PERSONHOOD IN PRACTICE AND SILENCE IN THEORY: HOW NORTH DAKOTA LAW AND *WRIGLEY I* AND *II* BYPASS UNBORN PERSONHOOD

ABSTRACT

The Equal Protection Clause of the Fourteenth Amendment guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Whether unborn children qualify as "persons" within the meaning of the Clause remains among the most significant unresolved questions in constitutional law. In *Roe v. Wade*, the United States Supreme Court held that the word "person" did not include the unborn as used in the Fourteenth Amendment, thereby foreclosing equal protection claims on behalf of fetal life for nearly fifty years. That holding, however, arose from a substantive due process challenge grounded in the right to privacy. The Court's conclusion as to fetal personhood was a threshold determination that preceded and enabled its substantive due process analysis, functioning as a necessary predicate to recognizing a constitutional right to abortion.

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* in 2022 fundamentally altered this constitutional framework. By overruling *Roe* and rejecting substantive due process analysis untethered from constitutional text, history, and tradition, *Dobbs* returned primary authority over abortion regulation to the states while expressly declining to resolve whether unborn children qualify as "persons" under the Fourteenth Amendment.

North Dakota provides a particularly instructive context in which to examine this unresolved question. For decades, the State has enacted statutes recognizing unborn children as distinct legal subjects, including treating them as independent victims under criminal law. Yet recent post-*Dobbs* decisions—*Wrigley v. Romanick* (*Wrigley I*) and *Access Independent Health Services, Inc. v. Wrigley* (*Wrigley II*)—resolved constitutional challenges to abortion regulation without reaching whether unborn children possess constitutional status, as the issue was not briefed by the parties in either case.

This divergence between statutory recognition and constitutional silence creates a structural tension in North Dakota law. This Note examines federal equal protection doctrine, North Dakota's statutory framework, state constitutional interpretation, and historical evidence bearing on the meaning of "person" at the time of the Fourteenth Amendment's ratification to demonstrate that the structural tension between North Dakota's robust statutory framework and the constitutional silence of its own courts is not merely an

anomaly to be tolerated, but a gap that both the federal Equal Protection Clause and the North Dakota Constitution may, and should, fill.

I. INTRODUCTION

For nearly half a century, constitutional abortion doctrine rested on an unexamined premise: that unborn children fall outside the category of "persons" protected by the Fourteenth Amendment.[1] That assumption, announced in *Roe v. Wade*, functioned less as the result of sustained constitutional analysis and more as a doctrinal necessity. If unborn children were constitutional persons, *Roe* itself acknowledged, the asserted right to abortion would collapse.[2] As a result, fetal non-personhood became embedded in constitutional

1. Roe v. Wade, 410 U.S. 113, 158 (1973) (concluding, without sustained historical analysis or adversarial briefing on the equal protection question, that the word "person" as used in the Fourteenth Amendment does not include the unborn), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

2. *See id.* at 156-57 (explaining the appellant's argument would collapse if personhood is established as suggested by the appellee).

law not because it was historically established or textually compelled, but because it was necessary to sustain a substantive due process framework grounded in privacy rather than equal protection.[3]

Nearly half a century later, the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* dismantled that framework.[4] By rejecting *Roe*'s method of abstract balancing untethered from constitutional text, history, and tradition, *Dobbs* returned primary regulatory authority over abortion to the states and expressly declined to resolve whether unborn children qualify as "persons" under the Fourteenth Amendment.[5] The consequence is not doctrinal closure, but the revival of a constitutional question that *Roe* assumed rather than decided—one that courts and legislatures may no longer sidestep by deferring to *Roe*'s now-repudiated framework.

North Dakota provides a uniquely revealing case study in the post-*Dobbs* constitutional landscape. For decades, the State has enacted statutes that consistently recognize unborn children as distinct legal subjects: victims of crime, beneficiaries of state protection, and objects of regulatory concern.[6] Yet when constitutional challenges to abortion regulation reached the North Dakota Supreme Court after *Dobbs*, the court resolved those cases—*Wrigley v. Romanick* (*Wrigley I*) and *Access Independent Health Services, Inc. v. Wrigley* (*Wrigley II*)—without reaching whether unborn children possess independent constitutional status or are entitled to equal protection under either the Fourteenth Amendment or the North Dakota Constitution because those theories were not briefed by the parties.[7] Instead, the court analyzed abortion

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3. *See generally Roe*, 410 U.S. at 153 (stating the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

4. *See* 597 U.S. 215, 231 (2022).

5. *See id.* at 231, 263, 270, 300 ("Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin."). The Court did not address whether unborn human beings are "persons" within the meaning of the Fourteenth Amendment. Although the question was not presented as an issue for decision, several amici advanced arguments concerning the original public meaning of "person" and its potential application to unborn human beings. *See, e.g.*, Brief of Amicus Curiae Lee J. Strang in Support of Petitioners at 1-3, *Dobbs*, 597 U.S. 215 (No. 19-1392), 2021 WL 3375870 (arguing that the original public meaning of "person" in the Due Process and Equal Protection Clauses includes unborn human beings); Brief of Amici Curiae Scholars of Jurisprudence John M. Finnis & Robert P. George in Support of Petitioners at 4-22, *Dobbs*, 597 U.S. 215 (No. 19-1392), 2021 WL 3374325 (contending that common-law doctrine, antebellum statutes, and ratification-era sources treated unborn children as constitutional persons entitled to equal protection).

6. *See generally, e.g.*, N.D. CENT. CODE chs. 12.1-17.1 (1987) (Offenses Against Unborn Children), 12.1-19.1 (2023) (relating to "Abortion" as stated in the Criminal Code), 14-02.1 (2025) (Abortion Control Act); *id.* § 23-02.1-20 (2022) (Fetal death registration).

7. *See generally* Wrigley v. Romanick (*Wrigley I*), 2023 ND 50, 988 N.W.2d 231; Access Indep. Health Servs., Inc. v. Wrigley (*Wrigley II*), 2025 ND 199, 28 N.W.3d 850 (per curiam); Petitioner Drew H. Wrigley's Brief in Support of Petition for Supervisory Writ, *Wrigley I*, 2023 ND 50, 988 N.W.2d 231 (No. 20220260), 2022 WL 16857896; Brief of Respondents Access Independent Health Services, Inc. d/b/a Red River Women's Clinic and Kathryn L. Eggleston, M.D., *Wrigley*

exclusively through the lens of pregnant women's liberty interests, vagueness concerns, and due process protections.[8]

This divergence between statutory recognition and constitutional silence creates a structural tension at the heart of North Dakota law. While the State repeatedly affirms, through positive law, that unborn children are real human beings worthy of protection, its courts have not yet had occasion to consider whether excluding them from equal protection analysis is itself constitutionally defensible.[9] That omission is not merely academic. Equal protection doctrine does not permit the State to selectively recognize a class of human beings as legally cognizable while categorically excluding that class from threshold constitutional consideration.[10]

North Dakota's post-*Dobbs* abortion jurisprudence exposes an unresolved equal protection gap: unborn children are treated as persons for purposes of criminal and regulatory protection, yet their status remains unaddressed in the constitutional analyses employed by the North Dakota Supreme Court in *Wrigley I* and *Wrigley II*, which proceed exclusively through the rights of women and physicians.[11] Examination of federal equal protection principles, North Dakota's statutory framework, state constitutional interpretation, and historical evidence reveals that the continued exclusion of unborn children from equal protection analysis is no longer doctrinally sustainable. Judicial and legislative pathways by which North Dakota could confront, rather than bypass, this question would answer the constitutional question *Dobbs* left open.

II. LEGAL BACKGROUND

This part provides the legal framework governing the analysis that follows. It first outlines federal equal protection principles and the Supreme Court's treatment of constitutional personhood, then turns to North Dakota law to examine how the State recognizes unborn children in its statutory and constitutional structure.

I, 2023 ND 50, 988 N.W.2d 231 (No. 20220260), 2022 WL 17324327; Appellant Brief of Drew H. Wrigley, *Wrigley II*, 2025 ND 199, 28 N.W.3d 850 (No. 20240291); Brief of Plaintiffs/Appellees, *Wrigley II*, 2025 ND 199, 28 N.W.3d 850 (No. 20240291).

8. *See generally Wrigley I*, 2023 ND 50, 988 N.W.2d 231; *Wrigley II*, 2025 ND 199, 28 N.W.3d 850.

9. *See generally sources* cited *supra* note 6; *supra* notes 7-8 and accompanying text.

10. *See* Romer v. Evans, 517 U.S. 620, 633 (1996).

11. *See Wrigley I*, 2023 ND 50, ¶ 20, 988 N.W.2d 231 (addressing the "fundamental right for a woman to obtain an abortion in instances where it is necessary to preserve her life or health"); *Wrigley II*, 2025 ND 199, ¶ 10, 28 N.W.3d 850 (addressing claims brought by physicians who challenged the constitutionality of a state abortion regulation).

A. FEDERAL EQUAL PROTECTION PRINCIPLES

The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution declare that "No State shall . . . 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."[12] The Amendment does not define the scope of "person."[13] Whether unborn children fall within that scope of the Clause is not resolved by text alone but depends on historical understanding, legal tradition, and judicial interpretation.[14]

The Supreme Court of the United States has treated, for example, minors, dependents, and individuals with intellectual disabilities as "persons" entitled to the protections of the Fourteenth Amendment, notwithstanding their decreased legal autonomy or independence.[15] These applications demonstrate that dependency and incapacity do not categorically preclude constitutional personhood.

In *Roe v. Wade*, the Court stated that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[16] Notwithstanding that statement, the Court constructed a trimester framework that both constrained state regulation in early pregnancy and explicitly recognized a legitimate and growing state interest in protecting prenatal life, culminating in the authority to prohibit abortion after viability subject to exceptions for the life or health of the mother.[17] This framework exposes a foundational tension that persists in abortion jurisprudence: the Court denied unborn personhood even as it relied on an interest in protecting prenatal life to justify state regulatory authority, implicitly recognizing its legal significance without clarifying its constitutional status.

Many scholars, most notably John Hart Ely, have argued that *Roe v. Wade* was not grounded in identifiable constitutional text, history, or

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12. U.S. CONST. amend. XIV, § 1.

13. *Id.*

14. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231-32 (2022) (explaining that enumerated rights under the Fourteenth Amendment must be "deeply rooted in this Nation's history and tradition" and that constitutional analysis begins with text but is informed by historical understanding and legal tradition).

15. *See generally, e.g.*, *In re* Gault, 387 U.S. 1, 13 (1967) (holding that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone" and extending due process protections to juveniles in delinquency proceedings); Heller v. Doe, 509 U.S. 312, 314-15, 332 (1993) (adjudicating Equal Protection claims brought by involuntarily committed individuals with intellectual disabilities without addressing personhood as a threshold question and recognizing state *parens patriae* authority over persons unable to care for themselves).

16. 410 U.S. 113, 158 (1973) (footnote omitted), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

17. *Id.* at 164-65.

structure.[18] To Ely, when the Court infers a general right of privacy from provisions such as the First, Fourth, and Fifth Amendments, that inference must be limited by clearly defining the sort of right the inference will support.[19] For example, as illustrated in *Katz v. United States*, constitutional protections may extend to modern forms of government intrusion, such as telephone wiretapping, that the Framers could not have specifically anticipated, so long as the practice plainly involves a general concern with privacy.[20] However, such limits are not apparent in *Roe*, which arose under substantive due process rather than equal protection, because the Court's treatment of fetal personhood was a necessary predicate to its privacy analysis and was not the product of adversarial briefing or sustained historical inquiry focused on the Equal Protection Clause.[21]

Dobbs v. Jackson Women's Health Organization represents a decisive shift in the Court's approach to abortion and Fourteenth Amendment interpretation.[22] In overruling *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court rejected the use of abstract substantive due process balancing untethered from constitutional text, history, or tradition.[23] Instead, the Court emphasized that constitutional rights not expressly enumerated "must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[24] By grounding its analysis in original public meaning and historical practice, *Dobbs* repudiated the interpretive methodology that sustained *Roe*, including its cursory treatment of fetal personhood.[25]

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18. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 929 (1973); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 182-83; *see also* Harold Hongju Koh, *Choosing Heroes Carefully*, 57 STAN. L. REV. 723, 723-25 (2004) (describing Ely as a leading constitutional scholar whose work shaped generations of legal academics).

19. Ely, *supra* note 18, at 929.

20. *Id.* (citing Katz v. United States, 389 U.S. 347 (1967)).

21. 410 U.S. at 120, 156-57, 158 (stating that "[if] personhood is established [for the unborn], the appellant's case, of course, collapses," and holding that "the word 'person' as used in the Fourteenth Amendment[] does not include the unborn"); *Dobbs*, 597 U.S. at 349 (Roberts, C.J., concurring in the judgment) ("That [three-part trimester] framework, moreover, came out of thin air. Neither the Texas statute challenged in *Roe* nor the Georgia statute at issue in its companion case included *any* gestation age limit. No party or *amicus* asked the Court to adopt a bright line viability rule." (citation omitted)).

22. 597 U.S. 215, 292 (2022).

23. *Id.* at 231-32, 241, 271. *See generally* Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

24. *Dobbs*, 597 U.S. at 231 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

25. *See generally id.* at 231, 247-51 (using the Nation's history and traditions to analyze constitutional interpretation and concluding that *Roe* lacked grounding in historical practice).

Notably, *Dobbs* expressly declined to resolve whether unborn children qualify as "persons" under the Equal Protection Clause.[26] By returning primary regulatory authority over abortion to the states and insisting on historical analysis as the touchstone of constitutional interpretation, *Dobbs* implicitly invites renewed examination of how unborn children were understood by those who drafted and ratified the Fourteenth Amendment.[27]

B. NORTH DAKOTA FRAMEWORK

North Dakota's statutory law reflects a longstanding and consistent legislative treatment of unborn children as distinct, rights-bearing individuals under state law. Unlike jurisdictions that treat prenatal life solely as a derivative interest of the pregnant woman, North Dakota has repeatedly enacted statutes that recognize unborn children as independent subjects of legal protection across multiple domains.[28]

Chapter 12.1-17.1 of the North Dakota Century Code, titled "Offenses Against Unborn Children," defines an "[u]nborn child" as a "conceived but not yet born human being" and treats harm to the unborn child as distinct from harm to the pregnant woman.[29] The statutory framework excludes the conduct of the pregnant woman herself, lawful abortion procedures, and medical treatment from criminal liability.[30] As structured, the chapter directs any potential criminal consequence toward third-party conduct while shielding abortion-related and medical care.[31] The statutes reflect a partial and context-specific recognition in which unborn children are identified as legally cognizable subjects by the State, though they are not consistently protected across all circumstances.

Chapter 12.1-19.1 governs criminal offenses related to abortion.[32] The chapter defines "[a]bortion" in terms that expressly reference the termination

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26. *See id.* at 263 ("Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin.").

27. *See id.* at 292.

28. *Compare* N.D. CENT. CODE ch. 12.1-17.1 (1987) (criminalizing certain offenses against "unborn children"), *with* CAL. PENAL CODE § 187(a)-(b) (West 2024) (defining "[m]urder" to include the unlawful killing of a fetus, but providing exemptions for lawful abortion and maternal conduct), *and* MINN. STAT. §§ 609.2661, 609.269 (2025) (criminalizing causing the death of an "unborn child" while maintaining statutory exceptions for abortion-related conduct).

29. *See* N.D. CENT. CODE §§ 12.1-17.1-01(3), 12.1-17.1-02(1)(a), (b) (1987).

30. *Id.* at ch. 12.1-17.1. *Contra* CAL. PENAL CODE § 187(a)-(b) (West 2024) (defining "[m]urder" as the unlawful killing of "a human being, or a fetus," while excluding acts committed during lawful abortion, by the pregnant woman herself, or in the course of medical treatment, and thus extending criminal liability for third-party violence without conferring general legal personhood or independent constitutional rights on the fetus).

31. N.D. CENT. CODE ch. 12.1-17.1 (1987).

32. *Id.* at ch. 12.1-19.1 (2023).

of an "unborn child" and establishes criminal penalties for unlawful abortion procedures.[33] As with other areas of North Dakota law, the statutory language treats the unborn child as the object of the prohibited conduct, rather than as an inseparable aspect of the pregnant woman's body.[34] The chapter, however, carefully limits the scope of criminal liability, mirroring Chapter 12.1-17.1, by focusing on third parties involved in performing or facilitating unlawful abortions.[35] Together, these provisions recognize unborn children as distinct legal subjects while limiting the contexts in which that recognition carries criminal consequences.

Chapter 14-02.1, known as the Abortion Control Act, sets forth the state's regulatory framework governing abortion and includes express legislative declarations regarding the value of unborn life.[36] The chapter refers to the "unborn child" as the subject affected by abortion and articulates a state policy of protecting "every human life, whether unborn or aged, healthy or sick."[37] The statute regulates abortion primarily through restrictions on medical providers and procedural requirements.

North Dakota law further recognizes unborn children through its regulation of vital records. Chapter 23-02.1 of the Century Code defines and requires the registration of "[f]etal death," establishing it as a district reportable category within the state's vital records system.[38] The inclusion of fetal death within the state's vital statistics framework reflects an administrative recognition of prenatal life as a separate subject of recordkeeping and legal acknowledgment.[39] This recognition, however, is not uniform across all areas of North Dakota law. In the context of public benefits, North Dakota does not adopt the Children's Health Insurance Program (CHIP) "unborn child" low-cost coverage option and instead provides coverage to pregnant women directly through Medicaid, treating the fetus as a factor in eligibility rather than as an independent beneficiary.[40]

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33. *See id.* §§ 12.1-19.1-01 to -02.

34. *See generally id.* § 12.1-19.1-01(1) (defining "[a]bortion" as conduct that "will with reasonable likelihood cause the death of the unborn child").

35. *Compare id.* § 12.1-19.1-02 (prohibiting the performance of an abortion by "a person, other than the pregnant female upon whom the abortion was performed"), *with id.* § 12.1-17.1.01-02 (1987) (criminalizing conduct performed by third parties that causes the death of an unborn child).

36. *Id.* at ch. 14-02.1 (2023).

37. *Id.* § 14-02.1-01.

38. *Id.* §§ 23-02.1-19 to -20 (2022) (distinguishing that "[a] death record for each death" and "[a] fetal death record for each fetal death" be separately filed with the state registrar); *see also id.* § 23-02.1-01(8) (2023) (defining "[f]etal death").

39. *See* sources cited *supra* note 38 and accompanying text.

40. *See Medicaid Eligibility*, N.D. HEALTH & HUM. SERVS., https://www.hhs.nd.gov/healthcare/medicaid/eligibility [https://perma.cc/9CHF-D9ZG] (last visited Apr. 3, 2026) (counting the unborn child as a family member); *see also North Dakota CHIP Fact Sheet*, NAT'L ACAD. FOR STATE HEALTH POL'Y (Dec. 12, 2019), https://nashp.org/north-

C. NORTH DAKOTA CONSTITUTIONAL INTERPRETATION

Article I, Section 1 of the North Dakota Constitution provides that "[a]ll individuals are by nature equally free and independent and have certain inalienable rights," foremost among them the right of "enjoying and defending life and liberty."[41] The Constitution does not define "individual," but North Dakota's general rules of statutory and constitutional construction supply a controlling definition: "'Individual' means a human being."[42] This definitional provision supplies the ordinary meaning of "individual" in the absence of contrary constitutional text, and Article I, Section 1 contains no express limitation conditioning constitutional rights on legal autonomy, independence, or capacity.[43]

The Constitution's current text reflects a 1984 amendment that replaced the word "men" with "individuals," explicitly clarifying that the enumerated natural and inalienable rights apply equally to all human beings regardless of sex.[44] A member of the North Dakota Supreme Court has explained that Article I, Section 1 declares inherent rights possessed "by nature" and that the rights listed are illustrative rather than exhaustive.[45]

Read alongside North Dakota's statutory framework, this understanding of "individual" is especially significant. North Dakota law expressly defines an "[u]nborn child" as "the conceived but not yet born offspring of a human being."[46] North Dakota statutes repeatedly treat unborn children as victims of crime, subjects of protection, and objects of state concern.[47] If "individual" means "human being," and if an unborn child is a living human being as a matter of statutory definition, then Article I, Section 1 at least plausibly encompasses unborn children within its textual scope.[48] The text and structure of Article I, Section 1 leave unresolved, but do not preclude, the question

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dakota-chip-fact-sheet/ [https://perma.cc/S2VT-BS88] (noting that North Dakota does not provide pregnancy coverage through the Children's Health Insurance Program (CHIP)).

41. N.D. CONST. art. I, § 1.

42. N.D. CENT. CODE § 1-01-49(10) (2025).

43. *See id.* §§ 1-02-02 to -03 (1943).

44. Wrigley v. Romanick (*Wrigley I*), 2023 ND 50, ¶ 53, 988 N.W.2d 231, 248 (McEvers, J., concurring specially) (first citing N.D. CONST. art. I, § 1 (noting Initiated Measure 3 was approved November 6, 1984); and then citing MKB Mgmt. Corp. v. Burdick, 2014 ND 197, ¶¶ 88-89, 855 N.W.2d 31, 60-61 (Kapsner, J., concurring) (per curiam) (discussing the amendment from "men" to "individuals")).

45. *See generally Wrigley I*, 2023 ND 50, ¶¶ 48-54, 988 N.W.2d 231 (McEvers, J., concurring specially) (reasoning that Article I, Section 1 does not delineate rights exhaustively but instead imposes implicit limits to protect preexisting rights).

46. N.D. CENT. CODE § 12.1-17.1-01(3) (1987).

47. *See generally* sources cited *supra* note 6 and accompanying text.

48. *Cf.* N.D. CENT. CODE §§ 1-01-49(10) (2025) (defining an "[i]ndividual" as a human being), 12.1-17.1-01 (1987) (defining an "[u]nborn child" as a conceived but not yet born human being).

whether unborn human beings are entitled to equal protection under the existing Constitution.

In the wake of *Dobbs v. Jackson Women's Health Organization*, North Dakota's abortion laws were challenged in two separate state constitutional cases arising from different legislative enactments.[49] The first challenge involved the State's 2007 abortion trigger law, which became operative after *Dobbs* but was enjoined at the preliminary stage.[50] In *Wrigley v. Romanick* (*Wrigley I*), the North Dakota Supreme Court declined to vacate the district court's preliminary injunction, leaving the trigger statute unenforceable while litigation proceeded.[51] Before a final determination on the merits occurred, the Legislature repealed reliance on the trigger statute and enacted a new comprehensive abortion framework in 2023.[52] The later enactment was challenged by patients and doctors in *Access Independent Health Services, Inc. v. Wrigley* (*Wrigley II*).[53] The Supreme Court reversed the district court's judgment, and because fewer than four justices agreed on a constitutional rationale, the statute was not invalidated as unconstitutional.[54] Neither decision addressed whether unborn children possess independent constitutional status or are entitled to equal protection under the North Dakota Constitution.[55]

In *Wrigley I*, abortion providers sought a temporary restraining order and preliminary injunction to enjoin enforcement of Section 12.1-31-12 of the North Dakota Century Code, arguing that the statute violated the North Dakota Constitution by inadequately protecting women facing life-threatening or serious medical conditions during pregnancy.[56] The statute made it a felony for anyone other than a pregnant woman to perform an abortion, with an affirmative defense for abortions "necessary in professional judgment" to prevent the death of the pregnant woman.[57] The plaintiffs argued that the statute's life-saving exception failed to adequately protect access to abortions necessary to prevent serious and potentially irreversible threats to a pregnant woman's health, creating uncertainty as to whether physicians could lawfully

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49. *See generally* cases cited *supra* note 11 and accompanying text.

50. *Wrigley I*, 2023 ND 50, ¶¶ 1, 6, 988 N.W.2d 231.

51. *Id.* ¶ 1.

52. *See* S.B. 2150, 68th Legis. Assemb., Reg. Sess. (N.D. 2023) (codified at N.D. CENT. CODE ch. 12.1-19.1).

53. 2025 ND 199, ¶¶ 1, 10, 28 N.W.3d 850, 850-51, 854 (per curiam).

54. *See id.* ¶ 1.

55. *See generally Wrigley I*, 2023 ND 50, 988 N.W.2d 231; *Wrigley II*, 2025 ND 199, 28 N.W.3d 850.

56. 2023 ND 50, ¶ 1, 988 N.W.2d 231.

57. *Id.* ¶ 2 (citing N.D. CENT. CODE § 12.1-31-12 (2023)).

intervene before a patient's condition deteriorated to life-threatening or fatal levels.[58]

The North Dakota Supreme Court granted supervisory review but denied the State's request to vacate the preliminary injunction and concluded that the plaintiffs had demonstrated a substantial likelihood of success on the merits that the state constitution protects "a fundamental right to an abortion in the limited circumstances of life-saving and health-preserving circumstances."[59] Applying strict scrutiny, the court held that Section 12.1-31-12 was not narrowly tailored because its exception did not adequately protect access to abortion when necessary to preserve a woman's life or health, particularly given the statute's criminal penalties and the medical uncertainty physicians face in emergency situations.[60]

The decision in *Wrigley I* addressed only the issues the parties briefed and did not reach fetal constitutional status.[61] Rather, the court's analysis focused on the rights of pregnant women and the due process concerns arising from vague criminal prohibitions.[62] When the question of whether a woman had a fundamental right to abortion under the North Dakota Constitution was previously visited in *MKB Management Corp. v. Burdick*, Chief Justice Gerald W. VandeWalle wrote in a concurrence that North Dakota's "constitutional provisions were not intended to encompass a fundamental right to abortion."[63] The court's analysis focused exclusively on pregnant women's rights and did not address whether unborn children possess independent constitutional status.[64]

After *Wrigley I*, the legislature enacted Chapter 12.1-19.1, a revised abortion statute criminalizing abortion while providing exceptions for life-saving and health-preserving circumstances, rape and incest before six weeks gestational age, and for individuals assisting in the procedure who do not know they are assisting in an abortion.[65] Abortion providers challenged the statute, and the district court declared the law unconstitutional on vagueness grounds as violating pregnant women's rights under Article I, Sections 1 and

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58. *Id.* ¶ 20.

59. *Id.* ¶ 1.

60. *Id.* ¶¶ 28, 30-33.

61. *See generally* sources cited *supra* note 7 and accompanying text.

62. *See Wrigley I*, 2023 ND 50, ¶¶ 20, 30, 32, 988 N.W.2d 231.

63. MKB Mgmt. Corp. v. Burdick 2014 ND 197, ¶ 38, 855 N.W.2d 31, 45 (VandeWalle, C.J., concurring) (per curiam).

64. *See Wrigley I*, 2023 ND 50, ¶¶ 13-15, 988 N.W.2d 231.

65. Access Indep. Health Servs., Inc. v. Wrigley (*Wrigley II*), 2025 ND 199, ¶ 9, 28 N.W.3d 850, 853 (per curiam) (first citing *Wrigley I*, 2023 ND 50, 988 N.W.2d 231; and then citing N.D. CENT. CODE ch. 12.1-19.1).

12 of the North Dakota Constitution.[66] The question of fetal personhood was not raised.[67] The State appealed.[68]

The North Dakota Supreme Court ultimately reversed the district court's judgment because fewer than four justices agreed on any single constitutional rationale.[69] Under Article VI, Section 4 of the North Dakota Constitution, the court may not declare a statute unconstitutional unless at least four justices concur in that result.[70] A plurality of the court concluded Chapter 12.1-19.1 was unconstitutionally vague as applied to life- and health-preserving abortions, while other justices concluded the statute was constitutional.[71]

Importantly, *Wrigley I* and *Wrigley II* were not the correct vehicles for a plaintiff to present a fetal equal protection claim: each case challenged statutes that restricted a pregnant woman's access to abortion and criminalized third-party providers, rather than statutes that classify or deny benefits to fetuses as a claimant class.[72]

III. CURRENT ISSUE ANALYSIS

This part examines whether North Dakota's legal history reflects recognition of unborn children as members of the legal community for purposes of equal protection analysis. It focuses on the State's treatment of unborn children across both criminal and civil law, demonstrating that these bodies of law—though doctrinally distinct—converge in recognizing prenatal life as legally cognizable and worthy of protection.

A. CIVIL AND CRIMINAL LAW AS COMPETING HISTORICAL EVIDENCE OF PRENATAL PERSONHOOD

Beyond the statutory framework above, North Dakota's legal history reflects sustained recognition of unborn children as legally protected beings.[73] From territorial days through modern statutory enactments, the North Dakota

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66. *See id.* ¶¶ 4, 120, 127.

67. *See generally* sources cited *supra* note 7 and accompanying text.

68. *Wrigley II*, 2025 ND 199, ¶ 4, 28 N.W.3d 850.

69. *See id.* ¶ 1.

70. *See id.* ("[T]he supreme court shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide." (alteration in original) (quoting N.D. CONST. art. VI, § 4)).

71. *See generally Wrigley II*, 2025 ND 199, ¶ 62, 28 N.W.3d 850; *id.* ¶ 147 (Tufte, J., concurring).

72. *See generally* Wrigley v. Romanick (*Wrigley I*), 2023 ND 50, ¶¶ 1-4, 988 N.W.2d 231, 234-35; *Wrigley II*, 2025 ND 199, ¶¶ 4-5, 28 N.W.3d 850.

73. *See* Petitioner Drew H. Wrigley's Brief in Support of Petition for Supervisory Writ *supra* note 7, ¶ 40 (referencing North Dakota's historical abortion regulations from the territorial period through statehood and into the twentieth century, noting a continuous prohibition on abortion except to preserve the life of the mother and the absence of any constitutional reference to abortion).

Legislature has repeatedly recognized unborn children as distinct legal subjects—capable of being victims of crime, entitled to state protection, and regulated as more than a mere component of maternal interests.[74] The historical treatment of unborn children therefore bears directly on equal protection analysis, which turns not on philosophical debates, but on whether the law has recognized a class of human beings as members of the community entitled to legal protection.

From its earliest enactments, the Dakota Territory treated abortion as a criminal offense, permitting it only where necessary to preserve the life of the mother.[75] The 1865 Penal Code expressly identified "abortion, either upon herself or another female" as a punishable crime and imposed liability on all persons who committed, aided, or abetted the offense.[76] The Code further made it unlawful to "conceal the death of an infant, whether her own or that of another," confirming that both the procurement of a miscarriage and the concealment of a stillbirth or infant death were independently criminalized.[77] These provisions were reenacted in the 1877 Revised Codes and remained in force when North Dakota achieved statehood in 1889.[78] The continuity of these laws reflects a sustained legislative judgment that unborn children were not morally neutral or legally invisible, but rather vulnerable beings whose destruction constituted a public wrong.

This ideology persisted throughout statehood. Early legislative assemblies repeatedly referenced "criminal abortion"; imposed professional sanctions on physicians, surgeons, osteopaths, and chiropractors who performed abortions; and prohibited advertising for abortion-inducing drugs or devices.[79] These enactments were not framed as regulations of women's

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74. *See generally* discussion *supra* Section II.B.

75. *See generally Dakota*, ENCYC. BRITANNICA (July 25, 2023), https://en.wikisource.org/wiki/Encyclop%C3%A6dia_Britannica,_Ninth_Edition/Dakota [https://perma.cc/6UXF-SJLE] (describing the Dakota Territory's organization in 1861 and its territorial system of governance with a functioning legislature); *see also* REV. CODES OF THE TERRITORY OF DAKOTA PENAL CODE ch. XXIX, §§ 337-39 (1877) (criminalizing abortion and related conduct unless necessary to preserve the life of the mother).

76. REV. CODES OF THE TERRITORY OF DAKOTA PENAL CODE tit. I, § 22(10) (1865); *id.* at tit. II, §§ 26-28.

77. *Id.* at tit. I, § 22(11); *id.* at tit. II, §§ 26-28.

78. REV. CODES OF THE TERRITORY OF DAKOTA PENAL CODE ch. II, § 22(10)-(11) (1877); *id.* at ch. III, §§ 26-28; Act of Feb. 22, 1889, ch. 180, § 24, 25 Stat. 676, 684 ("[A]ll laws in force made by said territories, at the time of their admission into the Union, shall be in force in said states, except as modified or changed by this act, or by the constitutions of the states, respectively.").

79. *See generally, e.g.*, 1905 N.D. Laws 264-65, ch. 148, § 277 (providing for revocation of medical, surgical, and obstetrical licensures for engaging in the practice of criminal abortion); 1909 N.D. Laws 253, ch. 172, § 3 (providing for revocation of osteopathic licensure for engaging in the practice of criminal abortion); 1909 N.D. Laws 275, ch. 184 (prohibiting the advertisement of medicines, drugs, and means whereby causing a miscarriage or abortion); 1915 N.D. Laws 332, ch. 228, § 3 (providing for revocation of chiropractic licensure for engaging in the practice of criminal abortion).

autonomy but as prohibitions aimed at protecting prenatal life from third-party harm.[80] That focus is significant for equal protection analysis: the law consistently treated the unborn child, not merely the pregnant woman, as the object of protection.

In 1900 in *State v. Belyea*, the North Dakota Supreme Court held that a defendant charged with second-degree murder could not also be convicted of unlawfully procuring an abortion because the abortion statute created a distinct felony rather than a lesser-included offense of the charged homicide.[81] The court explained that the abortion offense under Section 7177 of the Revised Codes of the State of North Dakota did not require proof of death to either the woman or the fetus, nor did it involve an attack on a "living fœtus," and therefore was conceptually distinct from homicide.[82] The court's analysis reflects the common law's treatment of fetal death, particularly before quickening, as falling outside traditional homicide categories because of definitional and proof-based limits, even while abortion itself was treated as a serious offense under statute.[83] Crucially, however, the court did not deny the unborn any legal status or protection; rather, it confined its analysis to the statutory relationship between abortion and homicide and did not consider whether the unborn constituted a protected class for equal protection purposes.[84]

As the twentieth century progressed, North Dakota law moved decisively away from any ambiguity. By the late twentieth century, abortion was integrated into public health reporting requirements and law-enforcement coordination. In 1987, the Legislature enacted Chapter 12.1-17.1, explicitly recognizing unborn children as independent victims of murder, manslaughter, negligent homicide, and aggravated assault.[85] This marked a categorical shift:

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80. *See* sources cited *supra* note 79 and accompanying text; *see also* REV. CODES OF THE TERRITORY OF DAKOTA PENAL CODE ch. XXIX, §§ 337-39 (1877) (criminalizing abortion and related conduct unless necessary to preserve the life of the mother).

81. State v. Belyea, 9 N.D. 353, 360-62, 83 N.W. 1, 3-4 (1900).

82. *Id.* ("Under section 7177, if drugs are prescribed or administered to a pregnant woman, or if such woman is advised to take any drug or substance, or if instruments are used upon such woman, 'with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life,' the offense defined would be established." (quoting N.D. REV. CODE § 7177 (1895))).

83. *See id.* at 3-5.

84. *See* State v. Belyea, 9 N.D. 353, 360, 83 N.W. 1, 3 (1900) (distinguishing the statutory offense of procuring a miscarriage from homicide and noting that the offense does not involve an attack on the life of a "quick child," without addressing any broader constitutional status of the unborn).

85. Act of Apr. 4, 1987, ch. 166, § 1, 1987 N.D. Laws 409-11 (codified as amended at N.D. CENT. CODE ch. 12.1-17.1).

unborn children were no longer protected merely through indirect prohibitions on abortion, but directly recognized as subjects of criminal harm.[86]

Developments in civil law reinforce this conclusion. Probate and parentage law provide some of the clearest examples of this phenomenon, expressly treating children in gestation as legally "living" at moments prior to birth for purposes of inheritance, parentage, and related civil rights.[87] While North Dakota does not have "wrongful life" claims for unborn life, it has imposed affirmative legal duties designed to protect unborn children as distinct persons.[88] These include informed consent requirements for abortion, prohibitions on experimentation involving live fetuses, the formal recognition of fetal death in the state's vital records system, and sustained funding preferences for childbirth over abortion.[89] In addition, North Dakota law authorizes state intervention when a pregnant woman's conduct poses a risk to the unborn child, including through mandated reporting obligations that can trigger child-protection involvement when substance use or other harmful behavior endangers prenatal life.[90] Together, these enactments reflect a legislative

86. *Contrast* 1905 N.D. Laws 264-65 ch. 148, § 277 (revoking medical licensure for criminal abortion), *and* 1909 N.D. Laws 253, ch. 172, § 3 (revoking osteopathic licensure for criminal abortion), *and* 1909 N.D. Laws 275, ch. 184 (prohibiting advertisement of abortion-inducing drugs), *and* 1915 N.D. Laws 322, ch. 228, § 3 (revoking chiropractic licensure for criminal abortion), *with* N.D. CENT. CODE §§ 12.1-17.1-02(1) (1987) (murder of an unborn child), *and* 12.1-17.1-03 (manslaughter of an unborn child), *and* 12.1-17.1-04 (negligent homicide of an unborn child), *and* 12.1-17.1-05 (aggravated assault of an unborn child).

87. N.D. CENT. CODE § 30.1-04-04 (2009) (treating an individual in gestation as legally living at the decedent's death for inheritance purposes if the individual survives for one hundred and twenty hours after birth). Under these provisions, the unborn child acquires a vested legal right at the time of the decedent's death while still in utero, with live birth and a specified term of survival operating as conditions subsequent to enjoyment, rather than as events that create or vest that right. *See generally* RESTATEMENT (SECOND) OF PROPERTY: DON. TRANS. § 1.3 (A.L.I. 1983) (providing that "[a] child in gestation . . . who is later born alive is treated as a life in being" at the relevant legal moment); UNIF. PARENTAGE ACT § 708 (UNIF. L. COMM'N 2017) (permitting establishment of a parent-child relationship notwithstanding a parent's death prior to birth when statutory conditions tied to conception or gestation are satisfied, thereby treating the unborn child as a legally cognizable subject before birth, subject to live-birth requirements).

88. *Cf.* Turpin v. Sortini, 643 P.2d 954, 966 (Cal. 1982) ("[C]onclud[ing] that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child—like his or her parents—may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment.").

89. *See, e.g.*, N.D. CENT. CODE §§ 14-02.1-02.1(1)(a) (2023) (regarding the language permitted in printed materials about pregnancy assistance services), 14-02.1-03(1) (requiring a physician to obtain a woman's informed consent certified in writing prior performing an abortion), 14-02.1-03.2 (1991) (providing for a person upon whom an abortion was performing without consent to potentially recover civil damages), 14-02.2-01 (1989) (prohibiting live fetal experimentation), 14-02.2-02 (prohibiting experimentation on dead fetuses), 23-02.1-01(8) (2023) (defining "[f]etal death"), 23-02.1-20 (2022) (requiring registration of fetal death with the state); *id.* at ch. 14-02.3 (2025) (Limitation of Abortion).

90. *See, e.g.*, *id.* §§ 27-20.2-01(5)(f) (defining a "[c]hild in need of protection" as one "subject to prenatal exposure to chronic or severe use of alcohol or any controlled substance . . . in a manner not lawfully prescribed by a practitioner"), 50-25.1-01 (1995) (stating the purpose of the chapter on reporting child abuse or neglect), 50-25.1-03 (2021) (identifying persons required and permitted to

worldview in which unborn children are not abstractions or derivative interests, but real human beings whose welfare the state is willing to protect even against maternal misconduct.

B. REGULATORY PROTECTION WITHOUT CONSTITUTIONAL STATUS

North Dakota law protects unborn children in numerous contexts, yet those protections remain expressly statutory and are routinely treated as constitutionally insignificant.[91] Under this prevailing view, the Legislature may elect to safeguard prenatal life through criminal, civil, and regulatory measures, but courts may not translate those protections into constitutional personhood absent explicit textual grounding in the Fourteenth Amendment or the North Dakota Constitution.[92]

This position draws much of its force from *Roe v. Wade*, which asserted, without sustained historical analysis, that the unborn are not "persons" within the meaning of the Fourteenth Amendment.[93] It also informs the reasoning of *Wrigley II*, where no majority of the North Dakota Supreme Court addressed the constitutional status of the unborn, as it was not briefed by the parties, and where the analysis centered almost entirely on pregnant women's liberty interests under due process and vagueness doctrine.[94]

The categorical exclusion of unborn children from constitutional consideration operates as the unstated premise underlying judicial recognition of a right to abortion. Courts routinely proceed as though the absence of fetal constitutional status is settled while largely avoiding the question altogether, even as a threshold issue in the abortion analysis.[95] This pattern persists in part because of party presentation, but is not dispositive and is "pockmarked by exceptions."[96]

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report suspected child abuse or neglect), 50-25.1-16 (2025) (providing for required reporting of prenatal exposure to controlled substances or alcohol misuse).

91. *See generally* sources cited *supra* notes 6, 89, 90 and accompanying text.

92. *See* discussion *supra* Section III.A.

93. *See* 410 U.S. 113, 158 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

94. *See generally* Access Indep. Health Servs., Inc. v. Wrigley (*Wrigley II*), 2025 ND 199, 28 N.W.3d 850 (per curiam); Appellant Brief of Drew H. Wrigley, *supra* note 7; Brief of Plaintiffs/Appellees, *supra* note 7.

95. *See generally State and Federal Reproductive Rights and Abortion Litigation Tracker*, KFF (Mar. 5, 2026), https://www.kff.org/womens-health-policy/litigation-involving-reproductive-health-and-rights-in-the-federal-courts/ [https://perma.cc/XH7N-MFEE] (cataloging dozens of post-*Dobbs* cases litigating state constitutional provisions, the Emergency Medical Treatment and Labor Act, physician licensure, telemedicine restrictions, and Food and Drug Administration preemption issues—not fetal constitutional personhood).

96. *See* Scott Dodson, *Party Subordinance in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 12 (2014). *Compare* United States v. Sineneng-Smith, 509 U.S. 371, 375 (2020) ("We therefore vacate the Ninth Circuit's judgment and remand the case for an adjudication of the appeal attuned to the case shaped by the parties rather than the case designed by the appeals panel."), *with* Hormel

Because unborn children lack independent access to the courts, and because existing doctrine presumes they lack constitutional personhood, no party is positioned to assert their equal protection interests.[97] The result is a self-reinforcing doctrinal loop in which the unborn are excluded from constitutional analysis precisely because they are assumed to fall outside the scope of constitutional concern.

This procedural posture leaves the constitutional question unresolved. Equal protection doctrine does not require that a class affirmatively appear in court to warrant constitutional consideration, nor does it permit the State to deny constitutional relevance to a class it otherwise recognizes as legally cognizable.[98] Where the State has repeatedly identified unborn children as victims of crime, subjects of protection, and holders of legally cognizable interests, the refusal to confront their constitutional status reflects not neutrality, but an unresolved inconsistency at the core of constitutional analysis.

C. THE EQUAL PROTECTION GAP IN NORTH DAKOTA

North Dakota law protects unborn children across criminal, civil, and administrative domains, yet these protections remain expressly statutory and are routinely treated as constitutionally insignificant.[99] Although the Fourteenth Amendment was originally aimed at protecting Black Americans from discriminatory denial of legal protection, its framers deliberately used the broad term "any person" to extend due process and equal protection to all human beings.[100] Over time, the Supreme Court has recognized many groups

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v. Helvering, 312 U.S. 552, 558 (1941) ("[W]hile [this Court] recogniz[es] the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless [this Court] do[es] not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice.").

97. *See Roe*, 410 U.S. at 158 (concluding that the unborn are not "persons" within the meaning of the Fourteenth Amendment); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263 (2022) (declining to resolve whether unborn children qualify as constitutional persons). *See generally* Access Indep. Health Servs., Inc. v. Wrigley (*Wrigley II*), 2025 ND 199, 28 N.W.3d 850 (per curiam) (not addressing fetal constitutional status where the issue was not briefed); *supra* note 94 and accompanying text.

98. Romer v. Evans, 517 U.S. 620, 633, 636 (1996) (explaining that laws making it "more difficult for one group . . . to seek aid from the government" and rendering that group "a stranger to its laws" violate equal protection).

99. *See generally Wrigley II*, 2025 ND 199, 28 N.W.3d 850 (framing the case as due process vagueness and women's rights under N.D. Const. art. I, §§ 1, 12, without addressing fetal constitutional status); Wrigley v. Romanick (*Wrigley I*), 2023 ND 50, 988 N.W.2d 231 (centering litigation posture and analysis on abortion access in life saving and health preserving circumstances, without fetal equal protection analysis).

100. *See generally* Joshua J. Craddock, *Personhood After* Dobbs, 74 CATH. U. L. REV. 536, 539-40 (2025) [hereinafter Craddock, *Personhood After* Dobbs] (arguing that *Dobbs* dismantled *Roe*'s substantive due process framework while deliberately leaving unresolved the Fourteenth Amendment question whether unborn children as "persons," and that *Roe*'s non-personhood conclusion rested on assumption rather than sustained historical analysis); Joshua J. Craddock, Note,

not originally contemplated—such as women, children, aliens, and Native Americans—as "persons" under the Amendment.[101] Unborn children remain perhaps the only class of human beings the Court has declined to equally protect under the Fourteenth Amendment.[102]

Under the prevailing judicial approach, the Legislature may elect to safeguard prenatal life through criminal prohibitions, regulatory schemes, and reporting requirements, but courts have not translated those protections into constitutional personhood absent explicit textual grounding in the Fourteenth Amendment or the North Dakota Constitution.[103] This framework permits the State to recognize unborn children as victims, subjects, and beneficiaries of the law while simultaneously denying them threshold consideration under equal protection analysis.[104] This position draws much of its force from *Roe v. Wade*, which asserted, without substantiated historical analysis, that the unborn are not persons within the meaning of the Fourteenth Amendment.[105] *Roe* treated fetal non-personhood as a necessary predicate to recognizing a constitutional right to abortion, reasoning that if the unborn were persons, the abortion right would necessarily collapse.[106] That conclusion, however, was announced without adversarial briefing, without engagement with original public meaning, and without sustained consideration of equal protection doctrine.[107]

Post-*Dobbs*, North Dakota courts have continued to rely implicitly on *Roe*'s non-personhood premise.[108] In *Wrigley I* and *II*, the North Dakota Supreme Court analyzed abortion exclusively through the lens of the pregnant

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Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?, 40 HARV. J.L. & PUB. POL'Y 539, 553-56, (2017) [hereinafter Craddock, *Protecting Prenatal Persons*] (examining common-law doctrine, antebellum treatises, and nineteenth-century abortion statutes and concluding that the original public meaning of "person" in 1868 encompassed unborn human beings).

101. Craddock, *Personhood After* Dobbs, *supra* note 100, at 539-40 ("Unborn children are perhaps the only class of human beings since the Amendment's ratification whose natural and legal rights the Supreme Court has said that the Fourteenth Amendment failed to equally protect." (footnote omitted)).

102. *Id.*

103. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232, 263 (2022) (returning authority to regulate abortion to the states, declining to recognize a constitutional right to abortion, but not holding that the unborn are "persons" within the meaning of the Fourteenth Amendment); *see also* Craddock, *Protecting Prenatal Persons*, *supra* note 100, at 542. *See generally* cases cited *supra* note 99 and accompanying text.

104. Craddock, *Personhood After* Dobbs, *supra* note 100, at 553-55; *see also* Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 ISSUES L. & MED. 185, 264-65 (2010).

105. *See* 420 U.S. 113, 158 (1973); *see also* Craddock, *Personhood After* Dobbs, *supra* note 100, at 545.

106. *See Roe*, 420 U.S. at 156-57.

107. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 349-50 (2022) (Roberts, C.J., concurring); *see Roe*, 410 U.S. at 171-77 (Rehnquist, J., dissenting).

108. *See generally* Wrigley v. Romanick (*Wrigley I*), 2023 ND 50, 988 N.W.2d 231; Access Indep. Health Servs., Inc. v. Wrigley (*Wrigley II*), 2025 ND 199, 28 N.W.3d 850 (per curiam).

woman's liberty interests, vagueness doctrine, and due process protections.[109] No majority opinion in either case addressed whether unborn children possess independent constitutional status, and no justice undertook an equal protection analysis that accounted for the State's longstanding recognition of unborn children as legally cognizable subjects.[110] The equal protection argument was not raised, but establishing the unborn as an individual under Article I, Section 1 of the North Dakota Constitution—consistent with North Dakota's longstanding history and tradition of viewing the unborn as life—would have been a persuasive basis for avoiding the resulting gap and potential miscarriage of justice.[111] This categorical exclusion of unborn children from constitutional consideration thus operates as an unstated but indispensable premise of abortion jurisprudence.[112] Courts proceed as though fetal non-personhood is settled without confronting the threshold question.[113] This avoidance is structural rather than accidental.[114]

This structural evasion stands in tension with modern equal protection doctrine and with historical evidence concerning the meaning of "person" at the time of the Fourteenth Amendment's ratification.[115] As multiple scholars have demonstrated, the original public meaning of "person" in 1868 encompassed all human beings, including children in utero, and the Amendment's framers deliberately selected capacious language precisely to avoid limiting constitutional protection to a narrow or enumerated class.[116] The Supreme Court itself has repeatedly acknowledged that although the Fourteenth Amendment was adopted in response to racial injustice, its text extends

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109. *See generally Wrigley I*, 2023 ND 50, 988 N.W.2d 231 (holding likely success on "fundamental right to an abortion" in life-saving and health-preserving circumstances and applying strict scrutiny); *Wrigley II*, 2025 ND 199, 28 N.W.3d 850 (addressing due process vagueness claim and women's asserted rights under Article I, Sections 1 and 12 of the North Dakota Constitution).

110. *See generally Wrigley I*, 2023 ND 50, 988 N.W.2d 231 (looking at abortion solely through the lens of women and not discussing if the unborn are considered "persons" under the Fourteenth Amendment or the North Dakota Constitution); *Wrigley II*, 2025 ND 199, 28 N.W.3d 850 (considering abortion only from the perspective of women, without addressing whether the unborn are considered "persons" under the Fourteenth Amendment or North Dakota Constitution).

111. *See supra* notes 109-10 and accompanying text; discussion *supra* Section III.A; Hormel v. Helvering, 312 U.S. 552, 558 (1941) ("[W]hile [this Court] recogniz[es] the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless [this Court] do[es] not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice.").

112. *See Roe*, 420 U.S. at 156-57 (holding that the unborn are not persons under the Fourteenth Amendment); Craddock, *Protecting Prenatal Persons*, *supra* note 100, at 549-50.

113. *See supra* notes 109-10 and accompanying text.

114. *See* Craddock, *Personhood After* Dobbs, *supra* note 100, at 542.

115. *See id.* at 538-41.

116. Justin Buckley Dyer, *The Constitution, Congress and Abortion*, 11 N.Y.U. J.L. & LIBERTY 394, 416-17 (2017).

broadly to "any person," and its protections have been applied over time to classes not specifically contemplated by its drafters.[117]

Historical legal practice reinforces this conclusion. Although early common-law courts often declined to indict abortion before quickening, that practice reflected evidentiary limits rather than recognition of a liberty to terminate pregnancy.[118] By the mid-nineteenth century, state legislatures overwhelmingly treated unborn children as persons, with at least seventeen states classifying acts against fetuses as murder or manslaughter and most anti-abortion statutes codified as "offenses against the person" using the terms "foetus" and "child" interchangeably.[119] When the Fourteenth Amendment was ratified in 1868, a supermajority of states criminalized abortion at all stages, and legislators explicitly described abortion as "child-murder," reflecting a widespread understanding that unborn human beings were persons entitled to legal protection.[120] Specifically in North Dakota, abortion was outlawed almost entirely with narrow exceptions even before statehood.[121]

This legal landscape undermines the assertion that unborn children were excluded from constitutional personhood as a matter of settled historical understanding. Justice Harry A. Blackmun candidly acknowledged in *Roe v. Wade* that if prenatal personhood were established, "the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment," and the abortion right would necessarily fail.[122] That logic reveals fetal non-personhood not as a neutral interpretive judgment, but as a doctrinal necessity for *Roe*'s substantive due process framework.

Dobbs v. Jackson Women's Health Organization dismantled that framework by rejecting *Roe*'s method of abstract balancing untethered from constitutional text, history, and tradition.[123] While *Dobbs* did not resolve the personhood question, it expressly repudiated *Roe*'s historical analysis and

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117. Craddock, *Personhood After* Dobbs, *supra* note 100, at 539-40.

118. Dyer, *supra* note 116, at 416-17.

119. *Id.* at 416.

120. *Id.*

121. *See, e.g.*, REV. CODES OF THE TERRITORY OF DAKOTA PENAL CODE tit. II, §§ 26-28 (1865) (criminalizing the procurement of miscarriage except where necessary to preserve the life of the mother); REV. CODES OF THE TERRITORY OF DAKOTA PENAL CODE ch. XXIX, §§ 337-39 (1877); Act of Feb. 22, 1889, ch. 180, § 24, 25 Stat. 676, 684 (continuing territorial criminal prohibitions at statehood); 1905 N.D. LAWS 264-65, ch. 148, § 277 (authorizing revocation of medical licenses for performing criminal abortions); 1909 N.D. LAWS 275, ch. 184 (prohibiting the advertisement of abortion-inducing drugs and methods); State v. Belyea, 9 N.D. 353, 83 N.W. 1 (1900) (recognizing abortion as a distinct criminal offense under state law); Act of Apr. 4, 1987, ch. 166, § 1, 1987 N.D. Laws 409-11 (codified as amended at N.D. CENT. CODE ch. 12.1-17.1) (recognizing unborn children as victims of criminal offenses).

122. 410 U.S. 113, 157 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

123. 597 U.S. at 221, 231, 270, 300.

emphasized that constitutional interpretation must be grounded in original public meaning.[124] In doing so, *Dobbs* reopened, rather than foreclosed, the question whether unborn children qualify as "persons" entitled to equal protection of the laws.

Yet in North Dakota, this reopened question remains unaddressed. The State continues to adjudicate abortion disputes as though fetal non-personhood were settled doctrine, notwithstanding the Legislature's persistent recognition of unborn children as victims of crime, subjects of protection, and bearers of legally cognizable interests.[125] This results in a constitutional double standard in which unborn children are treated as persons when their death justifies criminal penalties or regulatory restrictions, but as nonpersons when their exclusion is necessary to sustain constitutional claims to abortion access.[126]

This incongruity produces what may fairly be described as an equal protection gap. The State affirms, through positive law, that unborn children are distinct human beings worthy of protection, yet courts decline to ask whether denying them equal protection under the Constitution is itself a form of discrimination.[127] Equal protection doctrine does not permit the selective recognition of personhood based on convenience or doctrinal necessity.[128] Where a class of human beings is acknowledged as legally cognizable, systematically protected, and consistently treated as the object of governmental concern, the refusal to consider its constitutional status reflects not settled law, but an unresolved constitutional question.[129]

Because abortion is largely prohibited in North Dakota, there may be no realistic litigant to present a fetal equal protection claim.[130] Potential alternative litigants, like a father challenging a self-managed or out-of-state abortion by the mother, face standing and justiciability hurdles.[131] This structural reality strengthens the case that the Court addressing personhood sua sponte would be warranted. Whether an unborn child is a life is logically antecedent

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124. *See id.* at 222, 231, 236.

125. *See* discussion *supra* Section III.A; *supra* notes 109-10 and accompanying text.

126. *See* discussion *supra* Section III.A; *supra* notes 109-10 and accompanying text.

127. *See* discussion *supra* Section III.A; *supra* notes 109-10 and accompanying text.

128. Craddock, *Personhood After* Dobbs, *supra* note 100, at 541, 578.

129. *See generally* case cited *supra* note 98 and accompanying text.

130. *See generally* Access Indep. Health Servs., Inc. v. Wrigley (*Wrigley II*), 2025 ND 199, ¶ 56, 28 N.W.3d 850, 871 (per curiam) (concluding N.D. CENT. CODE ch. 12.1-19.1 contains unconstitutional vagueness); N.D. CENT. CODE ch. 12.1-19.1 (2023) (largely prohibiting medical providers from providing abortions).

131. *See generally, e.g.*, Diamond v. Charles, 476 U.S. 54, 56, 62, 64-68, 71 (1986) (holding that a pediatrician who intervened to defend an abortion statute lacked standing where he alleged only a generalized interest in enforcement and no concrete personal injury, and the State declined to appeal).

to the mother's abortion rights analysis. Finding unborn children as individuals under the North Dakota Constitution sua sponte vastly differs from *Roe*, as doing so is squarely within North Dakota's history, tradition, and legal landscape.[132]

IV. PERSUASIVE ARGUMENT

This part argues that North Dakota is institutionally and doctrinally positioned to resolve the equal protection gap surrounding prenatal personhood. It outlines both judicial and legislative pathways through which the State can align its constitutional analysis with its longstanding recognition of unborn children as legally cognizable beings.

A. NORTH DAKOTA'S POSITION TO ADDRESS THE GAP

North Dakota's central advantage is not the abundance of abortion litigation it generates, but its positive law that already contains the doctrinal raw material needed to resolve the personhood question without doctrinal improvisation. This positive law includes decades of statutory enactments treating unborn children as distinct legal subjects across criminal, civil, and administrative contexts.[133] North Dakota's post-*Dobbs* abortion cases demonstrate that constitutional adjudication is already operating in a space where the traditional *Roe*-era premise of fetal constitutional irrelevance is not doing the analytic work it once did.[134]

In *Wrigley I*, the court grounded abortion access in limited life-saving and health-preserving circumstances directly in the state constitution, confirming its willingness to engage in independent state constitutional analysis rather than rely on federal substantive due process.[135] That move occurred in a legal environment in which North Dakota statutes already define unborn children as independent victims of homicide, manslaughter, and aggravated assault, and required the State to treat fetal death as a legally cognizable

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132. *Compare* Roe v. Wade, 410 U.S. 113, 158 (1973) (concluding, without sustained historical analysis or adversarial briefing on the equal protection question, that the word "person" as used in the Fourteenth Amendment does not include the unborn), *with* Petitioner Drew H. Wrigley's Brief in Support of Petition for Supervisory Writ, *supra* note 7, ¶ 40 (referencing North Dakota's historical abortion regulations from the territorial period through statehood and into the twentieth century, noting a continuous prohibition on abortion except to preserve the life of the mother and the absence of any constitutional reference to abortion). *See generally* discussion *supra* Section III.A (providing an overview of North Dakota's history and legal landscape showing that abortion has been outlawed with exceptions to preserve the life of the mother in life-threatening situations).

133. *See* discussion *supra* Sections III.A-B. *See generally* sources cited *supra* notes 79, 89-90, 121 and accompanying text.

134. *See supra* notes 109-10 and accompanying text.

135. *See* Wrigley v. Romanick (*Wrigley I*), 2023 ND 50, ¶ 1, 988 N.W.2d 231, 234.

event, though the Court did not reach fetal status given the issues briefed.[136] The decision in *Wrigley II* confirms that the current doctrinal regime remains unsettled and fragmented, particularly in its treatment of vagueness, medical judgment, and the scope of constitutional protection.[137] Neither decision addressed whether unborn children possess independent constitutional relevance under the Fourteenth Amendment or the North Dakota Constitution, even though the question bears directly on the State's longstanding statutory recognition of prenatal life. Because that fragmentation already exists, a personhood-based equal protection analysis would not introduce instability into an otherwise settled field but would provide a coherent axis around which competing constitutional claims can be evaluated.

North Dakota's institutional posture also differs from the *Roe* era because *Dobbs* left the federal personhood question unresolved, and recent scholarship treats the decision as consistent with—if not inviting—future recognition of unborn children as "persons" within the meaning of the Fourteenth Amendment.[138] This scholarly reassessment rests on evidence that by the mid-nineteenth century, a substantial majority of states criminalized abortion at all stages and routinely classified abortion as an offense against the person, reflecting a legal understanding that children in utero were members of the protected human community at the time the Fourteenth Amendment was ratified.[139] *Dobbs* therefore presents no barrier to state courts engaging the personhood question; instead, it removes the principal doctrinal constraint that previously foreclosed the inquiry.[140] The proper institutional role for a state court in this setting is to square the state's asserted interest in protecting unborn life with the constitutional meaning of "individual," rather than to assume fetal non-personhood as an unstated premise.

B. JUDICIAL PATHWAYS

Justice Jerod E. Tufte's concurring opinion in *Wrigley II* underscores an important structural point about North Dakota constitutional interpretation. He argued that if citizens of North Dakota wish to recognize abortion as a broader constitutional right, that change must come through constitutional

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136. *See generally* discussion *supra* Section III.A; sources cited *supra* note 7 and accompanying text.

137. *See generally* Access Indep. Health Servs., Inc. v. Wrigley (*Wrigley II*), 2025 ND 199, 28 N.W.3d 850 (per curiam).

138. *See* Craddock, *Personhood After* Dobbs, *supra* note 100, at 538, 541-43.

139. *See* discussion *supra* Section III.B.

140. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232, 263 (2022) (returning authority to regulate abortion to the states, declining to recognize a constitutional right to abortion, and requiring states to address abortion policy directly rather than deferring to *Roe*, but not holding that the unborn are "persons" within the meaning of the Fourteenth Amendment).

amendment rather than judicial expansion.[141] On the other hand, he did not suggest that recognition of equal protection for unborn human beings would likewise require constitutional amendment, nor did he identify any textual barrier preventing courts from considering unborn children as constitutional persons under existing law.[142] This distinction reflects the core structure of equal protection doctrine, which asks whether a class of human beings falls within the scope of existing constitutional guarantees, rather than whether courts should create new substantive rights through judicial expansion.[143] The concurrence thus reinforces a critical distinction between judicial creation of new substantive rights and judicial application of settled constitutional guarantees, such as equal protection, to classes of human beings that law already recognizes.

Equal protection personhood likewise does not require collapsing abortion into homicide in every circumstance.[144] That objection mischaracterizes the relationship between equal protection and criminal law as the Constitution has never required uniform treatment of all killings, even when the victim is a person.[145] Furthermore, it does not foreclose historically grounded distinctions in culpability, punishment, or defenses.[146] Early abortion laws distinguished abortion from homicide not because unborn children were regarded as lacking moral or legal significance, but because common-law homicide rules imposed evidentiary and definitional limits that made proof of fetal life and causation difficult, particularly before quickening.[147]

Scholarship defending prenatal personhood consistently recognizes that states retain latitude to apply ordinary doctrines of criminal law, including justification- and necessity-based defenses, to address hard cases.[148] Gerard Bradley's framework argues that equal protection personhood would primarily require inclusion of unborn children within the protection of homicide laws, while still allowing states substantial discretion to define conditions under which deadly force or comparable acts are not criminally

141. *See Wrigley II*, 2025 ND 199, ¶ 121, 28 N.W.3d 850 (Tufte, J., concurring).

142. *Id.*

143. *See* discussion *supra* Part II.

144. *See* Craddock, *Personhood After* Dobbs, *supra* note 100, at 552.

145. *Id.*

146. *Id.* at 552-55.

147. *See, e.g.*, Brief of Amicus Curiae Joseph W. Dellapenna in Support of Petitioners at 9-11, 18, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392), 2021 WL 9219014 (explaining that early abortion cases turned on "procedural and evidentiary" limitations, including the inability to prove fetal life or causation, and that homicide liability depended on proof of death following live birth).

148. Dyer, *supra* note 116, at 413.

punishable.[149] This framework aligns with North Dakota's statutory structure, which simultaneously treats unborn children as distinct victims of criminal harm while preserving explicit exceptions and defenses for life-saving and health-preserving medical care in the abortion context.[150] *Wrigley II* itself reflects this conceptual structure by analogizing health-risk exceptions—permitting the ending of one life to preserve another—to doctrines such as self-defense rather than to negligence-based crimes.[151]

A judicial pathway that recognizes unborn children as persons, while acknowledging historically rooted defenses for maternal life and grave bodily harm, therefore fits comfortably within mainstream criminal law structure rather than disrupting it. This approach directly addresses the central methodological failure of *Roe*, which treated fetal non-personhood not as a conclusion of constitutional analysis but as a necessary predicate for sustaining an abortion right.[152] That predicate lacked grounding in original public meaning or nineteenth-century legal practice, where contemporaneous statutes, treatises, and judicial decisions overwhelmingly treated abortion as a serious offense against human life rather than as an exercise of individual liberty.[153] Post-*Dobbs* personhood scholarship argues that *Roe*'s non-personhood conclusion is historically unsound because, by 1868, "person" had a settled public meaning broad enough to include children in the womb, and because a substantial majority of states had criminalized abortion at all stages.[154] The most defensible judicial pathway, then, is a shift in the threshold inquiry itself: unborn children may no longer be excluded from the constitutional consideration before equal protection analysis even begins.

If this were to be presented to the court on the slim chance a proper plaintiff presents this claim to the court, the court should interpret "individual" in an original-meaning method in light of contemporaneous legal practice and statutory context, recognizing that state law has long treated unborn children as distinct legal subjects while also preserving exceptions for the life

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149. *Id.* at 418-19 (citing Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 344-45 (1993)).

150. *See* discussion *supra* Section II.B.

151. *See generally* Access Indep. Health Servs., Inc. v. Wrigley (*Wrigley II*), 2025 ND 199, ¶¶ 39-46, 28 N.W.3d 850, 851, 864-67 (per curiam) (describing life- and health-threatening pregnancy complications and explaining that the statute's health-risk exception—permitting termination of pregnancy to prevent harm—is "more analogous" to self-defense and defense of others doctrines than to negligence-based criminal liability).

152. *See generally* 410 U.S. 113, 156-57 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

153. *See* discussion *supra* Part III.

154. *Dobbs*, 597 U.S. app. A-B, at 302-30 (cataloging state abortion statutes at the time of the Fourteenth Amendment's ratification and showing that most states criminalized abortion throughout pregnancy).

and health of the mother.[155] The coherence of the lines drawn by abortion regulations ultimately depends on whether the unborn are constitutional "persons."[156] If unborn children are "individuals," the state's interests in protecting prenatal life are compelling; the analysis then turns to narrow tailoring and administrability of exceptions.[157] The court should align personhood with existing criminal law structure by recognizing unborn children within the scope of "victims" while confirming that good-faith medical judgment in emergencies remains justified.[158]

C. LEGISLATIVE PATHWAYS

Legislative action may also close the gap in a way that is both constitutionally legible and medically administrable by defining personhood and aligning statutory definitions with the State's claimed equal protection commitments. This approach mirrors North Dakota's longstanding practice of using statutory law to give concrete form to its interest in protecting unborn life. As a possible model, Alabama provides a concrete approach to constitutionalizing protection of unborn life through public policy language recognizing "the sanctity of unborn life and the rights of unborn children, including the right to life," which was adopted by a statewide amendment in 2018.[159]

A North Dakota personhood framework should expressly adopt the biological premise, widely accepted in modern embryology, that a new human organism begins at fertilization, while avoiding doctrinal confusion among fertilization, implantation, and live birth.[160] Modern embryology recognizes that a human embryo is a whole, living member of the species *Homo sapiens*

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155. *See* discussion *supra* Section III.A.

156. *See* Roe v. Wade, 410 U.S. 113, 120, 156-57, 158 (stating that "[if] if personhood is established [for the unborn], the appellant's case, of course, collapses," and concluding that "the word 'person' as used in the Fourteenth Amendment, does not include the unborn").

157. *See* sources cited *supra* note 48; *see also* N.D. CONST. art. I, § 1 (providing that all "individuals" possess inalienable rights, including life and liberty).

158. *See* N.D CENT. CODE §§ 12.1-17.1-02 to -05 (1987) (identifying unborn children as victims of multiple crimes but "person" in this chapter as being the perpetrator does "not include the pregnant woman"); *id.* § 12.1-19.1-03(1) (2023) (providing for exceptions "deemed necessary based on reasonable medical judgment which was intended to prevent the death or a serious health risk to the pregnant female").

159. *Alabama Amendment 2, State Abortion Policy Amendment (2018)*, BALLOTPEDIA, https://ballotpedia.org/Alabama_Amendment_2,_State_Abortion_Policy_Amendment_(2018) [https://perma.cc/VG5M-A98Q] (last visited Mar. 22, 2026).

160. *See, e.g.*, Asim Kurjak & Ana Tripalo, *The Facts and Doubts About Beginning of the Human Life and Personality*, BOSN. J. BASIC MED. SCIS., Feb. 2004, at 5, 8-9 (noting that human life is understood to begin when sperm and egg fuse to form a genetically distinct zygote and distinguishing fertilization from later developmental stages such as implantation); KEITH L. MOORE, T.V.N. PERSAUD, MARK G. TORCHIA, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 2 (10th ed. 2016) (stating that human development begins at fertilization, when sperm and oocyte unite to form a zygote, a genetically distinct human organism).

at the earliest stage of development.[161] This biological understanding underlies many of North Dakota's existing statutory protections for unborn children, even when it is not expressly articulated. A fertilized egg thus constitutes the emergence of a new human life as a biological matter, independent of contested moral or legal conclusions.[162]

Once life at fertilization is acknowledged, the most urgent legislative task becomes precision: the statute must clearly distinguish intentional killing from natural death and treatment following death. North Dakota's statutory language already incorporates this distinction by excluding acts undertaken to remove a dead unborn child following spontaneous abortion.[163] It also excludes acts undertaken with the intent to treat ectopic pregnancy or molar pregnancy from the definition of abortion.[164] *Wrigley I* likewise emphasizes statutory language excluding from abortion the removal of a dead unborn child resulting from spontaneous miscarriage, accidental trauma, or criminal assault.[165] Together, these sources of North Dakota law establish an intent-based framework in which legal consequences attach to the deliberate termination of a living unborn child but exclude conduct undertaken without such intent, consistent with criminal law principles and equal protection analysis. Under that framework, miscarriage management does not constitute "abortion" under existing law because liability turns on the intent to terminate a living pregnancy with knowledge that death will result, rather than on treatment following fetal death.[166]

A legislative package can reinforce this clarity by expressly stating that spontaneous miscarriage, failed implantation, and procedures undertaken to remove fetal remains after fetal demise are not abortions when they lack the intent to kill a living unborn child. This is not merely rhetorical cleanup because *Wrigley II* shows that vagueness disputes and "chilling effect" arguments are often driven by uncertainty about whether physicians may act before catastrophic deterioration.[167] Clarifying these boundaries would directly address the concerns raised in those cases while preserving the State's asserted interest in protecting unborn life. A well-drafted personhood statute

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161. Dyer, *supra* note 116, at 418.

162. Dov Fox, *The Personhood Double Standard*, 59 U.C. DAVIS L. REV. ONLINE 173, 176 (2025).

163. *See* Access Indep. Health Servs., Inc. v. Wrigley (*Wrigley II*), 2025 ND 199, ¶ 9, 28 N.W.3d 850, 853 (per curiam) (first citing Wrigley v. Romanick (*Wrigley I*), 2023 ND 50, 988 N.W.2d 231; and then citing N.D. CENT. CODE ch. 12.1-19.1 (2023)).

164. *Id.*

165. *Wrigley I*, 2023 ND 50, ¶ 2, 988 N.W.2d 231.

166. *See* N.D. CENT. CODE § 12.1-19.1-01(1) (2023) (defining "[a]bortion" as requiring intent to terminate a clinically diagnosable pregnancy with knowledge that death will result, and excluding acts undertaken to remove a dead unborn child or treat ectopic or molar pregnancies).

167. *See Wrigley II*, 2025 ND 199, ¶¶ 5-8, 28 N.W.3d 850.

should therefore pair equal protection recognition with explicit safe harbors for good-faith medical care and with definitions that track intent and objective medical judgment.

In vitro fertilization (IVF) requires a distinct carve out because personhood at fertilization affects not only abortion law but also the private law of reproductive loss and embryo handling.[168] Many jurisdictions treat embryos as persons for purposes of abortion regulation while treating them as property in IVF-related negligence or misconduct, creating significant doctrinal incoherence.[169] Addressing IVF explicitly would avoid the appearance of selective personhood that critics often raise in equal protection debates.[170] Acknowledging unborn children as persons would change common IVF practices by limiting the treatment of embryos as property to be discarded without remedy under criminal or tort law.[171] Prenatal personhood would likely move the United States toward peer countries that impose stricter legal regulations on IVF, rather than ending IVF altogether.[172] Ethical standards on comparative practices in Australia and New Zealand often result in creating only one embryo at a time and transferring embryos one at a time in the overwhelming majority of cases.[173]

A North Dakota legislative framework can therefore proceed as follows: it should affirm that life begins at fertilization, prohibit intentional destruction of embryos as a matter of equal protection principle, and clarify that cryopreservation itself is not intentional killing. This approach aligns statutory clarity with the equal protection principle that a class of human beings recognized as legally cognizable may not be categorically excluded from constitutional consideration.[174] It channels ethical concerns into regulation of embryo creation, transfer, and disposition rather than collapsing IVF into

168. *See* Davis v. Davis, 842 S.W.2d 588, 589, 590, 597, 604 (Tenn. 1992) (addressing disputes over the disposition of cryopreserved embryos created through in vitro fertilization and recognizing that such embryos "occupy an interim category" requiring legal rules governing their use and disposition).

169. *See* Fox, *supra* note 162, at 174, 179-80 (observing that jurisdictions treat embryos as persons in abortion regulation but as property or non-persons in tort law governing reproductive loss, creating a "personhood double standard").

170. *See id.* at 173-74 (arguing that recognizing embryos as persons in abortion regulation but not in IVF and reproductive-loss context creates a "personhood double standard" that invites criticism of doctrinal inconsistency).

171. Craddock, *Personhood After* Dobbs, *supra* note 100, at 569-70 (arguing that recognizing unborn children as persons would subject the destruction or disposal of embryos to criminal and civil liability, thereby altering existing IVF practices).

172. *Id.*

173. *Id.* at 569 & n.189.

174. *See* case cited *supra* note 98 and accompanying text.

abortion doctrine.[175] It also places the State's policy in a defensible posture against the most predictable critique, namely that personhood is selectively invoked only when it burdens abortion decisions but ignored when embryos are lost or discarded in fertility contexts.[176]

V. CONCLUSION

The question of whether unborn children qualify as "persons" under the Equal Protection Clause remains one of the most significant unresolved issues in constitutional law after *Dobbs*. For nearly fifty years, *Roe* foreclosed that inquiry by assuming non-personhood as a necessary predicate to recognizing a constitutional right to abortion.[177] That assumption was reached without sustained historical analysis, adversarial briefing, or meaningful engagement with equal protection doctrine.[178] *Dobbs* dismantled the methodological foundation on which that assumption rested, returning constitutional interpretation to text, history, and tradition, while expressly declining to resolve the personhood question itself.[179] The result is not closure but an open constitutional field.

North Dakota sits squarely within the field. Its statutory law repeatedly and consistently recognizes unborn children as distinct legal subjects, including victims of crime, beneficiaries of state protection, and objects of regulatory concern.[180] Yet its courts have thus far not translated that recognition into constitutional analysis, continuing to adjudicate abortion disputes as though fetal non-personhood were settled doctrine.[181] This divergence between positive law and constitutional silence reveals an equal protection gap in which unborn children are treated as persons when their protection

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175. Craddock, *Personhood After* Dobbs, *supra* note 100, 569-70 (discussing IVF practices involving the creation, storage, transportation, and destruction of embryos, and explaining that legal regulation operates through those practices rather than through traditional abortion frameworks).

176. Fox, *supra* note 162, at 179-80.

177. *See* Roe v. Wade, 410 U.S. 113, 158 (1973) (concluding, without sustained historical analysis or adversarial briefing on the equal protection question, that the word "person" as used in the Fourteenth Amendment does not include the unborn), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

178. *See id.*

179. *See Dobbs*, 597 U.S. at 231-32, 235 (explaining that enumerated rights under the Fourteenth Amendment must be "deeply rooted in this Nation's history and tradition" and that constitutional analysis begins with text but is informed by historical understanding and legal tradition and leaving the question of personhood unresolved (citation omitted)).

180. *See* discussion *supra* Section III.A.

181. *See generally* Wrigley v. Romanick (*Wrigley I*), 2023 ND 50, 988 N.W.2d 231; Access Indep. Health Servs., Inc. v. Wrigley (*Wrigley II*), 2025 ND 199, 28 N.W.3d 850 (per curiam).

supports criminal or regulatory objectives, but as nonpersons when their inclusion would complicate constitutional adjudication.[182]

That gap is not constitutionally neutral. As a matter of constitutional principle, equal protection should not permit the State to acknowledge a class of human beings as legally cognizable while categorically excluding that class from threshold constitutional consideration.[183] Nor does historical evidence support the claim that unborn children were understood to fall outside the meaning of "person" at the time of the Fourteenth Amendment's ratification.[184] To the contrary, nineteenth-century legal practice, statutory enactments, and public discourse overwhelmingly treated abortion as a grave offense against human life, reflecting a widespread understanding that children in utero were members of the human community entitled to protection.

Closing this gap does not require absolutism, nor does it mandate collapsing very hard cases into homicide doctrine.[185] Both judicial and legislative pathways exist that can recognize prenatal personhood while preserving historically grounded distinctions in culpability, defenses, and medical judgment.[186] Properly understood, equal protection would require inclusion of unborn children within constitutional analysis, not the elimination of nuance, discretion, or mercy in lawmaking and adjudication.[187]

Ultimately, the question is not whether recognizing unborn children as "persons" would have profound legal consequences. It would. The fundamental question is whether continued exclusion can be justified in light of constitutional text, historical understanding, and the State's own legal commitments.[188] In North Dakota, where the law already speaks clearly about the value and reality of unborn life, the continued omission of personhood under equal protection reflects not settled doctrine but unfinished constitutional

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182. *See, e.g.*, N.D. CENT. CODE §§ 12.1-17.1-02 to -05 (1987) (recognizing unborn children as victims of criminal offenses); *Dobbs*, 597 U.S. at 263, 275-76 (declining to resolve whether unborn children are "persons" under the Fourteenth Amendment); Craddock, *Personhood After* Dobbs, *supra* note 100, at 568-70 (discussing the legal consequences of recognizing unborn children as persons in some contexts but not others).

183. *See generally* case cited *supra* note 98 and accompanying text.

184. *Dobbs*, 597 U.S. app. A-B, at 302-30 (cataloging state abortion statutes at the time of the Fourteenth Amendment's ratification and showing that most states criminalized abortion throughout pregnancy).

185. *See* Craddock, *Personhood After* Dobbs, *supra* note 100, at 552.

186. *See generally, e.g.*, *Dobbs*, 597 U.S. at 232, 263 (returning authority to regulate abortion to the states and declining to recognize a constitutional right to abortion, without holding that the unborn are "persons" within the meaning of the Fourteenth Amendment); N.D. CENT. CODE § 12.1-19.1-03(1) (2023) (providing for exceptions "deemed necessary based on reasonable medical judgment which was intended to prevent the death or a serious health risk to the pregnant female"); *id.* at ch. 12.1-17.1 (1987) (establishing a comprehensive set of offenses against "unborn children," including homicide and assault).

187. *See generally* case cited *supra* note 98 and accompanying text.

188. *See* discussion *supra* Part III.

work. *Dobbs* removed the barrier to that inquiry. Even though *Wrigley I* and *Wrigley II* did not present personhood, they were missed opportunities to address a logically antecedent question unlikely to return in a procedurally "clean" posture. North Dakota cannot continue to recognize unborn children as persons in its laws while declining to determine whether the Constitution protects them as such.

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