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New Radical Laws in States Hostile to Unborn Children

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The United States Supreme Court will soon release its opinion in *Dobbs v. Jackson Women's Health Organization*, potentially marking the dawn of a brighter future for unborn children and their mothers in at least 22 states.[i] If legislators, who are accountable to the American people, regain full authority to regulate abortion, each of these states may begin enforcing one or more strong, but currently unenforced, abortion bans.[ii] These bans either pre-date *Roe* but were never repealed,[iii] were explicitly written to take effect when the states regain this authority,[iv] or were enacted in recent years and are presently enjoined.[v] Further, eight additional states show promise for achieving stronger protections.[vi]

The outlook is bleaker in the remaining states, however, where U.S. Supreme Court interference is not the only impediment to the enactment of life-saving legislation. In at least 16 of these states and the District of Columbia,[vii] lawmakers have written explicit protection for abortion into their state codes, ensuring that unborn children have virtually no protection at any stage of pregnancy. These "abortion protection laws," many of which were enacted or broadened in the last four years, will remain in effect no matter what the Court decides in *Dobbs.*

While 10 of the abortion protection states limit abortion after either 24 weeks or viability, with the authority to determine gestation or viability inappropriately granted to abortion providers, all 10 of these states permit later abortions when necessary to preserve the life or *health* of the mother. Because the term "health" has been interpreted by courts to include virtually any justification for abortion, an undefined health exception swallows any late-term abortion prohibition. Illinois's law explicitly adopts a health definition based on the U.S. Supreme Court's decision in *Doe v. Bolton*,[viii] the companion case to *Roe v. Wade*—health is "all factors that are relevant to the patient's health and well-being, including, but not limited to, physical, emotional, psychological, and familial health and age."[ix]

These broad or undefined health exceptions permit an abortion provider to determine both an unborn child's gestation and when her mom's health "benefits" from aborting her. [x] These states have also not shown any intent to change how viability is determined even as medical and scientific advancements move viability to as early as 21-weeks. At least the states that have abortion protection laws without late-term limitations are intellectually honest—they make no pretense of protecting unborn children at any gestation.

Abortion-protecting states have also repealed or weakened many broadly supported laws that mandate informed consent and reflection requirements prior to abortion, limit abortion provision to licensed physicians, establish safety regulations tailored to address the risks from abortion, adequately screen women for coercion and abuse, and ensure parental

involvement in minors' abortion decisions. Further, once abortion is statutorily protected, these commonsense regulations to protect mothers and unborn children stand little chance of enactment.

The terminology in the abortion-protection laws, particularly those recently enacted or updated, displays the stunning distance that legislators will travel to avoid acknowledging the humanity of unborn children. The laws also entirely ignore dangers posed to women by surgical and drug-induced abortions. The lawmakers in these states are in a race to the bottom, enacting laws designed to attract abortion providers to their states and draw women seeking abortions that are not permitted in their home states.

In *On Point* 48, scholar Katey Price discussed the new or expanded radical abortion protection laws enacted in 2019 and 2020 in Illinois, Maine, New York, Rhode Island, and Vermont.[xi] Since that paper's publication, Colorado, Connecticut, Maryland, Massachusetts, New Jersey, and Washington have amplified or codified a special status for abortion in their state law. Also, citizens in Vermont will soon vote on whether to enshrine abortion in their state constitution and New York has appropriated millions of dollars to expand the state's capacity for abortion.

These new laws are horrific for the unborn. The motives behind their enactment are also transparent. Even without these laws, none of the abortion-friendly states would have enacted meaningful protections for unborn babies at any stage of pregnancy upon *Roe's* reversal. Well before 2019, most already protected abortion under court order or by statute, or at least demonstrated marked hostility to pro-life laws. Through the enactment of these new laws, legislators and governors in abortion-protecting states are simply pandering to their base, driving a false narrative that abortion might become unavailable in their states without these draconian new provisions.

Colorado

In 2022, Colorado enacted the "Reproductive Health Equity Act."[xii] Abortion was already legal throughout pregnancy before the enactment of this law; however, Colorado lawmakers decided to "modernize" Colorado law by enshrining abortion protections in the state code. The Act states that a "pregnant individual has a fundamental right to … have an abortion and to make decisions about how to exercise that right." Strikingly, Colorado explicitly excludes a whole group of human beings from any legal recognition or protection under the state's laws: "[a] fertilized egg, embryo, or fetus does not have independent or derivative rights under the laws of this state."

While Governor Polis posited in his signing statement that the new law will "preserve *Coloradans'* right to choose" abortion, the codification of Colorado's hostility towards the unborn ensures that unborn children from life-affirming states will continue to lose their lives in the Centennial State as well. Knowing the American people do not support abortion until birth, Governor Polis repeatedly avoided answering on national television whether the law he signed did in fact permit abortion through an entire pregnancy.

Connecticut

Connecticut enshrined abortion protections in state law in 1990, providing that "[t]he decision to terminate a pregnancy prior to the viability of the fetus shall be solely that of the pregnant woman in consultation with her physician. No abortion may be performed upon a pregnant woman after viability of the fetus except when necessary to preserve the life or health of the pregnant woman."[xiii]

On May 5, 2022, Governor Ned Lamont signed the "Reproductive Freedom Defense Act,"[xiv] permitting advanced practice registered nurses, nurse-midwives, and physician assistants to perform "medication and aspiration" abortions. The new law also "protects" abortion providers and others who assist women in obtaining abortions from liability or prosecution in life-affirming states. In other words, Connecticut will not extradite abortion providers who have been convicted of crimes in other states or enforce civil judgments against abortion providers entered in other states. The statute, in an obvious response to Texas's law permitting private lawsuits against abortion providers who violate the law, also permits anyone in Connecticut who is sued for violating another state's law protecting the unborn to countersue in Connecticut courts.

Through these changes to Connecticut's law, lawmakers encourage abortion tourism on an unprecedented level. The state, clearly not satisfied with permitting unfettered destruction of Connecticut's unborn babies, is permitting nonphysicians to perform abortions *and* has enacted legal protections for abortion providers in a transparent effort to draw both women seeking abortion and abortion providers to the state.

Maryland

Maryland's abortion-protection law was enacted in 1991, providing that "the State may not interfere with the decision of a woman to terminate a pregnancy: (1) Before the fetus is viable; or (2) At any time during the woman's pregnancy, if: (i) The termination procedure is necessary to protect the life or health of the woman;[xv] or (ii) The fetus is affected by genetic defect or serious deformity or abnormality."[xvi]

In April 2022, the Maryland legislature overrode Governor Hogan's veto of an enlargement of Maryland's already expansive abortion protections, the "Abortion Care Access Act."[xvii] Like Connecticut's new law, Maryland's act permits nonphysicians to perform abortions. The Act also mandates public funding for abortion and requires private insurance plans to cover abortion.

Perhaps Maryland lawmakers' most notorious contribution to ensuring that abortion remains available is through the establishment of an "abortion care clinical training program" that will receive $3.5 million each fiscal year in funding. The purpose of the program is to "protect access to abortion care by ensuring that there are a sufficient number of health professionals to provide abortion care." Given the substantial decline in the number of doctors willing to perform abortions in the United States, Maryland is expanding the category of legal providers within its borders and is trying to recruit healthcare personnel into the grisly practice.

Massachusetts

In 1981, the Massachusetts Supreme Judicial Court held that the state's "Declaration of Rights affords a greater degree of protection to the right [to abortion] than does the Federal Constitution,"[xviii] a decision that dramatically limited the state's ability to protect unborn children. However, the state's laws still contained language that acknowledged the humanity of unborn children. No longer. In 2018, the state repealed its pre-*Roe* ban. Then in 2020, Massachusetts lawmakers overrode proabortion Governor Charlie Baker's veto[xix] to enact "the Roe Act,"[xx] through which lawmakers replaced life-affirming text with sterile language that ignores basic biological facts, beginning with the definitions.

The state's previous definition of *abortion* was "the knowing destruction of the life of an unborn child." Now it is "any medical treatment intended to induce the termination of, or to terminate, a clinically diagnosable pregnancy…." The definition of *pregnancy* was "the condition of a mother carrying an unborn child." Now, "the presence of an implanted human embryo or fetus in the uterus." The new law completely removes the term *unborn child* from the statute, demonstrating that the state no longer recognizes unborn children as human beings.

The operative sections of the law provide that the state "shall not interfere with a person's personal decision and ability to … terminate …their own pregnancy consistent with this chapter, or restrict the use of medically appropriate methods of abortion or the manner in which medically appropriate abortion is provided." Nonphysicians are permitted to

perform abortions before 24 weeks, and abortions are limited after 24 weeks. However, there are exceptions for life, physical or mental health,[xxi] or when there is a "lethal fetal anomaly." The law also permits minors older that 15 to obtain an abortion without a parent's consent or notification and removed the state's 24-hour reflection period.

Ironically, facilities where viable unborn children are aborted are required to "maintain life-supporting equipment." This requirement begrudgingly acknowledges the rights of tiny born-alive infants after they exit the birth canal, though the law denies their humanity seconds and centimeters before. The express language of the law states that this equipment will enable abortion providers "to preserve the life and health of a *live birth* and the patient."[xxii] The law's authors simply cannot acknowledge that "live birth" is an *event* that produces a living, moving, fully human *baby* who is a patient like his mother.

New Jersey

The New Jersey Supreme Court has repeatedly found a greater right to abortion in the New Jersey Constitution than the right declared in *Roe v. Wade*: New Jersey's asserted interest in the protection of "potential life" could "at no point during pregnancy [] outweigh the superior interest in the life and health of the mother."[xxiii] Courts have also mandated public funding for abortion. As in Massachusetts, court interference has dramatically limited the state's ability to protect unborn children.

In 2022, New Jersey enacted a law providing that "every individual present in the State, including, but not limited to, an individual who is under State control or supervision, shall have the fundamental right to choose … to terminate a pregnancy."[xxiv] The law expressly invalidates any law, rule, regulation, ordinance, or order that conflicts with the new statute. Further, the law establishes a study that may lead to mandatory abortion coverage in private insurance plans.

Lawmakers in New Jersey have delivered a loud message in a crowded northeast market that abortion providers are open for business in the Garden State.

Washington

In 1991, Washington voters approved a ballot initiative providing that subject to very few restrictions: "[e]very woman has the fundamental right to choose or refuse to have an abortion;" "the state shall not deny or interfere with a woman's fundamental right to choose or refuse to have an abortion;" and "[t]he state shall not discriminate against the exercise of these rights in the regulation or provision of benefits, facilities, services, or information."[xxv]

Specifically, "[t]he state may not deny or interfere with a woman's right to choose to have an abortion prior to viability of the fetus, or to protect her life or health."[xxvi]

In a 2022 act, Washington's lawmakers modified their abortion-protection law to clarify that nonphysicians are permitted to perform abortions and modified the law's language to apply to "pregnant individuals" rather than "women." The state already mandates public funding and private insurance coverage of abortion.

Washington, like its fellow West Coast states, was already very abortion friendly. However, state lawmakers wanted to clarify that they are as committed to denying the humanity of unborn children as the other abortion-protecting states.

Vermont

Vermont enacted a "Freedom of Choice Act" in 2019. Apparently, however, lawmakers do not consider this extreme law sufficient to ensure that the right to abort unborn children is protected in the Green Mountain State.

The November 2022 state ballot will include Proposal 5, the Right to Personal Reproductive Autonomy Amendment, which provides "That an individual's right to personal reproductive autonomy is central to the liberty and dignity to determine one's own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means." While the word abortion is not included in this text, Governor Phil Scott stated:

> A few years ago we passed a law affirming that reproductive health decisions are between a patient and their doctor without government interference. In November Vermonters will have the ability to codify that right in our state Constitution when Prop 5 is on the ballot. So at the end of the day the fundamental rights and liberties of all women will be defended, protected and preserved here in Vermont.

Proposal 5 is as superfluous as it is vague. Vermont already statutorily protects abortion through all nine months of pregnancy. Apparently, a constitutional amendment is the last tool for Vermont's proabortion lawmakers to demonstrate their commitment to abortion.

New York

Governor Hochul of New York must have felt that the Empire State was no longer receiving enough attention for the state's long history of protecting abortion and the draconian anti-life law enacted in 2019. In a recent *Wall Street Journal* article, Ms. Hochul bragged that New York taxpayers are "providing $35 million in urgently needed funding to abortion providers to expand capacity and improve security of their patients and staff. I'm proud of this nation-leading response—we're the first large state in the country to launch a fund like this." While citizens fear for their lives when walking the streets or taking the subway in New York City, Ms. Hochul is pouring millions into addressing phantom threats to the state's abortion centers. In reality, her concern is not really for safety—Ms. Hochul wants to "expand capacity," thereby enriching abortion providers and "offer[ing] safe harbor" to women seeking abortion from other states.

Ms. Hochul also stated that she and her team "mandated that health-insurance plans cover abortion services without cost-sharing, ensured providers can offer abortion telehealth services without barriers, and convened an Abortion Access Working Group to meet regularly with patients, providers, and advocates."

Ms. Hochul hopes that these changes will encourage businesses to relocate to New York, which "offer[s] an ironclad guarantee to defend and uphold equal rights for all," that is, unless you are an unborn child or a pregnant woman coerced to abort. Hochul's comparison of how her pro-abortion policies should welcome business to "the Statue of Liberty … welcoming immigrants and refugees alike" is a bridge way too far. It is doubtful that any immigrant seeking a better life in America is drawn by the right to kill her unborn children. It is equally unlikely that this will be the selling point for many businesses to relocate to New York.

Federal bill

Not to be outflanked to the left by abortion-promoting states, proabortion members of Congress wish to impose these extreme and dangerous policies on the entire country, preempting all life-affirming laws enacted by the states. The "Women's Health Protection Act of 2022" failed in the U.S. Senate on May 11, 2022, but it will certainly receive a vote again.

Like their state counterparts, the authors of the federal bill actively avoid acknowledging the humanity of unborn children or that abortion is dangerous for women. The 2021 version of this bill includes 13 pages of findings cynically treating abortion as "essential health care,"

and the drafters fail to acknowledge that abortion ends the life of a developing human being, making it "medically [*in*]comparable" to any other medical procedure.

The legislation establishes that a "health care provider has a statutory right … to provide abortion services, and may provide abortion services, and that provider's patient has a corresponding right to receive such services" without numerous restrictions (listed in the bill) that states have enacted to protect both unborn babies and their mothers. While the bill allows restrictions on abortions after viability to remain in effect, such restrictions must have a health exception which renders the protection useless.

If enacted, the new federal law would explicitly supersede any conflicting state or federal law and permit the U.S. Attorney General to commence a civil action against any State that violates the law. It would also provide a private right of action for individuals adversely affected by a violation of the Act, and grant abortion providers third party standing to sue on behalf of patients.

Conclusion

The last four years have shown an increase in the enactment of anti-life laws; however, they are concentrated in 16 states that have a long history of supporting abortion. If the right to regulate abortion is returned to the states this summer, citizens in those states will face a dilemma. Do they want their states to be known as abortion destinations? In a stagnant or declining economy, should the abortion industry be one of the few that is growing?

In the states that respond to the Court's decision by banning or strictly limiting abortion, public officials and private organizations are already developing innovative plans and are facilitating a growing network of public and private resources to assist women facing unplanned pregnancy. The goal in these states is to affirm the value of two lives in every unplanned pregnancy—the baby's and the mother's. In challenging times, that is an agenda that can unite us all.

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[i] Alabama, Arizona, Arkansas, Georgia, Idaho, Iowa, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, Wyoming.

[ii] This process will be complicated in some states, necessitating judicial or legislative action. For instance, the state supreme courts in Iowa and Mississippi have held that their state constitutions protect abortion rights (an amendment to Iowa's state constitution clarifying that the constitution does *not* secure a right to abortion may be on the ballot for approval in 2024). Also, some public officials will face resistance from other state or local officials when seeking recognition and enforcement of presently enjoined laws.
[iii] Arizona, Arkansas, Michigan, Oklahoma, Texas, West Virginia, Wisconsin.
[iv] Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas Utah, Wyoming.
[v] Alabama, Arkansas, Georgia, Idaho, Iowa, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas.
[vi] Florida, Indiana, Kansas, Montana, Nebraska, North Carolina, Pennsylvania, Virginia. Efforts to ban abortion in some of these states will present challenges. For instance, state supreme courts in Florida, Kansas, and Montana have held that their state constitutions protect legal abortion (an amendment to Kansas's state constitution clarifying that there is *not* a state constitutional right to abortion will be on the August 2022 ballot). Also, in 2020, Virginia repealed many of its protections for unborn children. However, new opportunities may arise with new pro-life leadership.
[vii] California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington, Washington, D.C. Pro-life efforts in the remaining four states are encumbered by state supreme court decisions holding that state constitutions protect legal abortion (Alaska and Minnesota) or a hostile political climate (New Mexico, which also has unfavorable state court precedent), and New Hampshire (although New Hampshire enacted a ban on abortions after 24 weeks in 2021)).
[viii] 410 U.S. 179 (1973).
[ix] 775 ILCS 55/1-10.
[x] At least six additional states have undefined health exceptions to their viability laws: Alaska, Michigan, Minnesota, New Mexico, Virginia, Wyoming. However, none of these states have enacted legislation that grants abortion broad special protections.
[xi] The paper also discussed anti-life legislation in Virginia. However, Virginia has not enacted a broad abortion protection law.
[xii] Colo. Rev. Stat. §§ 25-6-401–406.
[xiii] Con. Gen. Stat. Ann. § 19A-602(a). Health is undefined. See earlier discussion.
[xiv] Ct. Pub. Act No. 22-19, 2022.
[xv] Health is undefined. See earlier discussion.
[xvi] MD Code, Health-Gen. § 20-209.
[xvii] Ch. 56, Apr. 9, 2022, MD HB 937.
[xviii] *Moe v. Secretary of Administration & Finance*, 417 N.E. 2d 387, 400 (Mass. 1981).
[xix] Governor Baker objected to the provisions that lowered the age of consent for abortion to 16 and expanded abortions permitted after 24 weeks.
[xx] Ch. 263, Mass. Sess. Law Acts of 2020.
[xxi] Health is undefined. See earlier discussion.
[xxii] *See* Mass. Gen. Stat. Ch.112 § 12O (emphasis added).
[xxiii] *Right to Choose v. Byrne*, 450 A.2d 925,941 (N.J. 1982).
[xxiv] Pub. L. 2021, Ch. 375, 2020 NJ S.B. 49.
[xxv] Rev. Code Wash. § 9.02.100.
[xxvi] Health is undefined. See earlier discussion.