate purpose, however, does not limit the application of the Equal Protection Clause exclusively to race. As David Smolin explains in the *Heritage Guide to the Constitution*,

The primary intent of the Equal Protection Clause was to require states to provide the same treatment for whites and freed slaves in regard to the class of personhood and citizenship rights enumerated in the Civil Rights Act of 1866. The clause is not limited to racial classifications, in large part because the framers were also concerned about white Union loyalists, who also suffered discriminatory treatment in the South. In addition, this general language reflected antislavery Republican jurisprudence, which drew links between the Declaration of Independence, natural law and

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<sup>53</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1291-93 (1866).

<sup>54</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1291-93 (1866).

<sup>55</sup> Civil Rights Act of 1866, 14 Stat. 27, 27 (1866).

natural rights, and constitutional jurisprudence. From an originalist constitutional perspective, application of the Equal Protection Clause to rights or issues beyond the scope of the 1866 Civil Rights Act can rest upon the broader principle enacted by the framers—their jurisprudence of equality linking the Declaration of Independence to the Constitution.<sup>56</sup>

The argument for congressional power in the area of abortion rests on this principle of equality. Human beings are inherently equal by virtue of their status as human beings. When States fail to secure the equal protection of the laws for persons at any stage of development, Congress may choose to enact remedial national legislation. This does not transfer the entire domain of criminal law to Congress, and this does not require Congress to enact any particular measure. What that legislation looks like is a matter of prudential political judgment that must take into account a variety of cultural, historical, political, and legal factors.

### III. CONSTITUTIONAL PERSONS AND THE ORIGINALIST CRITIQUE

Some originalists raise a challenge to the claim that Congress may regulate abortion under the Fourteenth Amendment by criticizing the notion that the unborn are, or could be considered, constitutional persons for the purpose of enforcing the Fourteenth Amendment. According to Robert Bork, for example, the Constitution says nothing about abortion, and therefore leaves the

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<sup>56</sup> David Smolin, *Equal Protection*, in THE HERITAGE GUIDE TO THE CONSTITUTION 400 (Meese et al. eds., 2005).

issue entirely to the discretion of state legislatures.<sup>57</sup> On Bork's reading, since the records of congressional and ratification debates are bare of any discussion of abortion or the implications of the Fourteenth Amendment's language for the issue of abortion, it follows that the original understanding of the word "person" was essentially *born human being*.<sup>58</sup>

Giving the issue back to the States would of course be an outcome preferable to the abortion regime bequeathed in *Roe v. Wade*, as States would at least be free to regulate abortion as they see fit.<sup>59</sup> There is, however, a plausible case to be made that the public understanding of the word "person" in the mid-nineteenth century did in fact include the unborn. Indeed, there is strong evidence that our nineteenth-century forebears did not entertain artificial or legal distinctions that would relegate unborn human beings to the status of non-persons. This is of more than just historical interest. "The case assumes a different complexion," Richard Epstein noted in an essay shortly after the decision in *Roe*, "if we decide that the unborn child is, or should be treated as, a person."<sup>60</sup>

Part of our confusion on this issue is a direct result of the specious historical claims the Supreme Court relied on in its decision in *Roe v. Wade*. In his majority opinion, Justice Blackmun insisted that

At the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American

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<sup>57</sup> See, e.g., Nathan Schlueter & Robert H. Bork, *Constitutional Persons: An Exchange*, FIRST THINGS (Jan. 2003), <http://www.firstthings.com/article/2003/01/002-constitutional-persons-an-exchange-on-abortion>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 177 (1973).

statutes currently in effect [in 1973]. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century.<sup>61</sup>

Blackmun had leaned heavily on the work of New York Law Professor Cyril Means when discussing the history of abortion in the United States, citing Means seven times in his official opinion.<sup>62</sup> Professor Means served as counsel to the National Association for the Repeal of Abortion Laws (since renamed NARAL-Pro Choice America). In a law review article published in the 1970s, Means put forward the novel historical claims that (a) the right to procure an abortion had been a common law liberty that was broadly recognized at the American founding, but was only later restricted by mid nineteenth-century anti-abortion statutes (b) these mid-nineteenth century anti-abortion statutes aimed only at protecting the life and health of the mother and not the protection of unborn human life.<sup>63</sup>

Both claims have since been roundly discredited.<sup>64</sup> Although eighteenth and nineteenth-century courts did adopt common law standards to refuse to indict abortion prior to quickening (*i.e.*, the detection of fetal movement), this does not mean that abortion was a

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<sup>61</sup> *Roe v. Wade*, 410 U.S. 113, 140-41 (1973).

<sup>62</sup> *Id.* at 133-35, 139, 148, 151 nn. 21-22, 26, 33, 42, 47.

<sup>63</sup> See Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Rise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y. L.F. 335, 336 (1971).

<sup>64</sup> For an exhaustive discussion of the fraught academic literature on nineteenth-century abortion history, see JOSEPH W. DELLAPENA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (2006). See also JUSTIN BUCKLEY DYER, *SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING* 105-132 (2013).

common-law liberty, as Means and Blackmun suggested. Courts did not usually indict for pre-quickening abortion because evidentiary rules required proof that the fetus was alive when the abortive act took place and that the act caused fetal death.<sup>65</sup> Yet by the middle of the nineteenth century there were at least seventeen state codes that characterized acts against fetuses as “manslaughter,” “murder,” and “assault with the intent to murder.”<sup>66</sup> It also is manifest that nineteenth-century antiabortion statutes unequivocally sought to protect the lives of unborn human persons from deliberate destruction. In 1868, when the Fourteenth Amendment was ratified, thirty of the thirty-seven States had anti-abortion statutes on the books and twenty-seven of those States prohibited abortion attempts *before* quickening.<sup>67</sup> Most abortion statutes were included in the section of the State codes that defined “offenses against the person,” and these statutes used the terms “foetus” and “child” interchangeably.<sup>68</sup>

The Ohio state legislature voted to ratify the Fourteenth Amendment and pass a statute criminalizing abortion in the same legislative session.<sup>69</sup> Revealingly, the Ohio Senate Committee on Criminal Abortion that drafted the statute described abortion as “child-murder” and insisted that the best scientific evidence available indicated that the “foetus in utero is alive from the very

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<sup>65</sup> See JOHN KEOWN, *ABORTION, DOCTORS, AND THE LAW: SOME ASPECTS OF THE LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1803-1982* at 3 (1988); JOSEPH DELLAPANNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* 135 (2006).

<sup>66</sup> James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 44 (1985).

<sup>67</sup> *Id.* at 33-34.

<sup>68</sup> *Id.* at 70.

<sup>69</sup> GENERAL AND LOCAL LAWS AND JOINT RESOLUTIONS OF THE STATE OF OHIO, VOLUME 64, 202-3 (Columbus, OH: L.D. Meyers & Bro., 1867)

moment of conception.”<sup>70</sup> Citing a turn-of-the-century medical textbook, the committee also maintained that “[t]o extinguish the first spark of life is a crime of the same nature, both against our Maker and society, as to destroy an infant, a child, or a man.”<sup>71</sup> Evidently, the Ohio legislators who voted to ratify the Fourteenth Amendment thought unborn human beings were persons.

Although abortion was not specifically addressed in any of the extant debates over the writing and ratification of the Fourteenth Amendment, abortion was treated before and after ratification as a matter which States were empowered to act against. The absence of any specific mention of abortion in the debates over the Fourteenth Amendment is no more surprising than the absence of any specific mention of infanticide; the silence provides no positive evidence that the framers and ratifiers of the amendment thought that unborn human beings were moral non-persons whom others had a constitutional liberty to destroy.

In fact, the historical record leans heavily in the other direction: medical treatises and legislative documents of the time denounce abortion as a great crime against another human being. Horatio Storer, who spearheaded the American Medical Association’s mid-century efforts to strengthen laws against abortion in the United States, and Franklin Fiske Heard, one of the leading jurists of the period, published a book the very same year the Fourteenth Amendment was ratified that begins with the assertion that “if the foetus be already, and from the very outset, a human being, alive, however early its stage of development, and existing independently

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<sup>70</sup> *The Journal of the Senate of the State of Ohio, Fifty-Seventh General Assembly* (Columbus, Ohio, L.D. Myers & Bro. 1867).

<sup>71</sup> *Id.* at app. 233-34.

of its mother, though drawing its sustenance from her, the offence becomes, in every stage of pregnancy, MURDER."<sup>72</sup>

The widespread efforts to criminalize abortion at the state level in the nineteenth century were motivated out of concern for the lives of unborn human beings. Historically and empirically, the warrant for an inclusive construction of the meaning of personhood in the Fourteenth Amendment is strong.<sup>73</sup> What we currently know scientifically about unborn life is striking. Robert George and Christopher Tollefsen summarize one of the basic findings of modern embryology: "A human embryo is a whole living member of the species *Homo sapiens* in the earliest stage of his or her natural development."<sup>74</sup>

Congress arguably has the authority to exercise prudential political judgment to enact remedial legislation to ensure the equal protection of unborn human life at the state level precisely because these beings are human persons.<sup>75</sup> Although Section 5 of the Fourteenth Amendment empowers Congress to act, it does not require Congress to take any particular action or to pursue the politically untenable goal of unilaterally and immediately requiring States to ban all abortions. As Gerard Bradley argues,

The important effect of personhood under equal protection would be inclusion of the unborn within the protection of state homicide statutes, that proscribe the various ways of "causing the death of another person." Failure of state

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<sup>72</sup> HORATIO R. STORER & FRANKLIN FISKE HEARD, *CRIMINAL ABORTION: ITS NATURE, ITS EVIDENCE, AND ITS LAW* 9-10 (Boston, Little, Brown, & Co. 1868).

<sup>73</sup> Witherspoon, *supra* note 66, at 70.

<sup>74</sup> ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, *EMBRYO: A DEFENSE OF HUMAN LIFE* 50 (2008).

<sup>75</sup> For a more detailed overview of the debate over personhood, see JUSTIN BUCKLEY DYER, *SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING* 133-155 (2013).

officials to enforce these laws on behalf of the unborn would be a constitutional violation.<sup>76</sup>

Even within this framework, however, States would have significant latitude in applying the ordinary rules and norms of criminal law to the complicated questions involved in abortion. Bradley notes that “States enjoy considerable freedom (consistent with the Fourteenth Amendment) to specify conditions under which use of deadly force and acts which create foreseeable risks to the lives and health of others may be performed without criminal liability.”<sup>77</sup> The Fourteenth Amendment argument for Congressional power is nuanced. It does not transfer authority and responsibility for the protection of life from the states to the federal government, but it does arguably allow Congress to enact some regulatory framework that sanctions States or individuals acting under state authority for failing to provide equal protection to unborn persons.

#### IV. CONTESTING JUDICIAL SUPREMACY

The argument sketched above is in obvious tension with the Supreme Court’s legal precedents and its dicta about the personhood of unborn human beings. Making the principled argument for congressional power in this area therefore invites us to consider whether the Constitution grants ultimate or final interpretive authority to the Supreme Court of the United States. Congressional legislation limiting abortion is based on premises about the constitutional status of unborn human beings and the constitutional authority of Congress that are at odds with the Supreme Court’s decisions in *Roe* and *Casey*. We must ask, then, whether the Supreme Court’s decisions in those cases (or any others) by themselves finally

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<sup>76</sup> Gerard V. Bradley, *Life’s Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 344-45 (2014).

<sup>77</sup> *Id.* at 345.

and authoritatively settle the constitutional dispute. Note this is not to call into question the power of judicial review but rather to question the much stronger claim of judicial supremacy: that is, the notion that the Supreme Court alone may authoritatively settle the meaning of the Constitution for all citizens and government officials. Indeed, the Court's vision of itself as the final interpretive authority of constitutional meaning is false normatively and historically.<sup>78</sup> Nothing in Article III of the Constitution gives the Court this power. The Court's claim to interpretive supremacy requires, in practice, the assent of the legislative and executive branches of government. Congress and the President have ample constitutional tools to contest the Court's claims to interpretive supremacy when there is a legislative and executive will to do so, including through ordinary legislation, funding decisions, bills shaping the structure and jurisdiction of the judiciary, signing statements, international agreements, informal speeches, prosecutorial discretion, and the like.

When faced with the disastrous *Dred Scott* ruling, for example, in which the Court argued that Congress had no authority to prevent the spread of slavery in the federal territories, Abraham Lincoln and the antebellum Republicans argued that the Court's judgments do not finally settle all matters of constitutional interpretation but bind only the parties to the particular suit before the Court. In April 1860, during debates in the 36<sup>th</sup> Congress, John Bingham put the argument this way:

If the Supreme Court is to decide all constitutional questions  
for us, why not refer every question of constitutional power

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<sup>78</sup> There is a large corpus of academic work contesting the concept of judicial supremacy both historically and normatively. Two very good works are KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007) and GEORGE THOMAS, *THE MADISONIAN CONSTITUTION* (2008).

to that body not already decided, before acting upon it. I recognize the decisions of that tribunal as of binding force only as to the parties and privies to the suit, and the rights particularly involved and passed upon. The court has no power in deciding the right of Dred Scott and of his children to their liberty, to decide, so as to bind this body, that neither Congress, nor a Territorial Legislature, nor any human power, has authority to prohibit slavery in the Territories; neither has that tribunal power to decide that five million persons, born and domiciled in this land, 'have no rights which we are bound to respect.'<sup>79</sup>

In his First Inaugural Address, Lincoln further developed this idea in memorable prose. "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court," Lincoln remarked, "...the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."<sup>80</sup>

Lincoln was not original on this score. His thought builds on the bedrock principles of American constitutionalism. As James Madison noted during constitutional ratification debates, the "several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."<sup>81</sup> To insist that the Supreme Court is empowered, through the course of ordinary litigation between two parties, to exercise an exclusive or superior right of settling the

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<sup>79</sup> CONG. GLOBE, 36th Cong., 1st Sess. 1839 (1860).

<sup>80</sup> President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861).

<sup>81</sup> THE FEDERALIST NO. 49, at 311 (James Madison) (Clinton Rossiter ed., 2003).

boundaries of power in the American constitutional system is to strike at the root of the constitutional separation of powers.

Lincoln provides just one example of a long tradition of presidents—including Jefferson, Jackson, Franklin Roosevelt, and Reagan—who espoused Madison’s view that each branch of the federal government has a coordinate right and duty to interpret the Constitution. Congress too has resisted judicial supremacy in practice. After the Court struck down legislative vetoes in *INS v. Chadha*,<sup>82</sup> to take just one example, Congress ignored the ruling and has used the functional equivalent of the legislative veto even more frequently. As Louis Fisher observed in a 2005 report for the Congressional Research Service, “more than 400 new legislative vetoes (usually of the committee variety) have been enacted since *Chadha*.”<sup>83</sup> Policy, Fisher notes, has been determined “more by pragmatic agreements hammered out between the elected branches than by doctrines fashioned and announced by the Supreme Court.”<sup>84</sup>

Following *Employment Division v. Smith*,<sup>85</sup> in which the Supreme Court adopted the secular-regulation view of the First Amendment’s Free Exercise Clause, Congress voted 435-0 in the House and 97-3 in the Senate to pass the Religious Freedom Restoration Act (“RFRA”), an exercise of ordinary congressional legislation which proclaimed the freedom-protective view of Free Exercise to be a proper interpretation of the First Amendment contrary to the Supreme Court’s ruling.<sup>86</sup> Although in *Boerne v. Flores*<sup>87</sup> the Court struck down

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<sup>82</sup> 462 U.S. 919, 959 (1983).

<sup>83</sup> LOUIS FISHER, CONG. RESEARCH SERV., RS22132, LEGISLATIVE VETOES AFTER CHADHA 2 (2005).

<sup>84</sup> *Id.*

<sup>85</sup> 494 U.S. 872 (1990).

<sup>86</sup> Pub. L. No. 103-141, § 2, 107 Stat. 1488, 1488 (1993).

<sup>87</sup> 521 U.S. 507 (1997).

this part of RFRA and insisted on the supremacy of its own interpretation,<sup>88</sup> the entire episode only underscores the way constitutional conflict between the branches drives constitutional development. Given sufficient will, Congress could continue to act on its own independent interpretation of the Fourteenth Amendment despite the Supreme Court's ruling. Section 5 of the Fourteenth Amendment – which says “Congress shall have power to enforce, by appropriate legislation, the provisions of this article” – does indeed provide a strong textual basis to claim just such an independent congressional power over constitutional interpretation, particularly with respect to the protection of unborn human life. As Professor Robert George suggests, “the proper response of pro-life citizens” to decisions such as *Roe* and *Casey* is to resist by lawful and constitutional means judicial “usurpation of our authority, as a people, to act through the institutions of representative democracy to protect the rights of the unborn.”<sup>89</sup>

#### CONCLUSION

This, now, is the complicated constitutional landscape on which the abortion debates play out. The protection of life from private violence (such as with laws against murder or assault or abortion) was traditionally within the province of the States. However, the Supreme Court in *Roe* overturned the States' longstanding restrictions on abortion without constitutional warrant. Filling a void in state law created by the federal courts, Congress has now taken up measures to roll back the abortion license through national legislation. These laws can be defended as valid exercises of

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<sup>88</sup> *Id.* at 536.

<sup>89</sup> Robert P. George, *Justice, Legitimacy, and Allegiance: “The End of Democracy?” Symposium Revisited*, in CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE 314, 324 (Sotirios A. Barber & Robert P. George eds., 2001).

legislative power under the Supreme Court's twentieth-century Commerce Clause jurisprudence, but that jurisprudence itself threatens to unravel the Constitution's scheme of limited, enumerated legislative power. An alternative argument for congressional power under the Fourteenth Amendment relies on a constitutional interpretation that is at odds with established federal case law. Absent the judicial overturning of *Roe v. Wade*, moving forward with legislation would require a congressional willingness to contest the Supreme Court's claim to judicial supremacy in constitutional interpretation.

Legislators and judges must take all of this and more into account when crafting laws and legal precedents to protect unborn human life. The decision in *Roe v. Wade* badly distorted the political and constitutional calculations by inventing a new version of substantive due process to proclaim a constitutional right to abortion previously unknown. This has no historical basis in the Due Process Clause or in the natural-law principles that undergird the Fourteenth Amendment. The *Roe* Court belied its lack of any textual basis by engaging in a long and now-discredited historical justification of abortion as a common-law liberty. The *Casey* Court then inaugurated the "undue burden" standard, but could point to neither constitutional text nor historical precedent to justify this standard of its own making. The Court continues to apply the framework from *Roe* and *Casey* in a way that makes it difficult for a State to enact regulations limiting or discouraging abortion within its own jurisdiction.<sup>90</sup>

Many citizens of good will continue to oppose the Court's decision; yet there are better and worse ways of opposing it.

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<sup>90</sup> The most recent case along these lines is *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which struck down two provisions of Texas state law under the *Roe-Casey* framework.

Although the protection of life, liberty, and property remains primarily a state-level function, Congress does have plausible constitutional authority to legislate to protect unborn human life in some circumstances. In the long run, however, reliance on the Court's modern Commerce Clause jurisprudence threatens to further chip away at the Constitution's model of limited, enumerated federal legislative powers. The Fourteenth Amendment provides a more promising path forward. Ultimately, citizens and lawmakers must pursue a multi-faceted, long-term strategy for protecting human life, prudentially weighing alternatives in light of our Constitution, our history, and our case law, so that we may preserve constitutional government for generations yet unborn.