An Assessment of the Reasoning in
Dobbs v. Jackson Women’s Health Organization
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While the Supreme Court’s decision in Dobbs v. Jackson is a cause for rejoicing, it is at the same time a cause for frustration, as it is maddeningly incomplete. This article examines a central problem with the Court’s decision in Dobbs: its studied refusal to take up the question of the personhood of a fetus, and thus its entitlement to rights and protections under law. While the Court in Dobbs sensibly demolished the notion that there is some kind of natural right to abortion in the U.S. Constitution, and thus sent the matter back to the states, the problem of abortion in America still remains. This article presents a number of the problems that the Dobbs decision brings in its wake, and indicates that pro-lifers will still have a great deal of work to do to address them.

I have said I would not believe the overturning of Roe v. Wade until I saw it, mostly because of the track record of Republican-appointed originalist judges. Thus, the Dobbs decision overturning Roe and Planned Parenthood v. Casey in June 2022 came as a welcome surprise. That day in June was a momentous one in U.S. history, both institutionally and constitutionally, though some important caveats must be made. I mostly will address a large caveat regarding the overall decision.

First, what is the rule of law coming out of this case? The rule of law is that there is no right to abortion in the Constitution and the states are free to regulate the practice of abortion. Roe is “egregiously erroneous” and so is overruled in the Court’s consideration of a Mississippi law. This is because Roe had erroneous legal reasoning, and employed misleading, irrelevant, and incorrect history—all of which had helped to fabricate a right to abortion.

For Justice Samuel Alito and the majority, the fundamental error in Roe is that it usurped the states’ power to regulate abortion, not that Roe created a right for one human person to kill another human person with legal impunity. Alito goes out of his way to claim that the Court does not take a stance on the status of the life and personhood—and therefore any subsequent rights—of what the Mississippi law says is an “unborn human being” and Roe calls “potential life.” Thus, for the majority, the flaw is that Roe took away the states’ ability to decide whether to give protection
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to what Mississippi law—not the Court majority in *Dobbs*—calls unborn human life, *not* that it removed what the Constitution gives to all persons (including the unborn) living under its jurisdiction: legal protection from homicidal killings, or, in rights language, the legal protection of the right to life. To me, this is the major flaw of the *Dobbs* decision. First, it is fatal to unborn human persons in those states which allow—or will allow—for abortion in the wake of *Dobbs*. And this is because the lack of constitutional protection for the unborn in these states is based on a flawed rationale.

The majority’s reasoning is like that of Senator Stephen Douglas’ argument regarding slavery before the U.S. Civil War. Douglas said the territories should decide through democratic majority whether they want slavery. In response, Abraham Lincoln rightly pointed out that one first has to answer the question of whether a “negro is or is not a man,” and if he is, then it cannot be left up to the territories to determine by a democratic majority whether a man can be enslaved or not. There cannot be one state free and another slave because slavery is wrong and violates the truth that “all men are created equal.” The same goes for abortion: there cannot be one state that is pro-life, while another is pro-abortion. The majority willfully sidesteps answering the fundamental question at the foundation of the abortion “right”: the metaphysical status of the being in the mother’s womb who is being aborted. In their words,

> Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution requires the states to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our nation’s legal traditions authorizes the Court to adopt that theory of life.

The majority is mistaken here. How can one refrain from recognizing when human life and rights begin and still decide this case? The majority appears to be skeptical, agnostic, relativistic—all of which are untenable. As referenced in this passage, the dissent is wrong not because it wants to impose on the nation a theory of unborn human life and personhood and rights, but because it wants to impose a *false theory* of unborn human life, personhood, and related rights on the nation. The Court *should* “impose” the correct view of unborn human life, personhood, and related rights on the nation. Or, more precisely, the Court should simply *recognize* that every unborn human being is, in fact, a human person with a right to life. Ultimately, it is not a matter of law, but rather a matter of fact.
Fetal life is or is not a human person, and, if so, deserves the same constitutional right to life which human persons have at a later age after birth. It is inappropriate for one to prescind from making this judgment, no matter how much one wants to claim ignorance and neglect it. The majority’s claim that the “Court has neither the authority nor the expertise to adjudicate those disputes [about the status of the fetus]” does not make sense. This claim of not having expertise is not put forth for by the Court with other constitutional rights, which are even less specific than the 14th Amendment of the U.S. Constitution. For instance, there is no mention of a person in the First Amendment—i.e., regarding the freedoms of religion or speech—about which Congress is prohibited from making any law. But if the Constitution does not mention which persons as having these freedoms, then to whom do they apply? No one, since “person” is not mentioned? Obviously not! The freedoms are presupposed to belong to human persons. And the Constitution presupposes that one can—with common sense, not some “expertise”—easily recognize a particular person whose First Amendment freedom(s) has been violated. And the Court not only has the authority to do so, it must do so. In addition, in affording these constitutional freedoms for persons outside the womb, the Court would be taking a position on a theory of human life, personhood, and related rights and thus “impose” it on the whole nation. The justices would use their eyes, ears, and faculty of reason to presuppose that the party seeking constitutional rights is a human life and person with these rights. Why do they have to prescind from what their eyes, ears, and reasoning can know about human life inside the womb? Ultimately, the Court cannot have it both ways—two theories of human life, personhood, and rights: one pre- and another post-womb. Its decision should be based on the metaphysical facts.

This “leave it to the democratic majority to decide the argument” is the grave danger of the majority opinion, as it rests on the falsehood that we do not know when human life begins or whether the unborn being is a human person with a right to life. Since the decision, many pro-life advocates have been saying, “Let the states decide.” If pro-lifers lose in some states—and they have so far lost in Kansas—and also lose in the U.S. Congress, then they will have no recourse. The pro-abortionists will say, “You said let the people in the states decide, and we have decided for abortion, so shut up and sit down, because you have no argument left.”

From another perspective, the majority opinion appears inconsistent with its own jurisprudential principles. The majority determines whether there is a constitutional right falling under the substantive due process analysis by assessing whether the right is rooted in the “history and tra-
ditions” of the people.14 If that is the test, then why doesn’t the unborn person’s being protected by laws throughout U.S. history amount to an implicit recognition that the unborn person has a right to life? In other words, legal protection of the unborn throughout U.S. history—which the majority demonstrates with more than ample evidence—amounts to, using rights language, a recognition of the unborn person’s right to life. The majority claims that “nothing in the Constitution or in our nation’s legal traditions authorizes the Court to adopt that ‘theory of life’ [the dissent’s theory that the unborn are not persons with rights that receive legal protection]” because it is not in the history and traditions of the people. But there is a long legal history and tradition that has recognized the humanity of the unborn life in the womb, and thus that the unborn is a human person worthy of legal protection. Therefore, states should be required to provide legal protection of unborn persons as they do for born persons.15

Furthermore, the majority opinion appears to be inconsistent with the very rationale state governments are now constitutionally permitted to use regulate and prohibit abortion. When fundamental constitutional rights are not under consideration, the Court uses the rational-basis test to determine if a state’s law is constitutional.16 Accordingly, for a state to prohibit abortion, the Court says that a state must show a rational relationship between the law and the government’s interest in prohibiting the behavior (abortion). The majority lists several interests states have:

[R]espect 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 mitigation of fetal pain, and the prevention of discrimination on the basis of race, sex, or disability.17

The interest that is the strongest—and gives the rationale for the others—pertains to the protection of prenatal life. Thus, if laws protecting preborn human life were challenged and reviewed by the Court, the Court would have to determine if the interest, and the law protecting that interest, are rationally related. But to arrive at that determination, it seems the Court would have to first determine whether the unborn is, in fact, a human life/person. If the unborn is not a human life/person, then, there would be no rational reason for a state to prohibit abortion.18 In addition, if a state claimed that a fetal life is a human person deserving of protection by law, it seems that the Court would have to affirm or deny that claim, and not merely defer to a state’s judgment about it.19 This necessity can be seen by looking at a state which permitted a “right” to abortion. That state’s interest would be defending this purported woman’s right, and the state’s corresponding claim would deny a fetal life the same legal protection as
born persons. If someone were to contest this purported right, the Court would have to assess whether the state’s claim is indeed true to determine whether there is a rational basis for the permissive abortion law. I do not see how they can logically get around making this determination, or fail to see the legal and moral inconsistency of failing to do so. If the Court were to find a right to abortion, they would be siding with the state’s rationale that an unborn human life is not worthy of legal protection. Therefore, as a result of the Court’s using its own jurisprudential principles (rational-basis test), it would end up in a contradiction: affirming both one state’s claim that a prenatal life is a human person worthy of legal protection and the other state’s claim that prenatal life is not a human person worthy of legal protection. Allowing both legal arguments to pass the rational-basis test would seem to render the test meaningless, i.e., to allow states to fill it with any content they so desire. The way out of this legal and moral dilemma would be the Court’s not prescinding from making a judgment about the status of the unborn.

That the Court cannot prescind from the judgment on the unborn’s status becomes more apparent in examining a key claim of the majority in *Dobbs*, namely, that the State has an interest in the “elimination of particularly gruesome or barbaric medical procedures.” One can ask: what makes a medical procedure gruesome and barbaric? It seems that these adjectives can only be applied if the procedure does something to a human person. And if the State determines that the abortion procedure is gruesome precisely because it kills a human person, or at least kills a human person in a specific way, and so prohibits abortion procedures in general, the only way for the Court to constitutionally assess that law is to decide whether it is indeed gruesome and why. But to do that, the Court must presuppose the human person upon which this procedure is undertaken. If there is no human person worthy of moral—and then legal—protection from the gruesome procedure of killing, then there is no basis for using the adjectives “gruesome” or “barbaric.” Thus, the Court implicitly appears to presuppose that there is a human person in the womb when they list out legitimate state interests regarding the regulation of abortion.

Another problem with the majority’s reasoning in *Dobbs* is that it is difficult to determine whether there is a constitutional right to an abortion unless one knows and defines what an abortion entails. That is, the majority must first know what human action/behavior the word “abortion” signifies. This requires a factual description of the human action undertaken. Is it the killing of a human person or not? For the majority to say it does not—and cannot—take a position on the status of the human life in the womb means that they cannot take a position on what an abortion is. But
if that is so, then it is impossible to determine whether there is a *right* to an abortion. One cannot figure out if someone has a right *to something*, if someone does not know *what* that something is.

In summary, the majority in *Dobbs* ruled that *Roe* is based on an egregious error and is thus overturned (along with *Casey*), thereby negating a purported constitutional right to abortion, and that states are not constitutionally prohibited from regulating and prohibiting abortion. The Court is correct, but incomplete. The states, by the majority’s own principles—implied and explicit—are required to protect unborn persons by law.

### Notes

2. Ibid.
3. Ibid.
4. Ibid.
5. Ibid.
7. Ibid. (Emphasis mine.)
8. In *Roe*, Justice Blackmun himself had correctly asserted that if the human life were a person, then it would receive protection under the Fourteenth Amendment. Of course, he denied that status to unborn human beings. So too, at least implicitly, is the majority in *Dobbs*.
9. The term “fetal life” or “fetus” is oftentimes used, even in the opinion, to somehow shroud the unborn human person in some unknowable mystery of its metaphysical and moral status. However, the Latin term “fetus” actually signifies an unborn human being at an early stage of development.
10. Ibid.
11. However, one could point to the “expertise” of embryological scientists who confirm that a new human life/being comes into existence at conception. And so does the human person. Otherwise, you have a human being who is not a person and then must arbitrarily assign a point at which a human being becomes a human person.
12. The unborn, of course, would need someone to represent him or her at the Court, and the right that would apply would be the right to life under the due process clause and the equal protection clause.
13. Furthermore, by the Court’s allowing a state legislature to decide to permit the killing of one person by another with legal impunity in their state, the Court implicitly accepts the theory of life that the unborn is not a human
life worthy of protection under the Constitution, that is, under the jurisdiction of
the federal government. Such facts were beautifully on display in an April 30,
1965, cover story of *Life Magazine*, which showed the self-evident humanity of
an 18-week old unborn child. See, for example, https://www.theguardian.com/
artanddesign/2019/nov/18/foetus-images-lennart-nilsson-photojournalist.


15. *Dobbs* does not address an argument regarding the 14th Amendment’s
equal protection clause, so I, too, do not provide the argument for the equal pro-
tection of unborn persons that would rest on the same metaphysical and moral
status of the unborn.

16. Ibid.

17. Ibid.

18. The interest in the health and safety of the mother might suffice.

19. Ibid.

20. Ibid.

21. And note that the focus of whether abortion is barbaric or gruesome is
not focused on the mother, but on the person in the womb.