The Exportable *Dobbs*: Elements Useful in Other Countries

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Abstract: Although *Dobbs* does not explicitly recognize a prenatal right to life, it provides future legislators and courts around the world with strong support for protecting preborn life. Among other things, it suggests recognizing legal "personhood" in the unborn child throughout gestation, along with the right to life. And it explicitly declares the right to live to be "the most basic human right."

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In ***Dobbs v. Jackson Women's Health Organization*** (June 24, 2022) the United States Supreme Court struck down nearly 50 years of case precedent interpreting the Fourteenth Amendment to the U.S. Constitution. Much of its decision was thus necessarily about justifying an exception the binding character of such longstanding precedent and about ascertaining the correct interpretation of a particular amendment to the U.S. Constitution.

As such, most of the *Dobbs* decision may not be of great interest to legal scholars outside the United States. Why should non-Americans care much about rightly understanding the precise language of our Fourteenth Amendment, or about the nuances of binding legal precedent in the U.S.,

especially since the legal traditions of most to the rest of the world do not consider decisions in past cases to be binding in the first place? Therefore, in order to highlight the part of *Dobbs* that is truly of worldwide significance, I propose here to skip over most of that decision, concentrating only on what is most likely to be relevant to scholars, judges, and legislators in other nations.

In other words, I focus here on what the *Dobbs* decision has to say about the nature and status of life before birth.

Some may be surprised to hear that *Dobbs* expressed any views at all about prenatal life. After all, the justices repeatedly emphasized the constitutional permissibility of state and federal laws in favor of abortion as well as against abortion. Nevertheless, although *Dobbs* does not explicitly recognize a prenatal right to life, it provides future legislators and courts, at home and abroad, with strong arguments in favor of protecting preborn life.

Note first that the Court majority quotes in detail the "pro-life" findings and conclusions of the Mississippi legislature, without questioning their accuracy anywhere in its opinion. Here, in part, is Mississippi's reasoning, as recounted by the Court:

> [The legislature] found that at 5 or 6 weeks' gestational age an "unborn human being's heart begins beating"; at 8 weeks the "unborn human being begins to move about in the womb"; at 9 weeks "all basic physiological functions are present"; at 10 weeks "vital organs begin to function," and "[h]air, fingernails, and toenails . . . begin to form"; at 11 weeks "an unborn human being's diaphragm is developing," and he or she [*sic*] may "move about freely in the womb"; and at 12 weeks the "unborn human being" has "taken on 'the human form' in all relevant respects." [The legislature] found that most abortions after 15 weeks employ "dilation and evacuation procedures which involve the use of surgical instruments to crush and tear the unborn child," and it concluded that the "intentional commitment of such acts for nontherapeutic or elective reasons is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." [Dobbs v. Jackson Women's Health Organization, No. 19-1392, slip op. by majority at 6-7 (U.S. Sup. Ct. June 24, 2022)].

At the end of its opinion in *Dobbs*, the Court returns to validate these sorts of legislative determinations as fully "rational" and therefore legitimate under the Fourteenth Amendment's due process clause. The Court there affirms:

> [A state's] legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability. [slip op. by majority at 78]

The key words here are "at all stages of development." The protectability of each prenatal life begins when its "development" begins (i.e., just after fertilization). And each such respect-worthy life has a continuous identity as it goes through various "stages."

The joint dissent (by Justices Breyer, Sotomayor, and Kagan) accepts this central conclusion regarding the nature of the unborn child. It emphasizes that "*Roe* and *Casey* [the main constitutional precedents upholding a right to elective abortion] invoked powerful state interests [in "protecting prenatal life"] operative at every stage of the pregnancy and overriding the woman's liberty after viability" [slip op. by dissent at 11]. But the dissent argues that those two prior cases rightly found that, prior to fetal viability, a pregnant woman's liberty interests outweighed those acknowledged state interests in protecting prenatal life at all stages.

In other words, although the *Dobbs* dissent recognizes state interests regarding prenatal life to be legitimate "at every stage of the pregnancy," it goes on to insist that maternal freedom is constitutionally more important than prenatal life up until viability. The majority opinion explicitly critiques this dissenting claim that fetal life can outweigh maternal freedom only post-viability. According to the *Dobbs* majority,

> The dissent . . . 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. [slip op. by majority at 38, emphasis in original]

Note that the majority makes three striking affirmations in this brief reply to the dissent, affirmations central to the new permission the *Dobbs* Court gives to states to forbid abortion. First, it calls the viability line "arbitrary" (and thus presumably illegitimate under the due process clause of the Fourteenth Amendment, which requires rationality in all laws). Second,

it suggests that states may recognize legal "personhood" in the unborn child prior to viability, along with the right to life. And third, it explicitly declares the right to live to be "the most basic human right."

Furthermore, although the *Dobbs* majority does not explicitly ask that life be legally protected prior to birth, it does provide a strong argument against those who claim a fetus to be unworthy of such protection because a fetus does not yet count as a "person":

> Some have argued that a fetus should not be entitled to legal protection until it acquires the characteristics that they regard as defining what it means to be a "person." Among the characteristics that have been offered as essential attributes of "personhood" are sentience, self-awareness, the ability to reason, or some combination thereof. By this logic, it would be an open question whether even born individuals, including young children or those afflicted with certain developmental or medical conditions, merit protection as "persons." [slip op. by majority at 51]

Regarding the argument that justice for women trumps justice for previable life, the majority counters that the "goal of preventing abortion" does not constitute a "invidiously discriminatory animus" against women, citing a prior Supreme Court finding. [slip op. by majority at 11]

Most amazing to many commentators may well be something left unsaid in the *Dobbs* case: the Court omits any discussion of religion. None of the opinions treats as even worthy of mention the commonplace claim that abortion involves a war between religious theocrats and secular democrats. Nowhere in the majority opinion, the concurring opinions, or the dissenting opinion is there any allegation that opposition to abortion arises from religious doctrine rather than from a rational interpretation of the universally acknowledged facts of human gestation. The opinions as a group and the case as a whole bespeak not dueling dogmas but a clear choice between liberty and life, with life designated by the Court's majority, as we have seen, to be "the most basic human right."

Lastly, let us note the peculiar relevance of *Dobbs* to the world's enduring postmodern condition, something described decades ago by the great comparative law scholar J.H.H. Weiler:

> [T]here is no doubt that the notion that all observations are relative to the perception of the observer, that what we have are just competing narratives, has

> moved from being a philosophic position to a social reality. It is part of political discourse: multiculturalism is premised on it as are the breakdown of authority (political, scientific, social) and the ascendant culture of extreme individualism and subjectivity. Indeed, objectivity itself is considered a constraint on freedom . . .[1]

And yet, despite the loss of objective truth as a criterion of validity, the human need for favorable recognition of one's opinions and actions does not disappear. As the philosopher John Rawls has written, "unless our endeavors are appreciated by our associates, it is impossible for us to maintain the conviction that they are worthwhile."[2]

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[1] J.H.H. Weiler, To Be a European Citizen: Eros and Civilization, in J.H.H. Weiler, *The Constitution of Europe*: *"Do the New Clothes Have an Emperor?" and Other Essays on European Integration* 324, 331 (1999).

[2] John Rawls, A Theory of Justice 441 (1971). See also Richard Stith, Punishment, Invalidation, and Nonvalidation: What H.L.A. Hart Did Not Explain, 14 *Legal Theory* 219 (2008)

[3] See *Audiencia pública, 6 de septiembre de 2012: Caso Artavia Murillo y otros vs. Costa Rica (fecundación in vitro), parte 4*, Vimeo, http://vimeo.com/49172353 (at 2:14:00 onwards). Case of Artavia Murillo et al. v. Costa Rica (regarding rights to *in vitro* fertilization), Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257 (decided Nov. 28, 2012). (During a

It is precisely those most accustomed to doubt all truths who are the least self-sufficient in securing their own self-respect, who must generate a thunderous judicial mandate in order to feel sure of the rightness of their endeavors. Constitutional authority becomes a surrogate for reason and even for courtesy.[3] Self-confident certitude is achieved by the legal suppression of open opposition, by final victory before the great tribunals of the world.

So it is that exposing prenatal life to elimination has been increasingly sought in many constitutional and international courts, with most looking to other courts for support. Together with the oft-overlooked German Constitutional Court's pro-life decisions of 1975 and 1993 (focusing on the continuity of individual identity during prenatal development), this 2022 decision by the United States Supreme Court case stands as a bulwark against the success of any effort to achieve a worldwide consensus of supreme court holdings that developing life merits no significant legal protection.

An unsinkable ship has sunk. A Berlin Wall has fallen. No longer is it likely that the world's judicial leaders will gather together to validate and facilitate death before birth.

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public hearing on Sept. 6, 2012, concerning Costa Rica's attempt at embryo protection outside the context of abortion, Inter-American Court of Human Rights Judge Pérez Pérez mocked Costa Rica's argument that personhood begins at fertilization by referring to it as a "magical moment" of sorts. Judge Leonardo Franco expressed concern over Costa Rica's stunted development in terms of "progressive" human rights causes. In addition, Judge Macaulay angrily asked if the state of Costa Rica intended to "ban sex," arguing that nature is as lethal to embryos as are the acts at issue in fertilization *in vitro*.)