DOBBS V. JACKSON: A CONSTITUTIONAL BREAKDOWN

DOI:10.47743/rdc-2022-2-0003

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Abstract

Roe v. Wade, a 1973 landmark decision granting women in the United States ("US") the right to have an abortion before the foetus is viable outside the womb before the 24-28 week period, was reversed by the US Supreme Court in a substantial restriction of women's rights. The decision has been anticipated for a few weeks now following the disclosure of an early May draught opinion that shocked the nation and ignited demonstrations. Women have had access to abortion rights for more than two generations, but now each State will decide on them.

Approximately 20 States have laws limiting or outright prohibiting abortions, according to information from the Associated Press. Currently that Roe has been overruled, legislation prohibiting the operation are now in force in thirteen states.

The judgement provides no exceptions to women undergoing medically unsafe and life endangering pregnancies or pregnancies caused as a result of sexual assault of any form, leaving the option of creating those exceptions to the state legislation.

This article, through a doctrinal and reform oriented approach, attempts to deconstruct, highlight and analyse issues of human rights, vis-à-vis the American Constitution that arise in lieu of derecognition of the right to abortion by the highest court of the United State of America, and thereafter highlight the impacts of the derecognition and pave the way forward for prospective reasonable judicial considerations so as to prevent continuing harm to human health and rights in lieu of such adverse impacts.

Keywords: *Abortion, Amendment, Constitution, Rights, Foetus*

Introduction

The Supreme Court overturned Roe v. Wade[1] and Planned Parenthood v. Casey[2] (hereinafter "Casey"), which had safeguarded pregnant people's constitutional right to choose whether to end their pregnancies. Dobbs v. Jackson Women's Health

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[1] Roe v. Wade, 410 U.S. 113 (1973).

[2] Planned Parenthood v. Casey, 505 U.S. 833.

Organization[3] (hereinafter "Dobbs") was the result. Dobbs' 5-4 majority opinion by Justice Alito refuted the notion that it "placed doubt" on any prior decisions. However, Justice Thomas' concurring opinion said what had previously been kept quiet: that all substantive due process rulings defending individual autonomy and physical integrity – including the right to contraception, the right to "same-sex" intimacy, and the right to "same-sex marriage" – were "demonstrably erroneous" and should be reversed. Those rights come next?

Is the Supreme Court only beginning? Many liberals and progressives have expressed this concern, including feminists, queer theorists, and critics of racial theories. That is what many conservatives have hoped. Some have attempted to draw boundaries.

In a significant restriction of women's rights, the US Supreme Court overturned Roe v. Wade (hereinafter "Roe"), a 1973 landmark decision providing women in the United States the right to an abortion before the foetus is viable outside the womb within the 24-28 week period. After the release of an early May draught opinion that stunned the country and sparked protests, the decision has been expected for a few weeks. Since more than two generations, women have had access to abortion rights, but now each State will decide on them.

According to data from the Associated Press, there are laws restricting or outright banning abortions in about 20 States. Since Roe has been overturned, laws against the practise are currently in effect in thirteen states. The ruling does not include any exceptions for women who are experiencing medically risky or life-threatening pregnancies or pregnancies brought on by sexual assault in any way, leaving it up to the state legislature to do so.

While many have expressed their disagreement with the position created in relation to the US Constitution, analysis of the impacts created in relation to the international legal system has not been addressed, going beyond concerns about autonomy and access to abortions being protected under the rights granted by the American Constitution.

The Road to Dobbs

Dobbs dominated the term and typifies a number of recurring traits of the disruptive conservative majority: it elevates the significance of the unjust historical practises as of 1791 or 1868 over the significant accomplishments of our constitutional practise since the New Deal in extending ordered liberty and the status of equal citizenship to all; it rejects incremental steps in favour of hard-right maximalist turns; it declares that all women must have access to contraception.

The Supreme Court determined that the right to an abortion is not "deeply

[3] Dobbs v. Jackson Women's Health Organisation, 142 S. Ct. 2228 (2022).

founded in our nation's history and culture" nor "vital to ordered liberty", the equilibrium our country has established between the duties of organised society and individual freedom. Even more concerningly, the Court decided that Washington v. Glucksberg[4] sets forth the right standard for determining what fundamental rights the Due Process Clause safeguards: only those particular rights safeguarded in the actual historical practises in effect in 1868, the year the Fourteenth Amendment was adopted. Glucksberg disagreed with Casey's interpretation of our traditions as aspirational, abstract concepts whose significance develops with time.

For instance, even in the face of actual historical acts of injustice like slavery, Jim Crow, and gender discrimination, the adage "all individuals are created equal" is a part of our culture. As a result, in order to be true to the Fourteenth Amendment, one must depart from traditional ways of doing things in order to uphold the aspirational concepts of liberty and equality.

Chief Justice Roberts expressed his disapproval of the decision in Obergefell v. Hodges[5], which expanded the right to wed to same-sex couples and "essentially overrules" Glucksberg, the "leading modern case" interpreting the Due Process Clause. However, Glucksberg is the preeminent contemporary case only for justices who oppose defending rights to personal autonomy and physical integrity, as I show in my new book, Constructing Basic Liberties: A Defense of Substantive Due Process. Obergefell does, in fact, contradict Glucksberg. The same applies to Lawrence v. Texas[6], which granted same-sex individuals the freedom to sexual intimacy, and Griswold v. Connecticut[7], which upheld the right to use contraception. In actuality, Glucksberg conflicts with every ruling from the previous century that upheld a fundamental personal liberty under the Due Process Clause. If the Court had used Glucksberg's framework, none would have turned out the way they did.

Before Dobbs, the conservative justices used the Glucksberg test as a form of damage management, arguing against the recognition of rights and limiting earlier rulings to their particular holdings because they lacked the necessary majority to overturn them. Although Alito's majority opinion in Dobbs denies that it raises doubt on any precedents other than Roe and Casey, conservative justices now have the votes to do so.

Alito's decision in Dobbs, according to Senator Lindsey Graham, "established the appropriate tone" by guaranteeing that it wouldn't jeopardise other liberties. However, Justice Thomas' concurring opinion made the understated point explicit: if the Court adopts Justice Alito's methodology, it will come to the conclusion that all decisions involving due process safeguarding individual autonomy and physical integrity, such as Griswold, Lawrence, and Obergefell, were "demonstrably erroneous" and should

[4] Washington v. Glucksberg, 521 U.S. 702 (1997).
[5] Obergefell v. Hodges, 576 U.S. 644 (2015).
[6] Lawrence v. Texas, 539 U.S. 558.
[7] Griswold v. Connecticut, 381 U.S. 479.

be reversed. Contraception, same-sex relationships, and same-sex marriage – not to mention interracial marriage, which Thomas rather conveniently ignored – are not protected liberties, according to the Glucksberg test, for the same reason that abortion is not: neither of those rights, nor abortion, was specifically protected in the actual historical practises as of 1868. Furthermore, Alito joined Thomas in 2020 in calling for the overturning of Obergefell in the case of Kentucky clerk Kim Davis. If this Court doesn't overturn precedents like Obergefell, Lawrence, and Griswold, it won't be because of their legal framework but rather because of political assessments (like Senator Graham's) of Republican Party politics.

Rightfully pointing out this "hypocrisy", the Dobbs dissenters cautioned that Roe and Casey were "part of the same constitutional fabric" as these other cases. Prior instances defending physical integrity and personal autonomy have all rejected the paradigm Alito adopts in Dobbs in favour of an abstract aspirational set of norms.

Contrarily, many conservatives have hailed Dobbs as a revival of constitutional legitimacy. It is only a restoration inasmuch as a counterrevolution reinstates an outdated, oppressive order – the actual historical practises as of 1868, in opposition to a constitutional amendment and a contemporary practise that aims to grant ordered liberty and the status of equal citizenship to everyone.

Current legislative position in the status quo

Instead of focusing on overturning Roe, pro-lifers now want to adopt deliberate legislation that imposes stringent guidelines on the physicians, clinics, and clients who seek abortions. Like rules, such as waiting periods and required counselling, were affirmed in Casey because they served a valid state purpose and did not impose an excessive burden on a woman's access to an abortion. However, some proponents of the legal right to abortion contend that limitations are gradually eroding that right by making it extremely difficult to supply and access, undermining the constitutional right to abortion established in Roe. According to the holding in Casey and Hellerstedt's definition of "undue burdens", some of these rules could qualify as such. Due to the often insurmountable obstacles they erect for women seeking abortions, these restrictions may actually serve as prohibitions for some of the women who need them.

Dobbs aims to go back in time to before Roe sided with a cause on which the Constitution is silent. As we have seen, pro-life advocates began by supporting prenatal constitutional personhood. Dobbs rejects the idea of a person during pregnancy. However, only Justice Kavanaugh specifically rejects it, and Alito's difference between prenatal and adult life permits pro-life arguments that the Constitution protects prenatal life. These arguments are being made by individuals that some justices may consider seriously. They have been proposed, among others, by John Finnis, a leading figure in natural-law jurisprudence who served as Justice Gorsuch's thesis advisor at

Oxford; Robert George, a renowned political philosopher at Princeton; and Michael Stokes Paulsen, a University of St. Thomas law professor who is regarded as one of the nation's foremost originalists.

Legal experts who support life have written articles and op-eds in which they claim that the Equal Protection Clause obliges states to forbid abortion and have called on Congress to pass prohibitory legislation. If Congress does, it will be up to the Supreme Court to determine whether Section Five of the Fourteenth Amendment grants Congress such authority. Advocates for reproductive rights will not anytime soon give up their constitutional rights. On the left, there is a prevalent belief that the Supreme Court simply represents what Gerald Rosenberg called a "hollow promise" of revolutionary social transformation. But the recommendations that stem from this criticism frequently include legislative and executive action. Additionally, the Court will unavoidably hear cases involving congressional and executive action.

Few if any topics rival abortion in the moral intensity for those involved in the debate on both sides. Moral urgency inspires constitutional inventiveness. It is telling that both pro-lifers and advocates for reproductive rights invoke the legacy of the abolitionists, who fought against the forces of slavery. In the end, both sides asserted that the Constitution created a standard of fundamental rights at the federal level that no state could fall below. The work of the Reconstruction Congress after the Civil War was motivated by constitutional arguments that were made by abolitionists but were considered "off the wall". In the years to come, we may anticipate hearing some fairly extreme opinions "on the table".

A variety of legal issues will arise because of post-Roe political and technical changes, as Rachel Rebouché, Greer Donley, and David Cohen have explained. Republican-dominated regions of the country already have "abortion deserts" in place. Dobbs has sparked abortion restrictions that were about to take effect after Roe was overturned, brought back restrictions from before Roe, and ensured that more restrictions would be adopted in roughly half of the nation. According to Michele Goodwin, state laws that "feticide laws, drug policies, legislation criminalising maternal behaviour, and statutes enabling the detention of pregnant women to preserve the health of foetuses" all penalise unintended harm to prenatal life.

Democratic states have passed laws to safeguard abortion providers and out-of-state women seeking abortion treatment while Republican states have imposed severe restrictions on abortion access. Regarding technology, medication abortion – a two-drug regimen that terminates a pregnancy up to 10 weeks – now represents more than half of all abortions performed in the United States. It makes it possible for women who are pregnant to end their pregnancies without going to a clinic. Additionally, it has prompted anti-abortion states to pass new legislation outlawing the sale of tablets through the mail and telemedicine, as well as outright drug bans in some cases.

Conflicts between the federal government and the states will also develop. Conflicting state laws are overruled ("pre-empted") by federal law. Are states allowed

to regulate a medicine more strictly than the FDA, even when the FDA already oversees medication-abortion drugs? The generic medicine maker for mifepristone, one of the two medications, has launched a lawsuit in Mississippi, claiming that certain of Mississippi's abortion regulations are preempted by the FDA's more lenient regulation of mifepristone. The verdict can motivate more legal action. There will also be disputes involving other important due process rights. Some pro-lifers view contraceptives – like Plan B and IUDs – that result in the destruction of fertilised eggs as abortifacients, as was made plain in Burwell v. Hobby Lobby Stores, Inc.

Is a state's honest conviction that a substance has abortifacient properties sufficient to support a ban, even if that conviction goes against the consensus of the scientific community? It may be difficult to foresee the Court reversing Obergefell and Lawrence and enabling states to outlaw same-sex sodomy and marriage. Polls on same-sex unions are favourable. However, Roe also did so. It is natural to be concerned about constitutional restrictions on politically important rights, a concern that opponents of substantive due process have long had. And as applied in Dobbs, it's impossible to envision such rights surviving Glucksberg.

Fatal defects of foetus *versus* the right to life and dignified existence of the foetus

The term 'foetus' is defined as "a living soul that grows in a woman's uterus or that is physically isolated from a woman's body but is capable of surviving outside the uterus to some extent as the result of the fertilization (*in vivo or in vitro*) of a human egg by a sperm"[8]. As per International standards, historically, the foetus has not been acknowledged as a person with full rights under English Common Law or American law. In its place, the mother's legal rights have taken precedence, and the foetus is viewed as an extension of her. But the foetus has been given some limited rights under U.S. law, especially since medical science has made it easier and easier to examine, monitor, diagnose, and treat the foetus as a patient.

It should be noted that it is quite effective to leverage male-dominated culture, the recent elevation of the foetus as having more value than the woman it is reliant on, and traditional beliefs that women should accept "all the children God gives". But one of the unique experiences of having a uterus is having to have an abortion. Abortion was lawful to save a woman's life toward the end of the 20th century in 98% of nations in the world. The percentage of nations that permit abortion on other grounds is as follows: to protect the woman's physical health (63%); to protect the woman's mental health (62%); to protect the woman from rape, sexual abuse, or incest (43%); to protect the woman from foetal anomaly or impairment (39%); to protect the woman from economic

[8] Gupte S: Rights of the foetus in Legal Angle of Gynec Practice: Eighth Issue: Publishers, Maharashtra Law agency, Nashik, 2008, 1-2.

or social disadvantage (33%); and on request (27%)[9].

Nonetheless, if we look at the historical pattern related to women's freedom of choice in the matters of pregnancy, in thirteen of fifteen cases from 1981 to 1986, the courts mandated forced cesarean sections. The Georgia Supreme Court held in one of these landmark decisions (*S Jefferson v. Griffin Spalding County Hospital Authority, 1981*) that a pregnant woman in the final stages of her pregnancy did not have the right to refuse surgery or other medical treatment if the life of the unborn child was at risk. However, later legal rulings progressively acknowledged a pregnant woman's freedom to decline medical care. The American Medical Association has reminded doctors that their responsibility is to provide pregnant women with the information they need to make an informed decision about their pregnancy and that they should not try to persuade her or force her to undergo a recommended surgery.

In nations like Chile, abortion for therapeutic reasons was legalized from 1931 to 1989. According to the Penal Code, this involved 'terminating a pregnancy before the foetus becomes viable for the aim of preserving the mother's life or safeguarding her health'. As he was leaving office in 1989, Pinochet, the dictator who toppled the Allende administration, outlawed abortion, giving absolutely no justification. It took Michelle Bachelet's administration until 2016 to introduce a bill allowing three legal grounds for abortion: to save the woman's life, in cases of rape or sexual abuse, and in cases of fatal foetal anomaly. These three grounds are more limited than those in place between 1931 and 1989, but they are the best that their proponents believe they can achieve today. In fact, it is not uncommon for the protection of unborn life to conflict with the mother's rights to life, physical integrity, health, self-determination, and private life, as well as, from a larger perspective, the right to benefit from scientific advancement and its applicability. In actuality, the gap can be difficult to close when taking into account some of the reproductive possibilities provided by technological advancement, of which in vitro fertilization and embryo modification are excellent examples.

In the context of the 1994 International Conference on Population and Development (ICPD), also known as the Cairo Conference on Population and Development and conducted within the auspices of the United Nations Population Fund (UNFPA), an early attempt was made to conceptualize reproductive rights. Reproductive health was described in the 1994 Cairo Programme of Action[10] as 'a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes,' and it

[9] United Nations Population Division. Abortion policies: A global review. 2002 http://www.un.org/en/development/desa/population/publications/abortion/abortion-policies-2002.shtml <last accessed on 29 October, 2022>.

[10] United Nations Population Fund, Programme of Action – Adopted at the International Conference on Population and Development (ICPD), 5-13 September 1994 (United Nations Population Fund, 2004) available at https://www.unfpa.org/sites/default/files/event-pdf/PoA_en.pdf <last accessed on 29 October, 2022>.

also included the freedom and capability to reproduce as desired. Furthermore, it was made clear that reproductive rights "rest on the recognition of the fundamental right of all couples and individuals to decide freely and responsibly the number, spacing, and timing of their children and to have the knowledge and means to do so, as well as the right to attain the highest standard of sexual and reproductive health". In this regard, the Committee on the Rights of the Child[11] has emphasized that adequate protection must be provided under the Convention on the Rights of the Child (CRC) in cases of early pregnancy, through access to sexual and reproductive health services, including abortion "where it is not against the law"[12]. Among order to "decrease maternal morbidity and mortality in adolescent girls, particularly caused by early pregnancy and unsafe abortion practise", the Committee has also recommended States Parties to legalise abortion[13]. Further, even the Preamble of the Convention's statement that the child "requires special safeguards and care, including adequate legal protection, before as well as after birth"[14] does not prohibit this interpretation of States' obligations under the CRC. As stated during the preparatory works, "it was not [planned] to preclude the possibility of an abortion". Additionally, this interpretation is consistent with Article 24 of the CRC, which "ensure[s] appropriate prenatal and postnatal health care for mothers"[15]. This is especially true when one considers that the original wording of this provision, which prioritized the protection of the unborn, was reversed during the *travaux préparatoires*.

In the case of *K.L. v. Peru*[16], it was taken into consideration the private communication of a young mother carrying an anencephalic child. The HRC determined that the denial of therapeutic abortion constituted a violation of Article 7 of the ICCPR in this instance because "[t]he omission on the part of the State in not enabling the author to benefit from a therapeutic abortion was, in the Committee's view, the cause of the suffering she experienced" and "the right set out in article 7 of the Covenant relates not only to physical pain but also to mental suffering, and that the protection is particularly important in cases where the mother is experiencing".

Furthermore, due to the fact that the refusal to end the pregnancy was unreasonable, the Committee also determined that the Covenant's Article 17-protected right to a private life had been violated. The HRC has expanded its call to include ARTs and has

[11] UN Committee on the Rights of the Child (CRC), General comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child, 1 July 2003, CRC/GC/2003/4, available at http://www.refworld.org/docid/4538834f0.html <last accessed 30 October, 2022>, para. 27.

[12] UN Committee on the Rights of the Child (CRC), General comment No. 4 (2003), para. 27.

[13] Committee on Economic, Social and Cultural Rights, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/5 (2009).

[14] UN Committee on the Rights of the Child (CRC), General comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child, 1 July 2003, CRC/GC/2003/4, para. 27, available at http://www.refworld.org/docid/4538834f0.html <last accessed 30 October, 2022>.

[15] UN Committee on the Rights of the Child (CRC), General comment No. 7 (2005): Implementing Child Rights in Early Childhood, 20 September 2006, CRC/C/GC/7/Rev.1.

[16] K.L. v. Peru, Communication No. 1153/2003, UN Doc. CCPR/C/85/D/1153/2003 (2005).

urged Costa Rica in its Concluding Observations[17] to "do all it can to pursue its stated intention to end the ban on in vitro fertilization and to prevent excessive restrictions from being placed on the exercise of the rights set forth in articles 17 and 23 of the Covenant by persons who wish to make use of that technology". It is indeed intriguing and crucial to emphasize that the Universal Declaration on Human Rights (UDHR), which is regarded as the model for all UN human rights documents and which, despite being a resolution rather than a treaty, serves as a fundamental guideline for international human rights law, already prioritized the rights of mothers. In fact, throughout the preparations, it became clear that although Article 1 of the UDHR states that "[a]ll human beings are born free and equal in dignity and rights", this does not imply that the unborn have the same rights as those recognised in the Declaration.

Despite the pluralism that characterizes the scientific and domestic legal debate on the topic of the intersection of abortion rights and the protection of the unborn, there is a core idea that is shared internationally regarding the nature of abortion rights and generally the predominance of the protection of the mother. Additionally, in this paradigm, there is a general awareness and acceptance of access to ARTs, particularly IVF. It's interesting to note that at the regional level, the way has been built for affirming the enjoyment of reproductive rights and the accompanying technologies under the right to benefit from scientific development. As a matter of fact, "[s]ince the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected [...], the margin of appreciation accorded to a State's protection of the unborn translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother"[18].

Before proceeding further, it should be noted that in the case of *R.R. v. Poland*[19], the Court determined that depriving the woman of amniocentesis access because her baby was born with severe disabilities constituted a violation of Articles 3 and 8 of the ECHR. The Strasbourg Court specifically ruled that access to prenatal genetic testing is protected under the right to a private life, which was necessary in this instance for the applicant to obtain the information she needed to determine whether she qualified for a legal abortion under Polish law. The Court made it clear in this respect that "[t]he right of access to [the information on a person's health] falling within the ambit of the notion of private life can be said to comprise [...] a right to obtain available information on one's condition, [and] during pregnancy the foetus' condition and health constitute an element of the pregnant woman's health". Thus, in order to understand the ongoing debate with precision, the authors would endeavor to shed light onto the jurisprudence relating to the concepts of "person" and "personality", in order to understand

[17] Human Rights Committee, Concluding Observations: Costa Rica, paras. 19-20, U.N. Doc. CCPR/C/CRI/CO/6 (2016).

[18] A, B and C v. Ireland, ECHR, Appl. no. 25579/05 (2010).

[19] R.R. v. Poland, no. 27617/04.

whether a foetus falls into their ambit or not?

Who is a person?

There are numerous sites where the definition of children's rights may be found, however there is not much literature on the rights of unborn children. The 'rights of the unborn child' are defined as follows by Black's Law Dictionary: "*the law of property considers the unborn child to be for all purposes which are to its benefits, such as taking by will or descent, and criminal law includes the unlawful killing of a foetus as examples of where the rights of an unborn child are recognised in various different contexts*". It is evident from the definition above that several law provisions define an infant's rights. An unborn child has the right to get proper care and nourishment from its parents as soon as it is fertilized, as well as the right to own property and even upkeep.

Historically, the beginnings of an unborn child's rights movement can be found in the middle of the 19th century on a global scale. It was unanimously determined to defend the rights of unborn children in the 1924 Geneva Declaration on the Rights of the Child in matters of property, health etc. The Geneva Convention was revised after the Second World War, adding two new clauses. First and foremost, children's rights must be upheld, regardless of caste, colour, sex etc. Second, to guarantee complete physical and mental development, an unborn kid needs to receive the right care and nutrition. Additionally, the 1947 draft of the international covenant states that human rights must be upheld beginning with 'conception'.

Additionally, as per the case of *Vo v. France*[20]*,* the unintended loss of the foetus as a result of medical error was considered and it marks a turning point in the ECHR's prenatal life jurisprudence. The Court emphasized that [t]he potentiality of that being and its capacity to become a person [...] require protection in the name of human dignity [which is ensured in some cases under civil law at the domestic level] without making it a "person" with the "right to life" for purposes of Article 2 when determining whether the unborn was included within the notion of "everyone" under Article 2 of the ECHR. In its Vo decision, the Court noted that "[a]t European level [...] there is no unanimity on the nature and status of the embryo and/or foetus. It [was] convinced that it is neither desirable, nor even possible, as matters stand, to answer in the abstract the question of whether the unborn child is a person for the purposes of Article 2 of the Convention. [a]t best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race". When the *Parrillo v. Italy*[21] case required it to weigh the generalized ban posed by Italian Law No. 40/2004 on the donation to scientific research of the cryopreserved embryos obtained from in vitro fertilization for originally reproductive purposes, the Court brought up the idea

[20] Vo v. France, ECHR, Appl. no. 53924/00 (2004).
[21] Parrillo v. Italy, ECHR, Appl. no. 46470/11 (2015).

of the human embryo's potentiality of becoming a person once more. The applicant's choice regarding the fate of her embryos concern[ed] an intimate aspect of her personal life and accordingly related[d] to her right to self-determination [under] Article 8 of the Convention as per right to respect for private life, according to the Court, which acknowledged that the embryos contain the genetic material of the [mother] and accordingly represent a constituent part of [her] genetic material and biological identity.

Furthermore, to ensure that a person may be held accountable for harming a person who is not yet born, laws should be rigorous. The Unborn Victims of Violence Act of 2004 in the US aims to do this. It states that anyone who engages in behavior that results in the death or physical harm of an unborn child at the time, that is, while the child is still in the uterus, is guilty of a criminal offence under this section. It further states that, unless otherwise stated in the paragraph, the penalties for those distinct violations are the same as those set down by federal law for conduct that results in the harm or death of the mother of an unborn child.

Although if we were to take India as an example, its laws recognise the existence of an unborn child as a legal person, they do not confer any rights prior to the child's birth, and the state cannot intervene until the kid reaches viability. It is still unclear how the law will protect the unborn child and what responsibility the state has for that child. The need of protecting unborn children was vividly shown at the Fourth Geneva Conference as well. Additionally, it was suggested that pregnant women should no longer be subject to the death sentence in order to safeguard the unborn child's right to life. The Hon'ble Supreme Court of India ruled that the mother's rights supersede the unborn child's in the case of Suchita Srivastava and Anr. v. Chandigarh *Administration*[22]. It was held that no one can compel a mother to have a child because she has a basic right to control her body. As a result, this case encapsulates the current legal doctrine that says that an infant's rights cannot be compared to a mother's basic rights. Notably, even Sections 312 to 316 of the Indian Penal Code states that anyone who prevents a child from being born alive, or for causing the death of a quick unborn child will be punished depending on the case type.

Similar to India, the UK also recognises that the state owes a duty to the unborn. In the UK, women are allowed to choose despite medical advice as long as they have the mental capacity to do so; foetuses do not have a separate legal personality from their mothers until they are born. It is not true that everyone shares the information's conclusion that a newborn does not acquire any legal rights in the UK until they are a distinct person from their mother. However, it does mean that the mother's decision should be accepted by all public entities. This is not to suggest that significant concerns cannot be shared with the proper specialists, nor does it preclude counsel from being

[22] Suchita Srivastava and Anr. v. Chandigarh Administration, S.L.P. (C) No. 17985 of 2009.

offered. Everyone has a right to life, according to the Human Rights Act of 1988. It also affirms that everyone has a right to privacy and a right to a family life. This provision is meant to safeguard a woman's right to an abortion if it endangers her ability to conceive, as well as her mental and physical health. Nevertheless, it should be noted that the nature of these duties and how they will be carried out are far too vague, which is intrinsically troublesome.

What does personality mean?

The type of interactions that an entity is permitted to have with other entities depends on its legal personhood. Given the implications for legal discourse, it is noteworthy that giving an entity legal personality alters how it is discussed because it 'turns something into someone'. Personhood – or the lack thereof – affects both legal treatment of and attitudes toward the developing human being.

The development of new methods for operating on a foetus while it is still inside the mother provides much-needed assistance to foetuses with disorders that would otherwise prohibit them from living long enough to give birth. A lack of fetal personhood also prevents pregnant women from being charged with a crime for injury done in gestation[23]. The recognition of fetal personhood, whether in civil or criminal law, would significantly restrict the freedom of pregnant women and would encourage at-risk women to avoid receiving medical and social treatment, endangering both themselves and their unborn children. Being born is only one aspect of acquiring legal personhood; one must also be born 'living'. When a child is born without showing any signs of life, it is called a stillbirth[24]. The presence of a stillborn child is recognised by the law, but it never grants them legal personality or acknowledges that they ever did.

In India, since personality development begins at birth, a child is regarded as having a legal personality as soon as he or she is born alive. Technically, an unborn child who is still in his mother's womb is not a person. An unborn child is assumed to be already born and is given a certain legal personality, even though this is a legal fiction. A child in the womb is regarded as existing for the purposes of partition, and once he is born alive, he receives the property. According to the Indian Succession Act, a property interest may be created in a foetus' name, but the interest in the property cannot become vested until the foetus is born alive. If a pregnant woman receives a death sentence, the execution date may be postponed until after the baby is born. Furthermore, it is unlawful to cause the death of an unborn child while it is still inside its mother's womb, and it is culpable murder to do so if any portion of the unborn kid has already been born but is still alive, according to Explanation 3 of Section 299 of the Indian Penal Code, 1860. A person may transfer property in favor of an unborn child in accordance with Section 13 of the Transfer of Property Act of 1882. As this

[23] CP (A Child) v. Criminal Injuries Compensation Authority, (2015) QB 459.
[24] Births and Deaths Registration Act 1953 s 41, as amended by Still-Birth Definition Act 1992 s 1(1).

clause specifies that the transfer is to be made 'for the benefit of' and not 'transfer to' an unborn child, the transfer is not made directly to the unborn person and may instead be made through a trust. Additionally, if no trust is established, the transfer must be made first in the beneficiary's favor before moving on to the unborn child. Absolute ownership of the property belongs to the unborn child. The term 'unborn' as used in the abovementioned act includes such children who have not yet been conceived.

In the case of *Sheetal Shankar Salvi v. Union of India*[25], a 28-year-old woman asked in March 2017 to have her 27-week pregnancy terminated since the foetus had Arnold Chiari Type II disease. The brain and spine are undeveloped as a result of this illness, and the prognosis is quite poor. The court-appointed seven-member medical board indicated that there are prospects for the baby to be born alive. Although acknowledging that it was 'extremely sad for a mother to raise a mentally impaired child,' the Apex court declined permission. However, in *Mamta Verma v. Union Of India*[26]*,* the petitioner approached the Court in accordance with Article 32 of the Constitution. She had been expecting for 25 weeks and 1 day when the verdict came. Her doctor notified her that the foetus has anencephaly during a normal medical exam. Due to the lack of skull bones in this situation, the foetus was unable to live outside of the womb. This abnormality has the potential to kill the baby either before or after delivery. The petitioner's bodily and mental health were also at danger as a result of this illness. The Supreme Court mandated the creation of a medical board to evaluate the petitioner's medical status. The Medical Termination of Pregnancy Act of 1971's provisions were followed in the formation of this panel. According to the recommendation from the aforementioned panel, the pregnancy should be terminated since it endangers the mother's physical and mental health. In this case, the Supreme Court permitted a medical abortion during the petitioner's 25th week of pregnancy on the grounds that the foetus' medical abnormality was endangering the mother's mental and physical health.

Moreover, as per English laws, all people who are born alive are given legal personality[27]. There is and appears to have always been a clear distinction in the law between a child before and immediately after birth. A foetus has no legal individuality before birth, but once it is born, it is given all the rights and protections that apply to children. Nevertheless, there is little additional explanation regarding the nature of birth or what it means to be born living. Despite the apparent biological similarities between humans immediately before and just after birth, the law distinguishes between people at birth because 'for legal purposes there are considerable differences [before and after birth] that produce a whole host of complexities'. Insofar as the subject revolves around a conflict between maternal and fetal rights, the answer to whether a

[25] Sheetal Shankar Salvi v. Union of India, (2018) 11 SCC 606.
[26] Mamta Verma v. Union of India, (2018) 14 SCC 289.
[27] Paton v. British Pregnancy Advisory Service Trustees, [1979] QB 276.

mother can be made to have a Cesarean section in order to rescue a foetus is no[28]. The *St. George's Trust* case disapproves of the application of the Mental Health Act in such situations, although it must be acknowledged that courts are quite willing to declare women in such situations incapable.

As per Canadian jurisprudence, the concept that a foetus is not a legal person is rigidly applied when we turn from these broad principles to cases of the fetal alcohol syndrome. In *Winnipeg Child and Family Services (Northwest Area) v. G*[29]*,* the Supreme Court of Canada declined to detain a pregnant woman who was 5 months along with a glue-sniffing addiction for treatment. Because of this, two of her earlier children had been born permanently disabled. Permitting an unborn kid to sue its expectant mother-to-be would represent a fundamental shift in the legal understanding of the unborn child and its mother as distinct juristic people. The court ruled that the mother's autonomy rights had to be upheld, no matter what the cost to the foetus.

Most recently, Baby Boemer, a Texas native, earned recognition in 2016 as 'the baby born twice'. It was determined that Margaret Boemer's unborn child had a dangerous and severe tumor while she was pregnant. The pre-viability foetus was successfully removed almost entirely from the uterine environment, the tumor was removed, and the foetus was then put back into the uterus to continue growing. At the end of the typical gestational time, Lynlee Boemer was then delivered in good health.

Considerations hereafter

The Court was divided on a number of issues, and those differences may have an impact on how policymakers and the legal system interpret the decision's ramifications. The majority of the Supreme Court, which consists of five justices (Justices Alito, Thomas, Gorsuch, Kavanaugh, and Barrett), overturned Roe and Casey and declared that the Constitution does not grant the right to an abortion. This decision was made with regard to Mississippi's general ban on abortion once a foetus is more than 15 weeks along in its gestation. Justice Roberts supported exercising judicial restraint by maintaining the Mississippi statute and constraining the Court's interpretation of Roe and Casey. He joined the Court's decision but dissented from the majority opinion. But he intended to "leave for another day whether to reject any right to an abortion at all". Justices Breyer, Sotomayor, and Kagan, three members of the Court, disagreed with every judgement reached by the majority. In addition to joining the Dobbs majority, Justice Thomas also wrote a concurring opinion in which he expressed the hope that the Court would more generally reject reliance on the notion of substantive

[28] St George's NHS Trust v. S, [1998] 3 All ER 673; but cp Re S (Adult: Refusal of Medical Treatment) [1993] Fam 123.

[29] Winnipeg Child and Family Services (Northwest Area) v. G, (1997) 3 BHRC 611.

due process, which he called an oxymoron and which has served as the foundation for decisions on issues like same-sex marriage and access to contraceptives. The dissenting Justices argued that these judgments were "part of the same constitutional fabric" as Roe and Casey and were currently "under attack", but the Dobbs majority underlined that it was not bringing these decisions into question. In a concurring opinion, Justice Kavanaugh, who cast the deciding vote to overturn Roe and Casey, stated that not all abortion restrictions would pass constitutional muster, including state laws prohibiting individuals from getting abortions outside of their home states. The Dobbs decision indicates that state abortion restrictions like Mississippi's Gestational Age Act will probably pass constitutional muster, but it is still unknown how far a state can go in regulating abortion. Additionally, it is not clear how Dobbs will affect how courts examine other constitutional questions.

However, it is obvious that states will have considerably greater freedom to limit access to abortions than they did before to Dobbs. Restrictions on abortion will now be reviewed under the deferential reasonable grounds approach. There may be some doubts about whether a specific set of abortion limitations meet this threshold, for example, if the restriction excludes the situation in which an abortion is essential to preserve the mother's life. Justice Kavanaugh's concurrence refers to then-Justice Rehnquist's dissent in Roe, when the future Chief Justice remarked that he had "little doubt that..." despite the majority judgement in Dobbs failing to name a specific type of prohibitions that would not endure rational basis assessment. A legislation does not make sense in regard to a legitimate governmental goal.

Many of the immediate legal issues surrounding abortion regulation will probably have to do with the federal and state governments' constitutional authority. The extent of Congress's direct and indirect authority to control access to abortion, such as through federal laws and regulations that supercede conflicting state laws, may be one of these issues. Other queries might be whether certain state abortion bans or other restrictions are already pre-empted, for example by the FDA's control over abortion-inducing drugs. There may also be concerns about a state's capacity to control people' travel to locations where abortions are available, such as in another state or on tribal territory (although Justice Kavanaugh's opinion implies that the Court may view the legitimacy of such limitations with suspicion). The capacity of states to impose criminal and civil liability onto individuals who execute or get abortions generally as well as in particular circumstances, such as at federally run facilities inside the state, may be the focus of further legal problems.

Dobbs may also cause lawmakers to think about passing federal abortion restrictions. Those who disagree with the ruling and favour a legal right to abortion may work to pass legislation that would do so. The Women's Health Protection Act of 2021[30], proposed in the 117th Congress, if passed, would grant medical professionals

[30] The Women's Health Protection Act of 2021, H.R. 3755/S. 4132).

a legal right to perform abortions and would pre-empt any state laws that would restrict or limit that right. The measure would also establish a similar right for patients to seek abortion services without being hindered by limitations imposed by state law, such as bans on abortions performed before to viability. The Senate twice rejected cloture requests to continue debating the measure after the House passed it in September 2021. The Reproductive Choice Act[31], a second measure presented this Congress, would codify the "essential principles" of Roe and Casey and state-level restrictions on a woman's freedom to obtain an abortion prior to foetus viability are prohibited. The bill looks to allow abortion restrictions to be assessed using the Casey test if it were to become law. Additionally, it's feasible that Congress may take into account legislation with a more restricted reach that aims to safeguard access to abortion in particular situations.

Future CRS publications may go into further detail and detail regarding the legal and policy concerns created by the Dobbs judgement, including factors that may guide legislation proposals made in response at both the state and federal levels.

[31] The Reproductive Choice Act, S. 3713.