



Federal Policymakers' Guide to a Post-*Roe* America

By Carolyn McDonnell, M.A., J.D.*

America weathered the disaster of *Roe v. Wade*¹ for forty-nine years, but that time has ended. In the Supreme Court's landmark ruling in *Dobbs v. Jackson Women's Health Organization*,² the Court overruled *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³ and corrected the pernicious idea that the Constitution protects abortion violence. *Roe* was an "exercise of raw judicial power" that severely restricted Congress and the States from enacting life-affirming laws.⁴ Now that *Dobbs* has overturned *Roe*, the Supreme Court has reinstated Congress' full constitutional powers to protect human life. Accordingly, the 118th Congress should act boldly to safeguard mothers, families, and unborn children from the harms of the abortion industry.

Federal Abortion Law Following *Dobbs*

The Supreme Court has returned the abortion issue to the democratic process. Congress and the States can once again enact life-affirming laws that protect mothers and unborn children from abortion violence. Congress has a particularly important role in setting a pro-life baseline for the nation, which can protect life even in anti-life States.

Dobbs notably did not reset federal policy to a neutral stance on abortion. Federal law does not protect abortion. Rather, federal policy is pro-life. Congress has passed numerous limits on elective abortion, including public funding restrictions, conscience protections, safeguards for infants born-alive after a botched abortion, and a prohibition on gruesome partial-birth abortions. Congress should reaffirm this pro-life policy stance through additional life-affirming laws.

Congress' Role in Protecting Human Life Post-Dobbs

There is a misconception that post-*Roe*, abortion is solely an issue for the States. In *Dobbs*, however, the Supreme Court returned the abortion issue to the *democratic process*, not just the States. As the Supreme Court held:

* Litigation Counsel, Americans United for Life. Email: Carolyn.McDonnell@aul.org. For federal legislative consulting or bill drafting assistance, please contact Americans United for Life's Federal Policy Director, Jesse Southerland, at Jesse.Southerland@aul.org.

¹ 410 U.S. 113 (1973).

² 142 S. Ct. 2228 (2022).

³ 505 U.S. 833 (1992).

⁴ *Dobbs*, 142 S. Ct. at 2241 (citing *Roe*, 410 U.S. at 222 (White, J., dissenting)).

We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.⁵

Accordingly, Congress and the States have the power to regulate abortion.

Congress has an important role in reaffirming a national pro-life baseline. Many state judiciaries have devised a state constitutional right to abortion.⁶ Some States have passed radical laws that permit abortion-on-demand up until the baby’s birth date.⁷ Under the Supremacy Clause, however, the “Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.”⁸ This means that a federal pro-life statute takes precedence over state constitutions and laws that have concocted protection for abortion.

Federal legislation that sets a national pro-life baseline does not preempt state laws with greater pro-life protections.⁹ A state law that abolishes abortion at conception does not contradict a federal law that abolishes abortion at fifteen weeks’ gestation. Nevertheless, a congressional bill can still include a clarification provision that acknowledges the federal law does not preempt state laws that further limit abortion.

It is important for Congress to hold hearings to find facts and raise public awareness about abortion violence. Facts raised during congressional hearings can bolster the defense of pro-life laws during litigation or lead to prosecution of illicit behavior. Congress should consider hearings on these topics:

- Fetal development of the unborn human child, including the child’s heartbeat and ability to feel pain at certain gestational ages.
- Accountability of administrative agencies that have promulgated radical abortion policies contradicting Congress’ pro-life policy stance.
- Health and safety threats mail order abortion pills pose to women.
- Life-affirming work performed by pregnancy resource centers, and the violence these centers have suffered post-*Dobbs*.
- Abortion’s infringement upon parental rights, including the care of a pregnant minor seeking abortion and the destruction of the mother-child relationship.

⁵ *Id.* at 2242–43.

⁶ *See, e.g.*, *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (devising a privacy right to abortion under the Florida constitution); *Armstrong v. State*, 989 P.2d 364 (Mont. 1999) (concocting a privacy right to abortion under the Montana constitution).

⁷ *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 123460 to 123468 (2003); 775 ILL. COMP. STAT. 55/1-1 to 55/1-97 (2019); N.Y. PUB. HEALTH LAW §§ 2599-AA to 2599-BB (McKinney 2019).

⁸ U.S. CONST. art. VI, cl. 2.

⁹ *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (There are “two cornerstones of [Supreme Court] pre-emption jurisprudence. First, the purpose of Congress is the ultimate touchstone in every pre-emption case. Second, in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” (cleaned up)).

In sum, the federal legislature is instrumental in the fight for human life. Congressional hearings highlight the harms of abortion violence and reinforce the need for life-affirming legislation. When the Supreme Court reversed *Roe* and *Casey*, the Court returned Congress' full constitutional powers to limit abortion violence. Accordingly, Congress should use its powers to reaffirm a pro-life baseline in America.

Federal Policy is Pro-life Policy

Dobbs recognized that no constitutional provision protects abortion. Moreover, Congress has repeatedly rebuffed anti-life bills that would concoct legal protections for abortion.¹⁰ Post-*Dobbs*, nothing in federal law protects, permits, or otherwise authorizes the federal government's support of elective abortion. This is especially important at the federal administrative level because it means the agencies that are trying to create a radical abortion policy are doing so contrary to Congress' pro-life stance.¹¹

Federal policy is pro-life. Congress enacted numerous life-affirming laws even under *Roe*'s restrictive regime. The Born-Alive Infants Protection Act recognizes that children born alive after attempted abortion are legal persons under federal law and cannot be left to die without medical care.¹² The Partial Birth Abortion Ban Act prohibits the horrific abortion method that induces labor just to kill the child when she is partially born.¹³ Federal law bars the use of the United States postal service or private carriers from mailing abortion-inducing drugs, including the chemical abortion regimen of mifepristone and misoprostol.¹⁴

Over the past half century, Congress has enacted numerous statutes protecting medical professionals that conscientiously object to taking a human life through abortion, including the Church Amendment,¹⁵ Coats-Snowe Amendment,¹⁶ and Weldon Amendment.¹⁷ There are conscience protections throughout federal law, such as in the Danforth Amendment to Title IX's definition of sex discrimination,¹⁸ amendments

¹⁰ See, e.g., Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. (2021) (seeking to extend legal protection to abortion but failing to pass the Senate); Women's Health Protection Act of 2019, H.R. 2975, 116th Cong. (2019) (seeking to extend legal protection to abortion but failing to pass the House).

¹¹ See Ams. United for Life, Comment Letter in Opposition to Interim Final Rule "Reproductive Health Services" (RIN 2900-AR57) 9–11 (Oct. 11, 2022), <https://aul.org/wp-content/uploads/2022/10/AUL-Comment-Reproductive-Health-Services-RIN-2900-AR57ab17208c589786466543d38eeac8c6559b35fe2461e3333022d5fa26815b474f.pdf> (arguing there is no "good cause" for Veterans Affairs to bypass the normal rulemaking process when the interim final rule subverts Congress' pro-life policy stance).

¹² 1 U.S.C. § 8.

¹³ 18 U.S.C. § 1531.

¹⁴ 18 U.S.C. §§ 1461–1462.

¹⁵ 42 U.S.C. § 300a-7.

¹⁶ 42 U.S.C. § 238n.

¹⁷ See, e.g., Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. H, tit. V, § 507(d), 136 Stat. 49, 496 (2022). Since 2004, every HHS appropriations bill has readopted the Weldon Amendment. Office for Civil Rights, *Conscience Protections for Health Care Providers*, U.S. DEP'T OF HEALTH & HUM. SERVS. (last reviewed Sept. 14, 2021), <https://www.hhs.gov/conscience/conscience-protections/index.html>.

¹⁸ 20 U.S.C. § 1688.

regulating managed-care providers in the Medicare and Medicaid programs,¹⁹ and Affordable Care Act provisions regarding insurance.²⁰

Congress restricts public funding of elective abortion. The Hyde Amendment has been a cornerstone of every federal health and welfare appropriations bill since Congressman Henry Hyde first proposed it in 1976.²¹ The present version of the Hyde Amendment restricts abortion funding except for medical emergencies and cases of rape or incest.²² Congress also restricts abortion funding in other areas. The Dornan Amendment prohibits the District of Columbia from expending public funds for abortion except if the mother’s life is at risk or in cases of rape or incest.²³ Federal programs often include explicit abortion funding prohibitions, such as in Title X, which restricts recipients from using public funds “in programs where abortion is a method of family planning.”²⁴

These statutes show that federal policy opposes abortion violence. Again, there is no federal constitutional right or legal interest protecting elective abortion following the *Dobbs* decision. Rather, federal abortion policy defends infants born-alive after a botched abortion, prohibits gruesome partial-birth abortions, bans the mailing of abortion-inducing drugs, safeguards conscientious objections towards abortion, and restricts the public funding of abortion. The 118th Congress should reaffirm this pro-life policy stance through additional pro-life legislation.

Congressional Powers to Protect Human Life

Congress has multiple constitutional powers to enact life-affirming laws. This memo highlights the Commerce Clause, Territorial Clause, Spending Clause, Postal Clause, and the Fourteenth Amendment’s Enforcement Provision.

Commerce Clause

The Commerce Clause is a strong source for federal policy restricting abortion. While not unlimited, Congress’s authority to “regulate commerce . . . among the several states” is vast.²⁵ Under the Commerce Clause, Congress may regulate (1) interstate commerce channels, (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce,” and (3) “those activities that have a substantial relation

¹⁹ Lynn D. Wardle, *Protection of Health-Care Providers’ Rights of Conscience in American Law: Present, Past, and Future*, 9 AVE MARIA L. REV. 1, 31–32 (2010); see 42 U.S.C. § 1395w-22(j)(3)(B) (protecting conscience rights in Medicare program) and 42 U.S.C. § 1396u-2(b)(3)(B) (codifying conscience protections in Medicaid program).

²⁰ 42 U.S.C. § 18023(b)(4) (“No qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions.”)

²¹ See Pub. L. No. 94-439, tit. II, § 209, 90 Stat. 1418, 1434 (1976) (“None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.”).

²² Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. H., tit. V, §§ 506–507(c), 136 Stat. 496.

²³ *Id.* div. G, tit. VIII, § 810, 136 Stat. 309.

²⁴ 42 U.S.C. § 300a-6.

²⁵ U.S. CONST. art. I, § 8, cl. 3.

on interstate commerce.”²⁶ The provision of abortion certainly constitutes “commercial activity.” Women travel across state lines to procure abortion services, doctors and nurses enter various States to perform abortions, and medical equipment and medicine move throughout interstate commerce. Therefore, the means of abortion may be regulated through the Commerce Clause, as commerce includes all phases of business.²⁷ In fact, Congress has used the Commerce Clause to prohibit the mailing of abortion-inducing drugs and promotions for chemical abortion,²⁸ and to proscribe gruesome partial-birth abortions.²⁹

Territorial Clause

The Territorial Clause grants Congress authority to limit or regulate abortion in Washington, D.C. and other U.S. territories. Under the Territorial Clause, “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”³⁰ This power is broad, and Congress can use its power to protect life in Washington, D.C., which has an expansive anti-life law, deeming abortion a “human right” and legally enshrining an unqualified “right of every individual . . . to have an abortion” while providing virtually no health and safety safeguards for the practice.³¹ Congress regularly uses the Territorial Clause to restrict the use of federal appropriated funds and local D.C. funds for elective abortion under the Dornan Amendment.³²

Spending Clause

The Constitution grants Congress the general power to spend “for the common Defence [sic] and general Welfare of the United States.”³³ In *South Dakota v. Dole*, the Supreme Court upheld Congress’ ability to place conditions upon federal funding in order to financially incentive States to comply with federal policy.³⁴ However, Congress is limited in its exercise of the Spending Clause by five factors: 1) the expenditure must promote “the general welfare”; 2) any conditions imposed through the spending power must not be ambiguous; 3) conditions must reasonably relate to the purpose of the expenditure; 4) the legislation cannot violate any independent constitutional rights of the recipient; and 5) the conditions must not be unconstitutionally coercive.³⁵ Congress has used the Spending Clause to attach the Hyde Amendment³⁶ to health and welfare

²⁶ *United States v. Lopez*, 514 U.S. 549, 558–559 (1995).

²⁷ *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824) (“It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”).

²⁸ 18 U.S.C. § 1461 (barring the use of the United States postal service for mailing abortion drugs, including chemical abortion pills); 18 U.S.C. § 1462 (applying same restrictions to private carriers).

²⁹ 18 U.S.C. § 1531.

³⁰ U.S. CONST. art. IV, § 3, cl. 2.

³¹ D.C. Law. 23-90, 67 D.C. Reg. 3537 (2020).

³² Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. E, tit. VIII, § 810, 136 Stat. 309.

³³ U.S. CONST. art. I, § 8, cl. 1.

³⁴ 483 U.S. 203 (1987).

³⁵ *Id.* at 207–208, 211.

³⁶ Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. H., tit. V, §§ 506–507(c), 136 Stat. 496.

appropriations bills, as well as safeguard conscience rights in the Church Amendment,³⁷ Coats-Snowe Amendment,³⁸ and Weldon Amendment.³⁹

Postal Clause

Congress has the constitutional power “[t]o establish Post Offices and post Roads”⁴⁰ and “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Power[.]”⁴¹ This power specifically allows Congress to regulate abortions by mail.⁴² Under the Postal Clause, Congress has barred the use of the United States postal service for mailing drugs, including chemical abortion pills,⁴³ and applied this prohibition to private carriers.⁴⁴

Fourteenth Amendment’s Enforcement Provision

Under the Due Process Clause of the Fourteenth Amendment, “nor shall any State deprive any person of life, liberty, or property, without due process of law.”⁴⁵ Section 5 of the Fourteenth gives Congress the “power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment].” Congress’ Section 5 power is “remedial,” not substantive, and “extends only to ‘enforc[ing]’ the provisions of the Fourteenth Amendment.”⁴⁶ This means that Congress only can enforce existing Fourteenth Amendment rights, not create new ones. However, there are two pro-life approaches Congress should consider.

The prominent approach is to focus on an unborn child’s due process rights under Section 1 of the Fourteenth Amendment. The Supreme Court has overturned *Roe*, and pro-life advocates again can argue that a child is a legal person, not merely “*potential* life.”⁴⁷ The Constitution recognizes the inalienable rights of life, liberty, and property, and “secure[s] the Blessings of Liberty to ourselves and our Posterity” of these inherent rights by protecting them through due process.⁴⁸ Pro-abortion laws infringe upon an unborn child’s right to life. Some state laws have gone further than simply denying an unborn child’s right to life; they have stripped away *all* rights from an unborn child. In Illinois, for example, “[a] fertilized egg, embryo, or fetus does not have independent rights under the laws of this State.”⁴⁹ These types of laws erase hundreds

³⁷ 42 U.S.C. § 300a-7.

³⁸ 42 U.S.C. § 238n.

³⁹ See, e.g., Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. H, tit. V § 507(d), 136 Stat. 496.

⁴⁰ U.S. CONST. art. I, § 8, cl. 7.

⁴¹ *Id.* art. I, § 8, cl. 18.

⁴² *Ex Parte Jackson*, 96 U.S. 727, 732 (1877) (“The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded.”).

⁴³ 18 U.S.C. § 1461.

⁴⁴ 18 U.S.C. § 1462.

⁴⁵ U.S. CONST. amend. XIV, § 1.

⁴⁶ *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (citation omitted) (alteration in original).

⁴⁷ *Cf. Roe*, 410 U.S. at 150 (emphasis in original).

⁴⁸ U.S. CONST. pmbl. & amend. XIV, § 1.

⁴⁹ 775 ILL. COMP. STAT. 55/1-15.

of years of an unborn child’s legally recognized rights in property, tort, and criminal law.

An alternative method is to use Section 5 of the Fourteenth Amendment under a parental rights theory. Parental rights have a rich history of constitutional protection under the Due Process Clause. “The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”⁵⁰ “[Supreme Court] decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”⁵¹ Yet, abortion threatens parental rights and the sanctity of the family. The practice warps and destroys the parent-child relationship, while legally condoning the death of an unborn child.

In sum, the Constitution authorizes Congress to pass pro-life laws. These constitutional powers include the Commerce Clause, Territorial Clause, Spending Clause, Postal Clause, and Fourteenth Amendment’s Enforcement Provision. Congress should think creatively about using its powers to protect human life.

Pro-life Legislation in a Post-Roe America

For forty-nine years, *Roe* inhibited Congress’ ability to pass pro-life legislation. Following *Dobbs*, Congress is no longer limited by *Roe*’s purported constitutional right to kill an unborn child, nor by *Casey*’s undue burden standard. Rather, federal abortion laws only are subject to rational basis review. This is a low standard that is favorable to the government. It merely requires the government to have a legitimate interest that is rationally related to an abortion law.

Following *Dobbs*, federal abortion laws likely will survive judicial review. As the Supreme Court explains in *Dobbs*: “[u]nder our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution’s text or in our Nation’s history.”⁵² Accordingly, “States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot ‘substitute their social and economic beliefs for the judgment of legislative bodies.’”⁵³ The Court recognizes that:

These legitimate interests include respect for and preservation of prenatal life at all stages of development . . . the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the

⁵⁰ *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

⁵¹ *Moore v. E. Cleveland*, 431 U.S. 494, 504 (1977).

⁵² *Dobbs*, 142 S. Ct. at 2283.

⁵³ *Id.* at 2239 (citations omitted).

mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.⁵⁴

Furthermore, “[a] law regulating abortion, like other health and welfare laws, is entitled to a ‘strong presumption of validity.’”⁵⁵

Notably, abortion litigation in the federal courts has virtually disappeared following *Dobbs*.⁵⁶ Abortionists have voluntarily dismissed their challenges, acknowledging that they can no longer argue for a constitutional right to abortion. Similarly, *Roe* and *Casey* cannot block life-affirming laws, so federal courts have lifted injunctions against pro-life laws across the nation. Without a purported constitutional right to abortion, abortionists will have difficulty challenging future litigation in the federal courts.⁵⁷ This is an encouraging sign for federal legislation, and Congress should think critically and creatively about enacting pro-life bills. Congress should consider legislation that:

- Abolishes abortion at a certain gestational age (*e.g.*, conception, heartbeat, pain capability).
- Reinforces federal laws prohibiting mail order abortions pills.
- Codifies the Hyde Amendment, so that Congress does not have to reinstate it within each health and welfare appropriations bill.
- Prevents executive overreach by clarifying that federal law does permit the government to support, fund, provide, counsel, or refer for elective abortions.
- Strengthens conscience protections, especially through a private right of action and extending conscience safeguards to pharmacists.
- Limits public funding of abortionists, to ensure there is no government subsidization of elective abortions.
- Prohibits eugenics-based abortions that kill an unborn child based solely on the baby’s sex or disability (*i.e.*, prenatal nondiscrimination act (“PRENDA”)).
- Requires States to report abortion statistics annually to the Centers for Disease Control and Prevention.
- Proscribes grisly dilation and evacuation (D&E) abortions that dismember a living unborn child and extract fetal parts piece by piece.
- Ensures parental involvement in a pregnant minor daughter’s abortion decision and post-abortive care.
- Bolsters informed consent and health and safety protections for women seeking chemical abortion pills.
- Expands protections for born-alive infant survivors of a botched abortion.

⁵⁴ *Id.* at 2284.

⁵⁵ *Id.* (citation omitted).

⁵⁶ Carolyn McDonnell, *AUL’s 2022 Q3 Life Litigation Report*, AMS. UNITED FOR LIFE (Sept. 15, 2022), <https://aul.org/2022/09/15/2022-q3-life-litigation-report/>.

⁵⁷ See Carolyn McDonnell, *The Attorney General’s Playbook for a Post-Roe World*, AMS. UNITED FOR LIFE 2–8 (June 28, 2022), <https://aul.org/wp-content/uploads/2022/06/AG-Playbook-for-a-Post-Roe-World.pdf> (discussing the procedural hurdles abortionists face post-*Dobbs* in abortion litigation in the federal courts).

- Appropriates money in support of pregnancy resource centers, which provide a real alternative to abortion.

This list is not exhaustive. For more ideas, Americans United for Life offers state model legislation that we can adapt to the federal level.⁵⁸ Americans United for Life also is available to consult on new bill ideas. *Roe* and *Casey* no longer inhibit federal policymakers, so the 118th Congress has a wealth of options in protecting human life.

The Path Forward

Now that the Supreme Court has reversed *Roe*, Congress has its full constitutional powers to safeguard the human right to life. Congress should expand its life-affirming policy to provide a federal pro-life baseline for the nation. Americans United for Life is committed to assisting federal policymakers defend life in a post-*Roe* America. We will continue to fight until the law protects all mothers, families, and unborn children from the harms of abortion violence.

⁵⁸ Pro-Life Model Legislation and Guides, AMS. UNITED FOR LIFE (last visited Nov. 3, 2022), <https://aul.org/law-and-policy/>.