TAX AND FETAL PERSONHOOD POST-*DOBBS*

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ABSTRACT

After the Supreme Court reversed decades of precedent in Dobbs by overruling Roe and Casey's constitutional right to abortion, state

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legislatures have been rushing to enact sweeping abortion bans and novel constitutional theories. Among the early novel fetal personhood laws to be enacted is Georgia's Living Infants and Fairness Equality (LIFE) Act, which includes a provision that changes the legal definition of a person, whereby a taxpayer can claim a fetus as a dependent exemption for state tax purposes. Before Dobbs, common law efforts by plaintiffs to convince the courts to read interpretations of fetuses as dependents in existing tax law were uniformly rejected. Now, Georgia's fetal personhood law opens the gates to a host of unanswered tax questions involving potential confusion between federal and state law, challenges to important definable tax terms, and questions of constitutionality. The history of opposition to abortion may reveal divided theories for how to reverse Roe but an undeterred, unified effort to bring about a nationwide ban on abortion. Redefining a legal person to include a fetus through the tax law is but one of many attempts to legislate abortion out of existence. In this paper, I urge an equally creative and persistent response to reversing Dobbs with attention paid to tax law. I ultimately propose strengthening the Internal Revenue Code to unambiguously exclude fetuses from the definition of dependent.

I. INTRODUCTION

The Supreme Court's opinion in *Dobbs v. Jackson Women's Health Organization*[1] overruled the holdings in *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[3] thereby eliminating a constitutional right to abortion.[4] Many immediate responses decried the majority's decision as the first time in United States history that the Supreme Court rescinded a previously granted freedom rather than expanding a freedom.[5] Writing for the majority, Justice Samuel Alito

1. 142 S.Ct. 2228 (2022).

2. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022).

3. 505 U.S. 833 (1992).

4. *Dobbs*, 142 S.Ct. at 2236.

5. *E.g.*, *U.S. Supreme Court Takes Away the Constitutional Right to Abortion,* CTR. FOR REPRODUCTIVE RTS., (June 24, 2022), https://reproductiverights.org/supreme-court-takes-away-right-to-abortion/ [https://perma.cc/JQB9-NDHD]; DAHLIA LITHWICK, LADY JUSTICE: WOMEN, THE LAW, AND THE BATTLE TO SAVE AMERICA 283 (2022). *But s*ee, *e.g.*, Christopher M. Richardson, *Op-Ed: Dobbs Isn't the First Time the Supreme Court Took Away Key Rights*, L.A. TIMES (July 15, 2022, 3:00 AM PT), https://www.latimes.com/opinion/story/2022-07-15/supreme-court-abortion-civil-rights [https://perma.cc/24KY-8UMG] (pointing to a reversal of rights for Black Americans in the Civil Rights Cases, 109 U.S. 3 (1883), where the Supreme Court struck down the Civil Rights Act, 18 Stat. 335–337 (1875), and held that the Thirteenth and Fourteenth

stated that the Court was not establishing "any view about *if* and *when* prenatal life is entitled to any of the rights enjoyed at birth."[6] Nor, for that matter, was the Court determining "when a State should regard prenatal life as having rights or legally cognizable interests[.]"[7] Nevertheless, Justice Alito relied on the language of Mississippi's Gestational Age Act,[8] which specifically protects "an unborn human being,"[9] and then peppered the 79-page opinion with fetal personhood language.[10] In overturning a constitutional right to abortion, the Court "returned to the people and their elected representatives" the authority to regulate abortion.[11] Claiming "not [to] pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*[,]"[12] Justice Alito then conferred on state legislatures an ability to claim as a legitimate interest the "preservation of prenatal life at all stages of development," thereby inviting States to draft their own fetal personhood laws.[13]

The full extent of the consequences of the decision to rescind the right to abortion are unknown. If taken seriously, state fetal personhood laws could logically lead to seemingly far-fetched legal conclusions.[14] Some scenarios include the providing of child support to a pregnant person from a noncustodial parent;[15] the illegal deportation of a non-U.S. citizen who

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Amendments "did not give Congress the power to outlaw private acts of racial discrimination").

6. *Dobbs*, 142 S.Ct. at 2261 (emphasis added).

7. *Id.* at 2256.

8. Gestational Age Act, MISS. CODE ANN. § 41-41-191 (2018).

9. *Id.* § 41-41-191(4)(b) (2018).

10. *E.g.*, *Dobbs*, 142 S.Ct. at 2243–44 ("[t]he legislature then found that at 5 or 6 weeks' gestational age an 'unborn human being's heart begins beating" . . . . "It found that most abortions . . . crush or tear the unborn child . . . ."); *Id.* at 2257 ("[v]oters in other States may wish to impose tight restrictions based on their belief that abortion destroys an 'unborn human being.'"); *Id.* at 2258 ("[a]bortion destroys . . . the life of an 'unborn human being.'"); *Id.* at 2284 ("[t]he Mississippi Legislature's findings recount the stages of 'human prenatal development' and assert the State's interest in 'protecting the life of the unborn.'").

11. *Dobbs*, 142 S.Ct. at *2279.

12. *Id.*

13. *See id.* at *2284 (discussing the rational basis standard by which abortion laws are now subject).

14. *See* Carliss N. Chatman, *If a Fetus Is a Person, It Should Get Child Support, Due Process, and Citizenship*, 76 WASH. & LEE L. REV. ONLINE 91, 91–97 (Apr. 30, 2020) (identifying some of the "unintended and potentially absurd consequences" of fetal personhood laws).

15. *Compare id.* at 92 (questioning whether a parent should be eligible for child support from the moment a fetus is declared a legal person), *and* GA. CODE ANN. § 19-6-15(a)(1) (establishing that the term "child" for purposes of Georgia's determination of alimony and child support includes "any unborn child with a detectable human heartbeat").

conceives and carries a U.S. citizen in the womb;[16] the illegal detention or arraignment of a fetus without the opportunity to confront its accuser if the pregnant person is held in prison;[17] and the counting of a fetus in the national census every ten years.[18] While these cynical takes imagine a post-*Dobbs* legal landscape,[19] conservative state legislatures are forging ahead with decades-long plans to codify fetal personhood. In 2019, two years before *Dobbs* overturned *Roe* and *Casey*, Georgia led the way in enacting a sweeping fetal personhood bill.[20]

This paper explores the tax complications of Georgia's Living Infants Fairness and Equality (LIFE) Act while demonstrating that Georgia's tax law is part of a larger decades-long effort on the part of the pro-life movement following *Roe v. Wade* to realize a national ban on abortion.[21] Part II tracks those efforts in federal and state legislatures, highlighting the opposition to the use of taxpayer dollars to support abortion through the *Hyde Amendment* from the inception of legalized abortion. Part III takes a closer look at Georgia's LIFE Act itself, beginning with its constitutional challenge in *SisterSong v. Kemp*[22] before reviewing the Georgia Department of Revenue Guidelines, published after the Eleventh Circuit

16. *See* Chatman, *supra* note 14, at 92–94 (asking whether the Fourteenth Amendment, declaring that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside[,]" grants citizenship rights to a fetus in states recognizing fetal personhood, even if the pregnant parent is subject to deportation).

17. *See id.* at 94 (stating that the natural extension of detaining a pregnant person would necessarily violate the fetus's due process rights according to the Fifth and Fourteenth Amendments).

18. *See id.* at 95 (suggesting that the natural extension of declaring a fetus a person is to count them in the national census held every ten years according to Article I, Section Two of the Constitution).

19. *See also* Carliss Chatman, "If a fetus is a person at 6 weeks pregnant, is that when the child support starts? Is that also when you can't deport the mother because she's carrying a US citizen? Can I insure a 6 week fetus and collect if I miscarry? Just figuring if we're going here we should go all in." @carlissc, TWITTER (May 9, 2019, at 6:59AM) https://twitter.com/carlissc/status/1126441510063542272?lang=en [https://perma.cc/VX5H-9Q4Q] (launching a viral thread later explored in the above-cited law review article).

20. *See* Living Infants Fairness and Equality (LIFE) Act, 2019 Ga. Laws 234 (amending sections of the Georgia Code relating to personhood definition, personhood rights, and abortion; and repealing conflicting laws).

21. *See, e.g.,* Mary Ziegler, *New Frontiers in Federalism – Session 3: Abortion and the Chaos of Conflicting Mandates*, NEW YORK CITY BAR (May 24, 2023), https://www.nycbar.org/media-listing/media/detail/new-frontiers-in-federalism-session-3-abortion-and-the-chaos-of-conflicting-mandates [https://perma.cc/853Y-YZ4V].

22. SisterSong Women of Color Reprod. Just. Collective v. Kemp, 40 F.4th 1320 (11th Cir. 2022).

found the law to be constitutional.[23] Part IV considers some of the tax implications of recognizing a fetus as a dependent. The discussion begins with two one-off attempts by plaintiffs to get the courts to recognize a fetus as a dependent within a reading of the Tax Code before isolating some of the live issues that may appear at the federal and state level after the enactment of Georgia's LIFE Act. Part V proposes that Congress act to strengthen the Internal Revenue Code against encroaching state fetal personhood bills by unambiguously excluding fetuses from the definition of dependent.

II. HISTORY OF FETAL PERSONHOOD AND THE LAW IN THE UNITED STATES

A. Federal Efforts to Codify Fetal Personhood

The Supreme Court first guaranteed a federal right to abortion in 1973 in *Roe v. Wade* when it found a Texas criminal abortion statute "violative of the Due Process Clause of the Fourteenth Amendment."[24] The 7-2 decision was grounded in an emerging right to privacy[25] and an expanded definition of "health"[26] that encompassed both the physical and mental well-being of the mother.[27] In response, legislative opponents of the pro-choice movement immediately began to develop plans to reverse *Roe v. Wade* by protecting fetal personhood.[28] Over the next decade, however,

23. *Id.* 1326.

24. Roe v. Wade, 410 U.S. 113, 164 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022).

25. *Roe*, 410 U.S. at 129 (citing Griswold v. Connecticut, 381 U.S. 479 (1965) for the concept of a discovered personal liberty embodied in the Fourteenth Amendment's Due Process Clause); *id.* at 169 (Stewart, J., concurring) ("Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").

26. *Id.* at 153, *accord* United States v. Vuitch, 402 U.S. 62, 72 (1971) (finding that "health" encompasses both physical and psychological well-being).

27. *See also* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 76–77 (2005) (tracking Justice Blackmun's careful consideration of healthcare professionals' opinions).

28. *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205 (1992). The author stated that the Court "can reinforce or signal a green light for a social change" through measured motions and adjudication without usurping power from the legislature, thereby "halt[ing] a political process that was moving in a reform direction," *id.* at 1208. She argued that a better strategy for the pro-choice movement to avoid the pro-life backlash would have been to decide a matter like *Struck v. Sec'y of Def.*, 409 U.S. 947 (granting certiorari in 460 F.2d 1372 (9th Cir. 1971), *remanded for consideration of mootness*, 409 U.S. 1071 (1972), whose gender equality claim might have succeeded on the basis of equal protection through the Fifth Amendment's Due Process Clause, *id*. at 1201.

the pro-life movement diverged into two large camps – the absolutists and the incrementalists.[29] On the absolutist side were legislators whose efforts stalled by divisions within the movement over the language of the ideal amendment.[30] In early 1973, Representative Lawrence Hogan (Republican-MD) proposed a constitutional amendment that would have granted a right to life "from the moment of conception."[31] In the other chamber of Congress, Senator James Buckley (Republican-NY) proposed an alternative that "appl[ied] to all human beings, including their unborn offspring at every stage of their biological development."[32]

As division stalled momentum for the absolutists, the incrementalists pursued alternate paths to undoing *Roe*. In 1973, the National Right to Life Committee (NRLC) condemned Hogan and Buckley's proposed constitutional amendment and offered an alternate amendment that would reverse *Roe*, and leave the regulation of abortion to each individual state.[33] Representative G. William Whitehurst (Republican-VA) echoed a minority of academics supporting judicial activism, who proposed stripping the Supreme Court of jurisdiction over an issue they argued was reserved for the states.[34] The process began by seeking political candidates who would nominate pro-life judges to the bench.[35]

By 1981, the absolutists had attempted to pass what became known as "the human life bill," introduced by Senator Jesse Helms (Republican-NC).[36] Citing Section Five of the Fourteenth Amendment, that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article,"[37] Senator Helms argued unsuccessfully that Congress had the power to enforce the Amendment by proclaiming new

29. MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 78 (2015).

30. *Id*. at 41, 43. *See also* NAT'L COMM. FOR A HUM. LIFE AMEND., HUMAN LIFE AMENDMENT: MAJOR TEXTS, 1973–2003 (Feb. 2004), https://www.humanlifeaction.org/downloads/sites/default/files/HLAmajortexts.pdf [https://perma.cc/RKV7-TYP8].

31. H.R.J. Res. 261, 93rd Cong. (1973).

32. S.J. Res. 119, 93rd Cong. (1973).

33. JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 120 (2021).

34. H.R.J. Res. 427, 93rd Cong. (1973) ("Nothing in this Constitution shall bar any State or territory or the District of Columbia, with regard to any area over which it has jurisdiction, from allowing, regulating, or prohibiting the practice of abortion.").

35. *See* Ellen McCormack, *Can Right to Life Do Anything about the Power of the Courts? The Ellen McCormack Report* (Jan. 1978) *in* ZIEGLER, *supra* note 29, at 53 (stating that pro-life forces needed to ensure that they had more impact in the judicial selection process than pro-abortion forces).

36. S.158, 97th Cong. (1981).

37. U. S. CONST. amend. XIV, § 5.

rights and redefining old ones.[38] Divisions in the pro-life movement continued to stall progress on the bill as abortion became a central issue in the hearings for President Reagan's 1981 Supreme Court nominee, Sandra Day O'Connor.[39] In 1983, the incrementalists, led by Senator Orrin Hatch (Republican-UT) and Senator Thomas Eagleton (Democrat-MO), proposed the Hatch-Eagleton Amendment, which again stated that abortion was not founded in the Constitution and should be relegated to the States.[40] The Bill failed by a vote of 50-49.[41] Even though neither faction of the pro-life movement managed to legislatively undo *Roe*, the incrementalist strategy of reversing *Roe* through the courts ultimately prevailed nearly fifty years later with the *Dobbs* decision issued by a 6-3 conservative majority of the Supreme Court.[42]

B. Intersection of Federal Legislation, Abortion, and Tax Law

Ever since the Supreme Court passed *Roe v. Wade* in 1973, pro-life members of Congress have sought to curtail the use of federal money in support of abortion access. Representative Henry Hyde (Republican-IL) specifically argued that taxpayers should not have to pay for abortion.[43] On September 30, 1976, Congress passed the Hyde Amendment as an attachment to the annual appropriation for Medicaid,[44] which Congress added to Title XIX of the Social Security Act in 1965.[45] Since its passage, the Hyde Amendment has blocked access to federal money for people who rely on public benefits that are seeking an abortion.[46]

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38. *A Bill to Provide that Human Life Shall Be Deemed to Exist from Conception: Hearing on S. 158 Before the S. Comm. on the Judiciary*, 97th Cong. 1, 498 (Jan. 19, 1981) (statement of Sen. Jesse Helms).

39. GREENE, *supra* note 33, at, 123.

40. S.J. Res. 3, 98th Cong. (1983).

41. *Id.; See also S.J.Res.3 - A Joint Resolution to Amend the Constitution to Establish Legislative Authority in Congress and the States with Respect to Abortion*, CONGRESS.GOV, https://www.congress.gov/bill/98th-congress/senate-joint-resolution/3/all-actions?q=%7B%22search%22%3A%22actionCode%3A%5C%2210000%5C%22+AND+billIsReserved%3A%5C%22N%5C%22%22%7D&s=1&r=13&overview=closed (last visited Dec. 23, 2023).

42. *See* David S. Cohen, Greer Donley, & Rachel Rebouché, *Rethinking Strategy After Dobbs*, 75 STAN. L. REV. ONLINE 1 (Aug. 2022) (highlighting abortion opponents' strategies aimed at all three branches of government).

43. Henry Hyde, *The Heart of the Matter*, 3 HUM. LIFE REV. 90–96 (Jun. 1977).

44. Hyde Amendment, Pub. L. No. 94–439, § 209, 90 Stat. 1434, 1422 (Sept. 30, 1976) (codified as 42 U.S.C. § 1396 *et seq*.). *See also* GREENHOUSE, *supra* note 27, at 138 (explaining background of the amendment).

45. Harris v. McRae, 448 U.S. 297, 301 (1980). *See* 42 U.S.C. §1396 *et seq*.

46. *See The Hyde Amendment: A Discriminatory Ban on Insurance Coverage of Abortion,* GUTTMACHER INST. (May 2021), https://www.guttmacher.org/fact-sheet/hyde-

The day that Congress passed the Hyde Amendment, on September 30, 1976, several plaintiffs filed cases challenging its constitutionality.[47] The Supreme Court consolidated the cases in *Harris v. McRae* and heard arguments in April 1980. In a 5-4 opinion written by Justice Stewart, the Court held that States opting to participate in the Medicaid program did not have an obligation to fund medically necessary abortions.[48] Notably, regarding the liberty interest implicated under the Due Process Clause, the Court stated that just because the government may not prohibit the use of contraceptives, pursuant to the Court's holding in *Griswold v. Connecticut*,[49] or prevent parents from sending their children to a private school, as in *Pierce v. Society of Sisters*,[50] that does not mean that the government "has an affirmative constitutional obligation" that all people have access to contraceptives or private schools.[51] Although *Dobbs* overturned *Roe* and *Casey*, *Harris v. McRae* is still good law because *Dobbs* leaves the right to abortion to state legislatures for protection.[52] [53]

C. State Legislative Efforts to Codify Fetal Personhood

Long before Georgia passed the LIFE Act, several states attempted to enshrine fetal personhood into law through personhood amendments to state constitutions,[54] often led by pro-life political organizations like

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amendment [https://perma.cc/W4XA-YXKU] (showing that on account of structural racism, sexism, and economic inequality, the Hyde Amendment has an outsized effect on people of color).

47. *Harris*, 448 U.S. at 303.

48. *Id.* at 326.

49. Griswold v. Connecticut, 381 U.S. 479 (1965).

50. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

51. *Harris*, 448 U.S. at 318.

52. *Dobbs*, 142 S.Ct. at 69.

53. While the Hyde Amendment continues to be debated, it is still applicable. *See* Pub. L. No. 117-103§§ 506–07 136 Stat. 49, 421–41 (2022); *See also The Hyde Amendment,* CONG. RSCH. SERV. (Jul. 20, 2022), https://crsreports.congress.gov/product/pdf/IF/IF12167 [https://perma.cc/B6FD-LV6V] (banning the use of federal funds for abortion except in the case of rape, incest, or when an abortion would save the mother's life). *Compare Biden Budget Drops Hyde Amendment to Allow Public Funding of Abortion*, REUTERS (May 28, 2021), https://www.reuters.com/world/us/biden-budget-drops-hyde-amendment-allow-public-funding-abortion-2021-05-28/ [https://perma.cc/U28A-2G4S] (showing the first time Democrats had attempted to eliminate the provision in decades); *with Democrats Lose Fights to Strip Abortion Funding Restrictions from Spending,* THE HILL (Mar. 9, 2022), https://thehill.com/policy/finance/597469-democrats-lose-fight-to-strip-abortion-funding-restrictions-from-spending/ [https://perma.cc/HKT5-D2YN] (showing Democrats losing the ongoing battle to eliminate the Hyde Amendment from omnibus spending packages).

54. *See generally* Katherine Kubak et al., *Abortion*, 20 GEO. J. GENDER & L. 265, 309 (2019) (identifying state fetal personhood constitutional amendments).

Personhood USA that sponsor mirrored bills across the country.[55] Colorado proposed a personhood amendment in 2008 and 2010 that voters rejected.[56] After a lawsuit failed to stop a proposed ballot measure from proceeding to signature collection,[57] Personhood Colorado failed to collect enough verified signatures to place the personhood amendment on the 2012 ballot.[58] Similarly, anti-abortion groups in Florida failed to get a fetal personhood amendment on the ballot in 2012 and withdrew the Florida ProLife Personhood Amendment in 2014.[59]

Oklahoma and Virginia legislatures attempted to introduce personhood statutes.[60] Oklahoma legislators introduced a senate bill stating that "the life of each human being begins at conception."[61] The Senate bill expired without being heard, however, after a nonbinding House resolution passed[62] that mirrored the Senate bill with the exception of recognizing in vitro fertilization as human life.[63] However, the Oklahoma Supreme Court ultimately struck it down.[64] And Virginia legislators introduced a bill defining an unborn child as "children or the offspring of human beings from the moment of conception until birth at every stage of biological development."[65] That bill stalled indefinitely while waiting in the Committee on Education and Health, which voted to pass by it.[66]

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55. *Personhood USA*, BALLOTPEDIA, https://ballotpedia.org/Personhood_USA (last visited Dec. 23, 2023) [https://perma.cc/8C5M-5EJD].

56. Kubak et al., *supra* note 54, at 309 n.363.

57. *In re* Title, Ballot Title, and Submission Clause for Proposed Initiative 2011–2012, No. 2012SA10 (Colo., Mar. 5, 2012) (affirming the Title Board's decision that the ballot language is not vague and can be included on the ballot initiative).

58. *Colorado Personhood Amendment, Amendment 62 (2012)*, BALLOTPEDIA, https://ballotpedia.org/Colorado_Personhood_Amendment,_Amendment_62_(2012)#cite_note-4 (last visited Dec. 23, 2023) [https://perma.cc/PJ9S-UTMG].

59. Kubak et al., *supra* note 54, at 309 n.363.

60. *Id.* at 309.

61. S. 1433, 53d Leg. 2d Sess. (Okla. 2012).

62. Michael McNutt, *Pressure Grows on Oklahoma Republicans to Take Up Personhood Bill*, THE OKLAHOMAN (Apr. 25, 2012) https://www.oklahoman.com/story/news/politics/state/2012/04/25/pressure-grows-on-oklahoma-house-republicans-to-take-up-personhood-bill/61078404007/ [https://perma.cc/BDU9-DVCD].

63. H.R. 1054, 53d Leg. 2d Sess. (Okla. 2012).

64. Katie Toth, *Oklahoma Supreme Court Unanimously Blocks Personhood Ballot Initiative*, RELIGIOUS DISPATCHES (May 2, 2012) https://religiondispatches.org/oklahoma-supreme-court-unanimously-blocks-personhood-ballot-initiative-updated/ [https://perma.cc/H4N3-V5VY].

65. H.R. 1440, 2011 Sess. (Va. 2011).

66. Unborn Children, Construing the word "person" under Virginia law to include, H.B. 1440, *passed by in Committee* (Feb. 7, 2011).

North Dakota was the first state to attempt to introduce a fetal personhood amendment to the state constitution by referendum.[67] Personhood USA's intentionally vague language read: "The inalienable right to life of every human being at any stage of development must be recognized and protected."[68] The referendum went to the voters of the state in 2014, who voted against the adoption of the amendment.[69]

Although protecting access to legal abortion is a different matter than codifying fetal personhood, recent ballots in the states of Kansas and Michigan may suggest that there is wide voter support to protect legal access to abortion in the states. Inferences, therefore, suggest that the ballot measures above may have failed for a lack of majority support to codify fetal personhood with respective state voters, a seeming contradiction with legislators towing a hard line for a minority of pro-life constituents.[70] In 2021, after Kansas legislators proposed an amendment on the August 2022 primary ballot to affirm that there was no constitutional right to abortion, the majority of Kansans voted to oppose the measure.[71] Similarly, a majority of Michiganders voted to repeal the state's pre-*Roe* ban in April 2023.[72]

III. GEORGIA'S HB 481/LIVING INFANTS AND FAIRNESS EQUALITY (LIFE) ACT

A. History of HB 481

Georgia House Bill 481, known as "The Living Infants and Fairness Equality (LIFE) Act", amends the Georgia law[73] to recognize unborn

67. Kubak et al., *supra* note 54, at 310.

68. Jennifer Haberkorn, *'Personhood' Faces N.D. Test*, POLITICO (Nov. 3, 2014) https://www.politico.com/story/2014/11/abortion-north-dakota-112419 [https://perma.cc/XYD4-ZBDU].

69. Kubak et. Al., *supra* note 54, at 310 n.372.

70. *See, e.g.,* Ziegler, *supra* note 21, at 24:00.

71. *Accord.*, *Kansas,* CTR. FOR REPRODUCTIVE RTS., https://reproductiverights.org/maps/state/kansas/ (last visited May 28, 2023) [https://perma.cc/TA4T-AXSC] (reporting voter data).

72. *Michigan,* CTR. FOR REPRODUCTIVE RTS., https://reproductiverights.org/maps/state/518Michigan/ (last visited May 28, 2023 [https://perma.cc/4RZG-8Z5K]) (reporting voter data); MI CONST. art. 12, § 2.

73. GA. CODE ANN. § 1-2-1 (2019), *amended by* HB 481(adding "unborn child with a detectable heartbeat" as a definition of a natural person); GA. CODE ANN. § 16-12-141 (2019), *amended by* HB 481 (proscribing limitations around abortions); GA. CODE ANN. § 19-6-15 (2019), *amended by* HB 481 (permitting alimony for child support upon detection of a heartbeat); GA. CODE ANN. §§ 31-9A-3, -6.1 (2019), *amended by* HB 481 (relating to the "Women's Right to Know" Act when seeking abortions); GA. CODE ANN. §§ 31-9B-2, -3 (2019), *amended by* HB 481 (relating to physicians' obligations when

children as legal persons, granting "Fourteenth Amendment protection – equal protections under the law – for living, distinct, and whole human beings in the womb,"[74] thereby "giving legal protection to an entire class of people that heretofore have not enjoyed that protection."[75] [76] The drafters drew a comparison between the unborn and formerly enslaved Americans by claiming protection to "an entire class of people" previously exempt, "as happened in 1868."[77] Representative Setzler further drew comparisons to the expansion of LGBTQ rights, [78] citing Massachusetts as the first state to guarantee protections for same-sex marriage,[79] which eventually led to federal protection of the same in *Obergefell v. Hodges*.[80]

Representative Setzler introduced HB 481 to the Georgia House of Representatives on February 25, 2019.[81] Speaking before the Health and Human Services Committee, he admitted that "it's something I've wanted

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performing abortions); GA. CODE ANN. § 48-7-26 (2019), *amended by* HB 481 (relating to income tax matters).

74. Georgia House of Representatives, *Health & Human Services 3 6 19*, YOUTUBE (Mar. 6, 2019) at 49:15, https://www.youtube.com/watch?v=K-W-5EhXKzw [https://perma.cc/K9AD-LCH6] [hereinafter HHS Comm. Hearing] (showing the remarks by Rep. Ed Setzler, Member, Health and Human Servs. Comm.).

75. *Id.* at 48:00.

76. Sponsors of the bill noted that the drafters relied on *PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74 (1980) – a First Amendment free speech case – for the proposition that states can expand rights beyond the protections which federal law affords. *See id.* at 50:28 (showing remarks by Rep. Ed Setzler, Member, Health and Human Servs. Comm.).

77. *Id.* at 48:00 (showing remarks by Rep. Ed Setzler, Member, Health and Human Servs. Comm.).

78. Pro-life supporters similarly relied on the recently expanded rights of groups historically marginalized who found legal recognition through the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. *Compare* ZIEGLER, *supra* note 29 at 69 (noting that pro-life groups "compar[ed] the unborn to illegitimate children, women, and other minorities recently protected by the courts") *with* HHS Comm. Hearing, *supra* note 74, at 48:00, 50:42 (comparing the expanded rights for the unborn with the formerly enslaved and LGBTQ individuals).

79. Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (finding unconstitutional excluding same-sex couples from the protections, benefits, and obligations of marriage under the State Constitution). Mass. Gen. Laws c.207 now applies to same-sex couples.

80. HHS Comm. Hearing, *supra* note 74, at 50:42 (remarks by Rep. Ed Setzler, Member, Health and Human Servs. Comm.).

81. *GA HB 481*, BILL TRACK 50 (Jan. 1, 2020) https://www.billtrack50.com/BillDetail/1081731 [https://perma.cc/WE3J-YCYB].

to do for thirteen years."[82] [83] While earlier bills floundered,[84] the political landscape after the election of President Donald Trump changed. Brian Kemp, campaigning for the Georgia governor's seat, explicitly stated in March 2018 that "signing one of the toughest abortion laws in the country" would be a centerpiece of his tenure.[85]

After Republican Brian Kemp won the gubernatorial election in 2019, passage of HB 481 moved through both legislative chambers quickly. The House read the bill on February 26, 2019, and the Health and Human Services Committee passed it on March 7.[86] On March 8, the Georgia Senate read the bill and referred it to the Senate Science and Technology Committee, where it was again passed with the addition of a provision allowing pregnant women to collect child support upon detection of a heartbeat.[87] The House then approved the Senate changes on March 29 before sending it to Governor Kemp on April 4.[88] The Governor signed the bill into law on May 7, 2019, thereby putting it into effect on January 1, 2020.[89] Within the span of two and a half months of Governor Kemp taking office, the LIFE Act became law.

The Act provides an expansive definition of "natural person" to include an unborn child with a detectable human heartbeat.[90]

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82. HHS Comm. Hearing, *supra* note 74, at 47:00 (showing remarks by Rep. Ed Setzler, Member, Health and Human Servs. Comm.).

83. *See, e.g.* H.R. 536, 149th Gen. Assemb., 1st Sess. (Ga. 2007) (proposing to extend personhood to an unborn child "from the moment of fertilization"); S. 328, 150th Gen. Assemb., 1st Sess. (Ga. 2009) (proposing to protect "the lives of the innocent at every stage"). *See also*, Saru M. Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 DUKE J. GENDER L. & POL'Y 45, 57 (Fall 2012) (noting that Georgia has been at the forefront of introducing personhood protections for fetuses and embryos).

84. *See HR 536*, GA. GEN. ASSEMB. (2007), https://www.legis.ga.gov/legislation/22274 [https://perma.cc/9DPJ-HBF7] (showing that the resolution never went from a House read to a vote); *SR 328*, GA. GEN. ASSEMB. (2007), https://www.legis.ga.gov/legislation/27201 [https://perma.cc/V92Z-MM9N] (showing that the Senate voted to approve but never went to the House).

85. Greg Bluestein, *Kemp Vows to Outdo Mississippi and Sign Nation's 'Toughest' Abortion Law*, ATL. J.-CONST., (Mar. 20, 2018), https://www.ajc.com/blog/politics/kemp-vows-outdo-mississippi-and-sign-nation-toughest-abortion-restrictions/82QEEBktHVKOkaG7qW7LII/ [https://perma.cc/3E56-SDWS].

86. *GA HB 481,* BILL TRACK 50, (Jan. 1, 2020) https://www.billtrack50.com/BillDetail/1081731 [https://perma.cc/N9KL-L8SE].

87. *Id.; see also* Michael G. Foo & Taylor L. Lin, *HB 481 – Heartbeat Bill*, 36 GA. ST. UNIV. L. REV. 155, 166–67 (2019) (tracking the textual changes and bill stages).

88. *GA HB 481*, *supra* note 86.

89. *Id.*

90. *Contra* HHS Comm. Hearing, *supra* note 74, at 1:35:154 (showing remarks by Dr. Albert Scott, Georgia OB/GYN Society President voicing medical position that "what is

Representative Setzler stated that, unlike viability, the heartbeat is a "definable, measurable threshold" to mark the point at which a legal status of an unborn child will apply in full.[91] Notably, Chapter 7, Title 48, provides that "the term 'dependent' shall have the same meaning as in the Internal Revenue Code of 1986; provided, however, that any unborn child with a detectable human heartbeat, as such terms are defined in Code Section 1-2-1, shall qualify as a dependent minor."[92] Because the LIFE Act alters the definition of "dependent" from that in the Internal Revenue Code (I.R.C.), that creates significant complications which will be discussed further in the next Part.

B. Pre-Dobbs Challenge in SisterSong v. Kemp

Soon after Governor Kemp signed the LIFE Act into law on May 7, 2019, a group of reproductive healthcare clinics, individual physicians, and Planned Parenthood brought a Section 1983 action against Georgia state officials, challenging the legality of HB 481 in *SisterSong Women of Color Reproductive Justice Collective v. Kemp*.[93] The U.S. District Court for the Northern District of Georgia granted the plaintiffs summary judgment and entered a permanent injunction against the law, finding that Sections 3 and 4 of HB 481 violated the Fourteenth Amendment because the *Roe* and *Casey* standard prohibit pre-viability abortion restrictions.[94] The State appealed and all parties agreed that the appeal would be stayed pending the Supreme Court's decision in *Dobbs*.[95] The *Dobbs* decision was released on June 24, 2022, prompting the Eleventh Circuit to lift their stay and consider the State's appeal.[96]

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detected via vaginal ultrasound as early as six weeks is not a heartbeat but a collection of tissue that will eventually form a heart").

91. *2019 Committee Meetings on Livestream*, VIMEO (Mar. 14, 2019), https://livestream.com/accounts/26021522/events/8751687/videos/194075744 [https://perma.cc/CM4R-Q9Z8] [hereinafter S&T Comm. Hearing] (showing remarks by Rep. Ed Setzler).

92. GA. CODE ANN. § 48-7-26(a) (2020).

93. SisterSong Women of Color Reprod. Just. Collective v. Kemp, 472 F.Supp.3d 1297 (N.D. Ga. 2020) (enjoining state officials from enforcing HB 481), *rev'd* 40 F.4th 1320 (11th Cir. 2022).

94. *Id.* at 1328.

95. *Id.* at 1325.

96. *Id*.

As a first matter, Chief Judge William Pryor[97] wrote that abortion prohibitions are now constitutional in the wake of *Dobbs*.[98] As the intervening decision from the Supreme Court was "clearly on point," the State's appeal would be subject to rational basis.[99] Finding that the Georgia Legislature had an interest in "providing full legal recognition to an unborn child[,]" the Court reversed and vacated the injunction.[100]

As a second matter, however, the respondents argued that redefining a person "gives way to uncertainty in the law" because the Act did not give fair notice and lacked explicit standards to apply.[101] The Court dismissed this argument, finding that the definition of "natural person" is not void for vagueness.[102] As the Court reasoned, a reasonable person can understand that the core provision of the Act is to protect persons at any stage of development.[103] The Legislature intended to expand the definition and it did, spelling out that the detection of a heartbeat is the new standard.[104] Therefore, the law is intelligible because it provides an ordinary person a reasonable opportunity to know what is prohibited.[105]

Both holdings are striking within the context of tax law. First, it does not logically follow that the LIFE Act's prohibition of abortion in a post-*Dobbs* landscape would necessarily extend to granting dependent status to a fetus for the purposes of state tax filings. In that sense, the Georgia law is vaster in scope than the aforementioned state legislative efforts to codify fetal personhood. Second, the new legal standard of a detectable heartbeat for the definition of a natural person is at odds with the federal definition. The Federal Tax Code defines a "person" broadly: "[t]he term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation."[106] A "United States person" is "a citizen or resident of the United States."[107] Furthermore, a

97. Leada Gore, *Bill Pryor, former Alabama Attorney General, Among Trump's Top 2 Supreme Court Prospects: Reports*, AL.COM (Dec. 15, 2016) (reporting that William Pryor was nominated to the Eleventh Circuit by President George W. Bush, confirmed by a contentious 53-45 vote, and was among the top picks of President Trump's Supreme Court list to fill Justice Scalia's open seat, which ultimately went to Neil Gorsuch after Senate Republicans refused to hold hearings for Merrick Garland).

98. *SisterSong*, 40 F.4th at 1326 (citing Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242, 2283–84 (2022).

99. *Id.* at 1326.

100. *Id.* at 1328.

101. *Id.* at 1324.

102. *Id*. at 1328.

103. *Id*. (citing H.B. 481 § 3(b), (e)).

104. *Id*. (citing H.B. 481 § 3(d)).

105. *Id.* at 1328.

106. I.R.C. § 7701(a)(1) (2022).

107. I.R.C. § 7701(a)(30) (2022).

"citizen of the United States" is one who is "born or naturalized in the United States[,]" per the Fourteenth Amendment.[108] Therefore, the Eleventh Circuit applied the Supreme Court's *Dobbs* decision to deny any constitutional right to abortion while simultaneously green-lighting a new legal definition of a person.

C. Post-Dobbs Enactment and Georgia Department of Revenue Guidelines

On August 1, 2022, The Georgia Department of Revenue issued its first guidelines regarding the legality and administrability of the tax provisions in HB 481.[109] The Department stated that in the wake of *Dobbs* and *SisterSong*, it "will recognize any unborn child with a detectable human heartbeat, as defined in O.C.G.A. §1-2-1, as eligible for the Georgia individual income tax dependent exemption."[110] The Department further stated that a taxpayer may claim a dependent personal exemption for the Tax Year 2022 "where, at any time on or after July 20, 2022, and through December 31, 2022, a taxpayer has an unborn child (or children) with a detectable heartbeat (which may occur as early as six weeks' gestation)."[111] As a final matter, the Department stated that "[s]imilar to any other deduction claimed on an income tax return, relevant medical records or other supporting documentation shall be provided to support the dependent deduction claimed if requested by the Department."[112]

There are a few notable particulars from this short departmental press release. First, the Department will only provide tax exemptions for those dependents who qualify *after* the decision in *SisterSong*. That means that any taxpayer who lost a pregnancy before July 20, 2022, may not be able to claim the tax dependent exemption, while any pregnant person who gave birth before the July 20 deadline would still be able to claim the child as a dependent, in keeping with the traditional operation of claiming the exemption.[113] Glaringly, the August 2022 Guidance did not address the

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108. Walby v. United States, 957 F.3d 1295, 1302 (Fed. Cir. 2020) (quoting U.S. CONST. amend. XIV, § 1) (finding that a woman born in Michigan to parents who were not foreign diplomats at the time of her birth qualifies her under the Fourteenth Amendment as a citizen and was therefore subject to income taxes).

109. *Guidance Related to House Bill 481, Living Infants and Fairness Equality (LIFE) Act*, DEP'T OF REVENUE (Aug. 1, 2022), https://dor.georgia.gov/press-releases/2022-08-01/guidance-related-house-bill-481-living-infants-and-fairness-equality-life [https://perma.cc/3JU5-5EQL] [hereinafter *Guidance*].

110. *Id.*

111. *Id.*

112. *Id.*

113. GA. CODE ANN. § 48-7-26(b), *amended by* 2023 Ga. Laws 236 (providing that "[e]ach taxpayer shall be allowed as a deduction in computing his or her Georgia taxable

issue of miscarriage, although the 2023 Frequently Asked Questions did address the issue as to whether a taxpayer can claim a deceased dependent on their tax return in the event of a miscarriage or stillbirth, with a curt "Yes."[114] Neither page provides information regarding recurrent pregnancy loss.[115]

A second issue is whether and how the Department will gather information to verify the pregnancy. The Guidance notes that "relevant medical records or other supporting documentation shall be provided . . . *if* requested by the Department."[116] While not initially clear from the August 2022 Guidance, a recently posted answer to a Frequently Asked Question states that taxpayers do not need to include documentation when claiming a fetal deduction.[117] Instead, the Department merely encourages taxpayers to "maintain accurate and appropriate medical records" of a pregnancy or a loss of pregnancy in the event that they are audited.[118]

IV. TAX IMPLICATIONS OF FETAL PERSONHOOD

A. Pre-Dobbs Common Law Efforts to Recognize a Fetus as a Dependent

There have been only two cases that went to trial in the United States brought by taxpayers arguing that a fetus, as an unborn child, qualifies as a person and, therefore, the taxpayer should be allowed to declare the fetus as a dependent. The first was in 1940 in *Wilson v. Commissioner of Internal Revenue*.[119] On August 11, 1936, Elsie Wilson of San Francisco, California, gave birth to a daughter, Helen Wilson.[120] The following year, Elsie and Lloyd Wilson claimed a credit for their daughter as a dependent

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income a personal exemption in the amount of $3,000.00 for each dependent of such taxpayer"); GA. CODE ANN. § 48-7A-2(3) (defining, in part, a "dependent" as a "natural or legally adopted child of the taxpayer).

114. *Life Act Guidance*, DEP'T OF REVENUE (2023) https://dor.georgia.gov/life-act-guidance [https://perma.cc/NM2E-6JD7] [hereinafter *Guidance FAQ*].

115. *Recurrent Pregnancy Loss*, YALE MED., https://www.yalemedicine.org/conditions/recurrent-pregnancy-loss# (last visited Oct. 1, 2023) [https://perma.cc/J949-MXD4] (defining recurrent pregnancy loss as having two or more failed pregnancies; noting that approximately 2% of women experience two consecutive pregnancy losses, and about 0.5% of women experience a third consecutive loss).

116. *Guidance*, *supra* note 109 (emphasis added).

117. *Guidance FAQ*, *supra* note 114.

118. *Id.*

119. Wilson v. Comm'r, 41 B.T.A. 456 (B.T.A. 1940).

120. *Id.* at 456.

on their joint tax return.[121] Prior to the Tax Act of 1944,[122] the IRS permitted prorated apportionments for dependents based on a percentage of the calendar year for which the taxpayer could claim the dependent.[123] Therefore, of a possible $400 total credit for the year, the IRS allowed the Wilsons $166.67 for the period between August 11 and through the year's end.[124] The Commissioner then disallowed the credit and determined a deficiency of $6.18[125] for fiscal year 1936. The Wilsons challenged the deficiency before the United States Board of Tax Appeals, arguing that Section 25(b)(2) of the Internal Revenue Act of 1926[126] intended that an unborn child be a "person" within the meaning of the statute, entitling them to a proration for the period between January 1 and August 11.[127] The Commissioner contended that the unborn child was not a "person" within the meaning of the tax law.[128]

Judge Ernest Van Fossan[129] sided with the Commissioner, citing *Daubert v. Western Meat Co.*,[130] a tort case in which a child born after the death of his father was not permitted to recover because "it was only a part of her mother, and not a human being or person" at the time of the father's accident.[131] Judge Van Fossan wrote that "the interpretation which petitioners suggest is so obviously strained as to merit little discussion."[132] The petitioners offered little by way of legal argument, prompting Judge Van Fossan to note "the paucity of authority" in their brief.[133] Judge Van Fossan further highlighted the policy underlying the IRS's denial of

121. *Id.*

122. *See* Henry Rottschaefer, *The Individual Income Tax Act of 1944*, MINN. L. REV. 94, 115–116 (1945) (noting the most radical changes to the personal exemption and credit for dependents since the Revenue Act of 1913, Public Law 63-16, 63d Congress, H.R. 3321).

123. *Wilson*, 41 B.T.A. at 456.

124. In 2022, accounting for inflation, $166.67 in 1937 would be worth the equivalent of $3,319.14. *Inflation Calculator*, AMORTIZATION CALCULATOR https://www.usd inflation.com (last visited Dec. 23, 2023) [https://perma.cc/67F2-BHL5].

125. In 2022, accounting for inflation, $6.18 in 1940 would be worth the equivalent of $123.07. *Id*.

126. I.R.C. §25(b)(2), 44 Stat. 9, (I.R.C. of 1954, 26 U.S.C. § 153; *redesignated* I.R.C. of 1986 by Pub. L. 99-514, §2).

127. *Wilson*, 41 B.T.A. at 456.

128. *Id.*

129. *U.S. Board of Tax Appeals Judge Ernest H. Van Fossan, 1926–1939*, UCLA LIBR. DIGIT. COLLECTIONS, https://digital.library.ucla.edu/catalog/ark:/21198/zz002cpvbv (last visited Dec. 23, 2023) [https://perma.cc/9YYZ-3K76] (depicting photograph of Judge Ernest H. Van Fossan) (promulgating *Wilson* on February 21, 1940, so it may well have been one of the last cases Judge Von Fossan wrote an opinion for as a judge on the Board of Tax Appeals).

130. 139 Cal. 480 (Cal. 1903).

131. *Id.* at 488.

132. *Wilson*, 41 B.T.A. at 457.

133. *Id*.

dependency status: the child was not *in esse*–in being–for the purpose of inheritance, and because "the credit here claimed is not for the benefit of the child but of the parents[,]" the claim of dependent status was denied.[134]

The second case in which a taxpayer challenged the IRS's definition of a dependent came about in 1992 in *Cassman v. United States*.[135] There, the United States Court of Federal Claims heard a challenge to the definition of a dependent according to Sections 151 and 152 of the I.R.C. of 1986 and brought before the court under the Tucker Act,[136] which grants jurisdiction to the court for contracts made with the United States. On July 24, 1992, Andrea Cassman of Ocean Park, Florida, gave birth to Jonathan Cassman, who was conceived in October 1991.[137] Before giving birth, Andrea Cassman and her spouse Michael submitted a joint tax return on April 22, 1992, for the tax year 1991, claiming an exemption of $2,150[138] and requesting a refund of $602.[139] On line 30 of Form 1040X, the taxpayers did not identify any dependents, but in Part II ("Explanation of Changes to Income, Deductions, and Credits"), they claimed that they were entitled to an exemption under Sections 151 and 152 because Mrs. Cassman was pregnant for part of 1991.[140] On August 18, 1992, the IRS disallowed the refund, stating that an unborn child does not qualify the Cassmans for an exemption.[141] Judge Wilkes Coleman Robinson[142] granted the United States summary judgment, agreeing with their argument that "judicial, legislative, and administrative authorities demonstrate[] that the unborn are not included as 'dependents' under [Sections] 151 and 152."[143]

The taxpayers in *Cassman* made two primary arguments, both rooted in *Wilson v. Commissioner*. The first is that Congress had enacted a new tax law in 1944 that dropped the prorating requirement for claiming a

134. *Id.*

135. 31 Fed. Cl. 121 (1994).

136. 28 U.S.C. §1491 (1993).

137. *Cassman*, 31 Fed. Cl. at 122.

138. In 2022, accounting for inflation, $2,150 in 1992 would be worth the equivalent of $4,346.80. *Inflation Calculator*, *supra* note 124.

139. In 2022, accounting for inflation, $602 in 1992 would be worth the equivalent of $1,217.11. *Id.*

140. *Cassman*, 31 Fed. Cl. at 122.

141. *Id.*

142. *Death Announcement: Senior Judge Wilkes Coleman Robinson, 1925–2015*, U.S. CT. OF FED. CLAIMS, https://www.uscfc.uscourts.gov/node/2727 (last visited Dec. 23, 2023) [https://perma.cc/PFE2-8UJ5] (stating that Judge Robinson was nominated to the United States Court of Federal Claims by President Ronald Reagan in 1987 and confirmed by the United States Senate that same year. He sat on the court from 1987 – 1997. Following his retirement, Judge Robinson served as a Senior Judge during periods of recall).

143. *Cassman*, 31 Fed. Cl. at 122.

dependent, thereby demonstrating Congress' intent to allow taxpayers to claim the unborn as dependents.[144] Judge Robinson rejected the argument. While he acknowledged that Congress did indeed make changes to the Tax Act of 1944, the taxpayers pointed to nothing in the legislative history that suggested that Congress intended to permit the unborn to be claimed as dependents.[145] To the contrary, Congress titled the Tax Act of 1944, "An Act to provide for simplification of the individual income tax."[146] Such a change plausibly demonstrates Congress' choice to eliminate the prorating dependent requirement.[147]

The taxpayers' second argument was that *Wilson* conflicted with another case decided in 1940 also involving an unborn child. In *Faulkner v. Commissioner*,[148] Mary Dupont Faulkner[149] challenged the IRS for failure to allow a gift tax exclusion of $5,000[150] for each of four children– three living at the time of the gift and one unborn. In *Faulkner*, the Board of Tax Appeals held that Faulkner's $5,000 transfer constituted a present interest in property and thus qualified for the gift tax annual exclusion because an unborn child who was a beneficiary of a trust was considered to be in existence for gift tax purposes.[151] The Board of Tax Appeals therefore upheld a gift tax exclusion for a transfer that was made to an unborn child, finding that it fit within the purpose of Section 504 of the Internal Revenue Act of 1932.[152] The plaintiffs in *Cassman* argued that one court's finding that an unborn child was unable to collect in a torts case while another court's finding that an unborn child was treated as in being for gift tax purposes rendered the holding in *Wilson* inapplicable to

144. *Id.* at 123.

145. *Id*. at 123, 127.

146. *Id.* at 123 (quoting Individual Income Tax Act of 1944, Pub. L. 78-315, 58 Stat. 231 (1944)).

147. *Id*.

148. 41 B.T.A. 875 (B.T.A. 1940), *rev'd*,112 F.2d 987 (1st Cir. 1940).

149. *Mary Faulkner Papers*, SMITH COLL. LIBRS. (Jul. 26, 2017), https://findingaids.smith.edu/repositories/2/resources/830 [https://perma.cc/BWS2-N58J] (providing context for Mary Dupont Faulkner (1907–1985) who served on the board of directors for the Planned Parenthood League of Massachusetts). Faulkner also filed a companion claim regarding a $6,000 gift (equivalent of ~$127,000 in 2022) to the Birth Control League of Massachusetts (formerly the Massachusetts Mothers Health Clinic) that the Commissioner held was subject to a gift tax. Faulkner v. Comm'r of Internal Revenue., 42 B.T.A. 1019 (B.T.A. 1940). However, the Court of Appeals for the First Circuit reversed in her favor. Faulkner v. Comm'r of Internal Revenue, 112 F.2d 987 (1st Cir. 1940)).

150. In 2022, accounting for inflation, $5,000 in 1935 would be worth the equivalent of $104,030.60. *Inflation Calculator*, *supra* note 124.

151. *Cassman*, 31 Fed. Cl. at 124.

152. Revenue Act of 1932, 47 Stat. 169 (codified at at I.R.C. § 2503(b).).

their present dependent claim.[153] The plaintiffs then requested that the court apply the *Faulkner* holding to their case.[154] Judge Robinson disagreed with the taxpayers' reading, stating that the difference was merely a distinction between trusts and estates law and torts law, making the two cases irrelevant to each other and, therefore, not in conflict.[155]

B. Tax Implications for Georgia's LIFE Act

New questions that the Georgia LIFE Act poses for federal and state tax matters are both numerous and unanswered. Below are just a few of the areas in which complications may arise.

1. Confusion with Federal Tax Law over Dependent Definition

The first and most obvious issue is the disparity between the Georgia law and the I.R.C. regarding the definition of dependent. Georgia Code Section 48-7-26 states that "the term 'dependent' shall have the same meaning as in the Internal Revenue Code of 1986; provided, however, that any unborn child with a detectable human heartbeat, as such terms are defined in Code Section 1-2-1, shall qualify as a dependent minor."[156] I.R.C. Section 151(c) simply allows for a deduction exemption in the case of a dependent, providing "[a]n exemption of the exemption amount for each individual who is a dependent (as defined in section 152) of the taxpayer for the taxable year."[157] I.R.C. Section152(a)(1) determines that a "dependent" means "a qualifying child."[158]

One unanswered question is what will happen if a parent legally claims a dependent for the Georgia State tax return while also attempting to have someone treated as such for federal income tax purposes.[159] Many taxpayers use tax preparation programs. For such programs, the taxpayer

153. *Cassman*, 31 Fed. Cl. at 124.
154. *Id*.
155. *Id.* at 124.
156. GA CODE ANN. § 48-7-26 (2020).
157. I.R.C. § 151(c).
158. I.R.C. § 152(a)(1).
159. *See* I.R.C. § 151(d)(5) (instructing that for taxable years 2018–2025, the "exemption amount" is zero). *See* GUIDANCE UNDER §§ 36B, 5000A, AND 6011 ON THE SUSPENSION OF PERSONAL EXEMPTION DEDUCTIONS (2018), https://www.irs.gov/pub/irs-drop/n-18-84.pdf; [https://perma.cc/VTJ3-4J23]; IRS, TAX REFORM: BASICS FOR INDIVIDUALS AND FAMILIES 7 (2019), https://www.irs.gov/pub/irs-pdf/p5307.pdf [https://perma.cc/S7BD-PJWT] (explaining that for taxable years 2018 through 2025, the personal exemption was suspended, although the standard deduction increase and additional Child Tax Credit expansions may offset the suspension of the personal exemptions for certain families).

would have to enter a social security number in order to claim a dependent[160] (although the Georgia Department of Revenue does not require a social security number for claiming the dependent exemption for state taxes).[161] Without a birth certificate, there would not be a legal social security number, so an attempt to claim a fetus for a federal income tax preparation program would automatically disallow the exemption. However, there is no automatic fraud detector for a taxpayer who self-files for federal taxes.[162] In such a case, the IRS may detect a falsified submission,[163] but the administrative delay would be a concern. The IRS is currently facing a backlog of millions of paper tax returns to process.[164]

2. Confusion over Determining Eligibility for Commonly Claimed Federal Tax Credits

Another problem is that a taxpayer's eligibility for common federal tax credits is often determined by reference to the number of qualifying

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160. *Dependents, Standard Deduction, and Filing Information*, IRS (Dec. 13,2022), https://www.irs.gov/publications/p501#en_US_2022_publink1000236379 [https://perma.cc/M3MT-6WEQ] (stating that taxpayer must show Social Security Numbers (SSN) of any dependents listed on filing, or apply for an Individual Taxpayer Identification Number (ITIN)); *see also Claiming a Newborn on Your Taxes*, H&R BLOCK TAX INFO. CTR., https://www.hrblock.com/tax-center/around-block/offers/claiming-child-on-taxes/ (last visited Dec. 23, 2023) [https://perma.cc/7MJN-97QC] (stating that a child's SSN is needed to meet dependency requirements).

161. *Guidance FAQ*, *supra* note 114.

162. *Cf.*, I.R.C. § 7206(1) ("Any person who— [w]illfully makes and subscribes any return, statement, or other document, . . . which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony . . . .").

163. *See Topic No. 652, Notice of Unreported Income – CP2000,* IRS (Apr. 6, 2023), https://www.irs.gov/taxtopics/tc652 [https://perma.cc/SK2B-3BHN] (explaining how the IRS uses automated systems to verify reported information with certain third-parties); *Six Ways Lying on Your Tax Return Can Get You into Trouble with the IRS*, H&R BLOCK TAX INFO. CTR., https://www.hrblock.com/tax-center/irs/audits-and-tax-notices/six-ways-lying-tax-return-can-get-trouble-irs/ (last visited Dec. 23, 2023) [https://perma.cc/V3AU-BY8J] (listing ramifications of providing false information on a tax return, including receiving a CP2000 letter identifying discrepancies, being audited, and facing possible civil or criminal penalties).

164. *See IRS Operations: Status of Mission-Critical Functions*, IRS (May 30, 2023), https://www.irs.gov/newsroom/irs-operations-status-of-mission-critical-functions#:~:text=As%20of%20May%2013%2C%202023,late%20filed%20prior%20year%20returns [https://perma.cc/D7NP-J9AY] (reporting that the IRS has 4 million unprocessed individual returns as of May 20, 2023, of which 1.9 million require error correction or special handling and 2.1 million are waiting to be reviewed and processed); Letter from Adewale Adeyemo, IRS Deputy Secretary, and Charles P. Rettig, IRS Commissioner, to Sen. Ron Wyden (June 21, 2022) https://int.nyt.com/data/documenttools/irs-letter/ed239330b610a235/full.pdf [https://perma.cc/E43R-JWL2] (tying the significant backlog to millions of paper returns filed in 2022).

children or dependents. For example, I.R.C. Section 32(b)(1), "The Earned Income Tax Credit" (EITC), provides a chart listing percentages for the credit depending on whether there is one qualifying child, two qualifying children, and three or more qualifying children.[165] Moreover, Section 32(k) provides for penalties to taxpayers who fraudulently or recklessly claim a credit.[166] There may be confusion among Georgia taxpayers who believe they have a certain number of dependents according to the LIFE Act that may not correspond directly to qualifying dependents for commonly claimed federal tax credits. Thus, not only might qualifying Georgia taxpayers run into errors in claiming federal credits, but, depending on the severity or level of intent, they could also face disqualification for future credits ranging from two to ten taxable years. Furthermore, such confusion would only exacerbate the ongoing problem of credits that are designed to assist the working poor, leading to overpayments,[167] which perpetuates a narrative of abuse of the tax system.[168]

3. Opening the Door to Challenging the Calculation of Age

A potential problem regarding the calculation of age for tax purposes may arise. Section 152(c)(3)(A) defines the age requirement for a qualifying child as an individual who:

> (i) has not attained the age of 19 as of the close of the calendar year in which the taxable year of the taxpayer begins, or

165. I.R.C. § 32.

166. I.R.C. § 32(k) (stating that taxpayers who fraudulently claim the EITC may be disallowed the same future credit for the next 10 taxable years while taxpayers who recklessly or intentionally disregard the regulations may be disallowed the same future credit for the next 2 taxable years).

167. DEPT. OF TREASURY, AGENCY FINANCIAL REPORT FY 2021 45 (2021) https://home.treasury.gov/system/files/266/Treasury-FY-2021-AFR.pdf#page=47 [https://perma.cc/5WQN-2CZP].

168. *E.g.*, Tim Cavanaugh, *Beware of the Expanding the Earned Income Tax Credit*, THE HILL (Dec. 31, 2022) https://thehill.com/opinion/finance/3792231-beware-of-expanding-the-earned-income-tax-credit/ [https://perma.cc/8NE6-SNEZ] (opining that the "EITC is a magnet for waste, fraud and abuse); *but cf. EITC Fast Facts,* IRS (Jan. 6, 2023) https://www.eitc.irs.gov/partner-toolkit/basic-marketing-communication-materials/eitc-fast-facts/eitc-fast-facts [https://perma.cc/NX8R-QRU2] (stating that only 4 out of 5 eligible workers claim the EITC even though it lifted 5.6 million people out of the poverty level in 2018).

(ii) is a student who has not attained the age of 24 as of the close of such calendar year.[169]

The court in *Cassman* noted that "age limits would be impracticable if the age of dependents [were] to be determined by reference to the date of conception rather than the date of birth, which is the universally accepted point of reference by which an individual's age is measured."[170] The Georgia LIFE Act determines that a fetus is a legal person from the point of heartbeat detection – as early as six weeks of pregnancy.[171] There is no clarity yet as to whether the point of detection of a heartbeat as defining the beginning of personhood would alter the calculation of a dependent's age, having the effect of reducing by some seven and a half months the tax definitions for the ages of 19 or 24. A crafty plaintiff may challenge the impracticability of determining one's age for the purpose of an age-dependent tax provision.

While the question above may seem minor and far-fetched, the fallout of *Dobbs* is presenting openings for opportunistic lawmakers to draft legislation in response to bold plaintiffs. One example comes from Texas and involves the definition of a person for the purposes of using a high occupancy vehicle (HOV) lane.[172] On June 29, 2022, Brandy Bottone was pulled over while driving in an HOV lane.[173] When the police officer questioned her about where the other passengers in the vehicle were, Bottone, then 34 weeks pregnant, "pointed to [her] stomach and said 'My baby girl is right here. She is a person.'"[174] While her first ticket was ultimately dismissed,[175] Bottone was pulled over a second time on August 3, 2022, for the same reason.[176] After generating nationwide press and

169. I.R.C. § 152(c)(3)(A).

170. *Cassman*, 31 Fed. Cl. at 127.

171. State of Ga. v. SisterSong Women of Color Reproductive Justice Collective, 317 Ga. 528, 536 –37 (2023) (finding that the Georgia LIFE Act was not void ab initio — or null from the beginning — when enacted in 2019, thereby allowing the six-week abortion ban to remain in effect).

172. TEX. TRANSP. CODE ANN. § 224.151(3) (2005) (defining high occupancy vehicle as one occupied by a specified minimum number of persons).

173. Kalhan Rosenblatt, *Pregnant Texas Woman Says Unborn Baby Should Count as Car Passenger After Receiving HOV Ticket*, NBC NEWS (July 10, 2022), https://www.nbcnews.com/news/us-news/pregnant-texas-woman-says-unborn-baby-count-car-passenger-receiving-ho-rcna37531 [https://perma.cc/9PDU-ZE8X].

174. *Id.*

175. Vanessa Romo, *Pregnant Woman Who Claimed Her Fetus Was an HOV Lane Passenger Gets Another Ticket*, NPR (Sept. 2, 2022) https://www.npr.org/2022/09/02/1120628973/pregnant-woman-dallas-fetus-hov-lane-passenger-ticket [https://perma.cc/Z5GT-Z498].

176. David K. Li, *A Pregnant Texas Woman Who Claimed Her Unborn Baby Counts as a Passenger in the HOV Lane Is Ticketed Again*, NBC NEWS (Aug. 31, 2022)

hiring an attorney to challenge the legality of her citations,[177] Texas Representative Briscoe Cain introduced House Bill 521, which would permit a pregnant operator of a motor vehicle to use an HOV lane "regardless of whether the vehicle is occupied by a passenger other than the operator's child."[178] The implication for tax law is that ambiguous statutes and definitions are susceptible to manipulation through legal challenges and legislation.

4. Effect of Lost Pregnancy Dependent Claims on the State of Georgia

The full scope of Georgia taxpayers claiming the dependent exemption who lost pregnancies through miscarriage or stillbirth has yet to be determined. The Department of Revenue stated that a taxpayer can claim a deceased dependent on their tax return in the event of a miscarriage or stillbirth.[179] In fact, it is also conceivable that a taxpayer could claim two or more exemptions if the miscarriage occurred in the earliest part of the calendar year followed by another pregnancy or miscarriage in the same calendar year. Although it is rare, approximately two percent of pregnant persons experience two consecutive pregnancy losses, and just under one percent of pregnant persons experience a third consecutive loss.[180]

The LIFE Act provides that "[e]ach taxpayer shall be allowed as a deduction in computing his or her Georgia taxable income a personal exemption in the amount of $3,000.00 for each dependent of such taxpayer."[181] The Georgia legislature voiced concerns about the fiscal effect of miscarriages on the state of Georgia during the Health and Human Services Committee hearing.[182] In response, Representative Setzler stated that "the dollar amount is a maximum of $172.50; that's a full tax write-off for a child."[183] He went on to qualify, "I'm not touting this as a

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https://www.nbcnews.com/news/us-news/pregnant-texas-woman-claiming-unborn-baby-hov-lane-hit-second-ticket-rcna45629 [https://perma.cc/PF88-VMRB].

177. Dave Lieber, *Why Is Pregnant HOV Lane Protest Mom's Court Date Postponed?,* DALL. MORNING NEWS (July 19, 2022) https://www.dallasnews.com/news/watchdog/2022/07/19/why-is-pregnant-hov-lane-protest-moms-court-date-postponed/ [https://perma.cc/77Y5-JGAA].

178. H.R. 521, 88th Leg. (Tex. 2023).

179. *Guidance FAQ*, *supra* note 114.

180. *Recurrent Pregnancy Loss*, *supra* note 115.

181. GA. CODE ANN. § 48-7-26(b), *amended by* 2023 Ga. Laws 236.

182. HHS Comm. Hearing, *supra* note 74, at 1:30:19 (showing remarks by Rep. Dexter Sharper, Member, House Comm. on Health).

183. *Id.* at 1:31:04 (showing remarks by Rep. Ed Setzler, Member, Health and Human Servs. Comm.).

windfall."[184] Because the Georgia Department of Revenue is only now processing their first dependent exemption claims once taxpayers became eligible on July 20, 2022, there is no data on how much money the state of Georgia is directing back into claimants' pockets on account of this provision.

5. Constitutionality of Fetus Dependent Exemption

There is a possibility that the Georgia LIFE Act might be unconstitutional for under-inclusivity. For example, Person A could become pregnant in January and give birth in September, in which case no additional deduction during the tax year would be granted for the unborn child apart from that child upon birth. Meanwhile, Person B could become pregnant in July of tax year 1 and give birth in April of tax year 2, in which case a deduction could be taken for the fetus in tax year 1 as well as for the child in the subsequent tax years. Because the LIFE Act will necessarily preclude all pregnant parents who conceive in the earliest part of the year from taking advantage of the dependent exemption for the fetus, a class of similarly situated persons might challenge the law for violating the Equal Protection Clause. The issue before the court would be a novel one.

A case in Alaska involving a statutory shift in an eligibility window may shed some light on how a Georgia court might consider the novel situation of determining eligibility for fetal dependents under Georgia's LIFE Act. In *Underwood v. State*,[185] the Supreme Court of Alaska heard an appeal regarding the State's denial of a permanent fund dividend (PFD) to a couple who had not been residents of Alaska for the entire prior calendar year statutorily required for the PFD.[186] On March 25, 1992, the Underwoods had permanently relocated from Texas to Alaska with the expectation they would be eligible for the PFD program, which was originally drafted to allow for participation by those who resided in the state before April 1.[187] However, on March 31, 1992, Governor Hickel signed a law[188] that retroactively set the residency date to January 1, 1992.[189] The Underwoods sued the State, claiming*, inter alia*, an equal protection violation of the Federal and State Constitutions. On the equal

184. *Id.* at 1:31:10.

185. Underwood v. State, 881 P.2d 322 (Alaska 1994).

186. *Id.* at 324 (explaining that the shift moved the original twelve-month period immediately preceding April 1 to the entire calendar year preceding January 1 of the current dividend year).

187. *Id.*

188. 1992 Alaska Sess. Laws ch. 4, § 4 (*amending* ALASKA STAT ANN.§ 43.23.005(a)).

189. *Underwood*, 881 P.2d at 324.

protection claim, the Underwoods argued that the retroactive adjustment of the residency requirement was underinclusive on account of its denial of their qualification.[190] Chief Justice Daniel Alton Moore, Jr.,[191] affirmed the lower court's motion of summary judgment for the state.

Applying common law, the court noted that the importance of the individual's asserted rights determines the degree of suspicion with which the court analyzes the case.[192] Lower scrutiny applies to less important governmental objectives, tolerating a wider range of means-to-end justifications.[193] Moreover, when an individual's interest is merely economic, she is entitled to minimal equal protection.[194] In *Underwood*, the court found that the government's interests in improving overall efficiency and simplifying the PFD program were legitimate and objective rationales. Even though the Underwoods argued that "cost savings alone are not sufficient government objectives under [Alaska's] equal protection analysis[,]"[195] the court found the government's objectives in "improved efficiency and consumer understanding" to be higher than just cost-savings objectives.[196]

Note that in *Underwood*, the taxpayers attempted to invoke strict scrutiny by arguing that the adjustment impinged their right to travel.[197] The court dismissed the argument that their right to travel was curtailed by having to move from Alaska to Texas earlier than desired.[198] The taxpayers further argued economic incentives alone would not meet Alaska's rational basis standard. However, the court found the government's reasoning of improving efficiency and simplifying the program were distinguishable from mere economic incentives. The government's means to an end satisfied both Alaska's rational basis test and the fair substantial relation test for determining an equal protection violation.[199]

As pertains to the dependent exemption provision of Georgia's LIFE Act, a challenger might seek to argue that they were denied an economic

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190. *Id*.

191. *Daniel Moore, 88: Alaska Supreme Court Justice*, WEDNESDAY J. OAK PARK & RIVER FOREST (Sept. 27, 2022), https://www.oakpark.com/2022/09/27/daniel-moore-88/ [https://perma.cc/TV9P-GYVQ] (Daniel Alton Moore, Jr., (1933 – 2022) served on the Alaska Supreme Court from 1983 – 1995 and as the Court's Chief Judge from 1992 to his retirement in 1995).

192. *Underwood*, 881 P.2d at 325.

193. *Id.* (citing State v. Ostrosky, 667 P.2d 1184, 1192–93 (Alaska 1983)).

194. *Id.* (citing State v. Anthony, 810 P.2d 155, 158 (Alaska 1991)).

195. *Id.* at 325 (citing Herrick's Aero-Auto-Aqua Repair Serv. v. State Dep't of Transp., 754 P.2d 1111, 1114 (Alaska 1988)).

196. *Id.* at 325.

197. *Id.* at 325 n.2.

198. *Id.* at 324.

199. *Id*. at 325.

benefit if the Georgia Department of Revenue granted them only one deduction with respect to the dependent child conceived and born in the same calendar year when a parent whose child was conceived in one calendar year and born in the next would receive two deductions. The balance of the economic benefit to the taxpayer would likely be compared to the government's interest in recognizing "the life interest of the child" as "a living, distinct whole human being in the womb with a heartbeat."[200] As long as the State of Georgia showed that it had a rational basis for enacting the law, a taxpayer's equal protection argument would fail. And the Eleventh Circuit already noted in *SisterSong* that the Georgia Legislature's "respect for and preservation of prenatal life at all stages of development" is a legitimate interest.[201]

A taxpayer challenge to Georgia's LIFE Act would need to construct an argument based on Georgia's common law. In Georgia, classification in legislation is permitted "when the classification is based on rational distinctions, and the basis of the classification bears a direct and real relation to the object or purpose of the legislation."[202] In *Cannon v. Georgia Farm Bureau*, the court found that the legislature's classification of different types of survivors for the purpose of survivor's benefits was rationally related to who is most likely to suffer from financial harm in the event of an insured person's death.[203] And, like Alaska, Georgia also requires that a classification "bears a fair and substantial relation to the legitimate purpose of the statute."[204]

A challenge in Georgia may pass the fair and substantial relation test. Because the government wishes to protect a new and distinct class – unborn children – parents declaring dependents will, by definition, receive only one deduction for a child conceived in the first few months of a calendar year and later born that same year, setting up a separate classification of taxpayers. Representative Setzler justified the LIFE Act's tax exemption by listing economic benefits that would flow from those able to claim the exemption, including offsetting immediately incurred healthcare costs because "she's taking prenatal vitamins; she's going to the doctor more."[205] If the government's interest is truly in providing a

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200. HHS Comm. Hearing, *supra* note 74, at 49:15 (showing remarks by Rep. Ed Setzler, Member, Health and Human Servs. Comm.).

201. SisterSong Women of Color Reprod. Just. Collective v. Kemp, 40 F.4th 1320, 1326 (11th Cir. 2022).

202. Cannon v. Georgia Farm Bureau Mut. Ins. Co., 241 S.E.2d 238, 241 (Ga. 1978).

203. *Id.* at 241 (finding that a mother and two surviving sisters were not entitled to survivor benefits that the legislature reserved for a spouse and children).

204. Bickford v. Nolen, 240 S.E.2d 24, 26 (Ga. 1977).

205. HHS Comm. Hearing, *supra* note 74, at 2:33:00 (showing remarks by Rep. Ed Setzler, Member, Health and Human Servs. Comm.).

benefit to expecting parents, then the law should be tailored to include a benefit that would be substantially related to that goal and equally fair to all expecting parents. In *Underwood*, the state's goal was merely to improve the overall efficiency and simplification of the PFD program.[206] While the court found that those goals were sufficiently related to the goal of efficiency and therefore found against the challengers,[207] the Georgia legislature's goal of protecting "an entire class of people as heretofore yet protected"[208] may not sufficiently relate to a dependent qualifying period that routinely excludes members of that additional "entire class" of certain taxpayers. In other words, Georgia's creation of a new class of people through an extension back of a life-in-being based on conception or heartbeat, not just from the point of a birth certificate, necessarily creates a separate and excluded group of taxpayer parents who conceive and give birth to a child in the same year.

V. PROPOSAL TO STRENGTHEN THE FEDERAL TAX CODE

The Supreme Court's decision in *Dobbs* to overrule *Roe* and *Casey* has thrown the country into a period of uncertainty. The Court's invocation of Federalism is an open invitation to draft and ratify confusing and contradictory laws. For that reason, Congress should take a strong position that it does not – and will not – consider fetuses as a protected category. As the pro-life movement attempts a nationwide ban on abortion from all possible fronts, Congress can at least act to fortify the Internal Revenue Code, clarifying that it will not recognize fetuses as dependents for federal income tax purposes.

As Judge Robinson noted in *Cassman*, the burden is on the taxpayer to show that an exemption applies to her within the statute.[209] Therefore, Congress should bolster the I.R.C. so that the IRS can maintain its position that absolutely no workaround of a dependent classification for the unborn can be justified. "A taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms."[210] Explicit language in the I.R.C. precluding a fetus from qualifying as an "individual"; a "national" or a "citizen" of the United States; or a "person" as a dependent would foreclose any pro-life challenger from forming inferences with other federal statutes that might be relied upon in the

206. Underwood v. State, 881 P.2d 322, 325 (Alaska 1994).
207. *Id.* at 326.
208. HHS Comm. Hearing, *supra* note 74.
209. Cassman v. United States, 31 Fed. Cl. 121, 125–26 (1994) (citing New Colonial Ice Co. v. Helvering, 292 U.S. 435, 54 (1934)).
210. *Id*.

absence of clearer language in the I.R.C. Finding no reference in the I.R.C. to a person who is "born," Judge Robinson relied on the government's position that the Immigration and Nationality Act[211] demonstrates that Congress "unambiguously does exclude them" as citizens of the United States.[212]

A counterargument to Congress explicitly stating that a fetus is not a person for federal income tax purposes is to avoid drawing a direct challenge. Instead, the IRS would simply administratively deny any attempt to claim a deduction. Two Revenue Rulings demonstrate that the Commissioner has taken the position of requiring a live birth in order to qualify as a dependent. Revenue Ruling 73-156 stands for the proposition that an exemption can be claimed when applicable state law shows that a child was born alive, even if only momentarily.[213] Revenue Ruling 85-118 states that a dependent cannot be claimed if an abortion is induced.[214]

In spite of these persuasive statements, Revenue Rulings reflect the IRS's own interpretations of the I.R.C. but do not have the same level of authority as the regulations.[215] The Commissioner is appointed as an officer of the Executive, and Administrative Law currently permits an administrative body to interpret its own rules through the *Chevron* Doctrine.[216] One cause of concern with the current Supreme Court, however, is the rate at which it is diminishing administrative agencies' powers for lack of clear congressional authorization.[217] The Major Questions Doctrine prevents an administrative body from interpreting its own rules where Congress has not specifically empowered it to do so in instances where issues of "vast economic and political significance" are invoked.[218] While the Environmental Protection Agency has seen the most alarming usurpation of power by the Court in recent years,[219] Congress can

211. 8 U.S.C. §1401.

212. *Cassman*, 31 Fed. Cl. at 126.

213. Rev. Rul. 73-156, 1973-1 C.B. 58.

214. Rev. Rul. 85-118, 1985-31 I.R.B. 6.

215. Milan N. Ball, *Reliance on Treasury Department and IRS Tax Guidance,* CONG. RSCH. SERV. (June 12, 2023) https://crsreports.congress.gov/product/pdf/IF/IF11604 [https://perma.cc/B6FD-LV6V].

216. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); Util. Air Regul. Grp. v. E.P.A., 573 U.S. 302 (2014).

217. *See* West Virginia v. E.P.A., 142 S.Ct. 2587, 2609 (2022) ("As for the major questions doctrine 'label', it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. Scholars and jurists have recognized the common threads between decisions. So have we.").

218. *Id.* at 2611 (citing Util. Air Regul. Grp., 573 U.S. at 324).

219. *E.g., West Virginia*, 142 S.Ct. at 2616 (holding that the EPA does not have the ability to interpret the Clean Air Act to cap carbon dioxide emissions through a nationwide

take note and bolster the I.R.C., which would protect the IRS from having to defend itself without clear directives. Explicit language in the I.R.C. precluding fetuses from qualifying as dependents may stave off a possible Major Questions Doctrine challenge to the IRS.

In addition, there may be a policy argument to be had over whether to adopt statutory deterrents such as fines and penalties against individuals who attempt to claim a fetus as a dependent for both Georgia state tax returns – or any other State that may ratify a fetal personhood tax law modeled after Georgia's LIFE Act – as well as federal tax returns. As discussed above, the I.R.C. already provides for such penalties in regard to Section 32 for the Earned Income Tax Credit.[220] According to Section 32(k)(B), offenders will be entered into a disallowance period in two scenarios. First, when there is a determination that the offender engaged in fraud, the disallowance period for claiming future Earned Income Tax Credits is ten years.[221] Second, when there is a determination that the offender engaged in reckless or intentional disregard of the rules, the disallowance period for claiming the credit is two years.[222] Congress added the disallowance provisions in the 1990s out of fear of abuse and fraud at the same time that it continued to expand the popular credit first introduced in 1975.[223]

Like the EITC, perhaps potential taxpayers who intentionally disregard the rules or make fraudulent claims of a dependent for both state and federal tax returns should incur a penalty designed to prevent similar actions for a limited period in the future and to curb potential bad behavior later. Detractors of promulgating such a rule may try to argue that the federal government could be penalizing expectant parents who are confused by inconsistences between state and federal laws. The EITC and fetus exemption are different, however, because Congress has already introduced a complex set of qualifications for properly claiming the EITC to the extent that the Department of Treasury has flagged the credit for being susceptible to significant improper payments.[224] As for the fetus exemption, the Georgia Department of Revenue merely suggests that

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transition away from the use of coal to generate electricity); Sackett v. EPA, 2023 WL 3632751 *17 (holding that the Clean Water Act only extends to wetlands with a continuous surface connection to bodies that are waters of the United States and therefore indistinguishable from them).

220. I.R.C. § 32(k).

221. I.R.C. § 32(k)(B)(i).

222. I.R.C. § 32(k)(B)(ii).

223. *See* MICHELLE LYON DRUMBL, TAX CREDITS FOR THE WORKING POOR: A CALL FOR REFORM 17 (2019) (explaining the history of the EITC).

224. DEP'T OF TREASURY, *supra* note 167.

taxpayers keep a record of their pregnancy in the event that they are audited.[225]

VI. CONCLUSION

Georgia's LIFE Act is a sweeping and unparalleled piece of legislation. In addition to its novel tax provision granting a fetus a dependent exemption status, the law redefines "natural person," proscribes vast limitations on abortion, makes available health records to the district attorney, institutes reporting requirements of physicians, and establishes citizen standing to intervene and defend the LIFE Act.[226] As the pro-life movement demonstrated from the time that *Roe v. Wade* was decided, the ultimate goal is a national ban on abortion.[227] And the movement will neither be satisfied by a win in *Dobbs* in the name of federalism nor will it be deterred by minor setbacks along the way.

Georgia's fetal personhood tax provision is an important component of that goal, even though it may receive less attention than the extreme bans on abortion without exceptions for rape or incest or the looming interstate travel restrictions.[228] A possible consequence of a split between federal and state law as regards fetal dependent status is that more states may enact similar fetal personhood laws and eventually challenge federal law. Those who oppose statutory recognition of fetal personhood should respond in two ways. The first is to press Congress to explicitly define that the legal status of a dependent for federal tax purposes should begin at birth, as evidenced by a birth certificate. The second is to take note of the persistence and creativity of the pro-life movement.[229] The same kind of persistence and creativity will be required to reverse *Dobbs*. Tax practitioners, academics, and students should recognize the potential in the Tax Code for assisting the realization of that goal.

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225. *Guidance FAQ*, *supra* note 114.

226. GA. CODE ANN. § 1-2-1 (2019), *amended* by HB 481.

227. *See, e.g.,* Rachel Rebouche, *New Frontiers in Federalism – Session 3: Abortion and the Chaos of Conflicting Mandates*, N.Y.C. BAR, at 14:38 (May 24, 2023), https://www.nycbar.org/media-listing/media/detail/new-frontiers-in-federalism-session-3-abortion-and-the-chaos-of-conflicting-mandates [https://perma.cc/853Y-YZ4V] (explaining that interstate travel bans limiting the movement of those who assist a person obtaining an abortion reveal the true desire for a national abortion ban); *see* 2023 Idaho Sess. Laws 310 (assisting a minor obtain an abortion is punishable by 2 to 5 years in prison).

228. *E.g.*, Elyssa Spitzer &Maggie Jo Buchanan, *2022 State Abortion Bans Are a Patchwork of Increasingly Extreme Laws*, CTR. FOR AM. PROGRESS (May 20, 2022) https://www.americanprogress.org/article/2022-state-abortion-bans-are-a-patchwork-of-increasingly-extreme-laws/ [https://perma.cc/5VFW-73XQ].

229. *See* Rebouche, *supra* note 227, at 2:10:18.